UNCITRAL UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

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Digest of Case Law on the United Nations Convention on the International Sale of Goods

UNITED NATIONS

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UNITED NATIONS
New York, 2008

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UNITED NATIONS PUBLICATION
Sales No. E.08.V.15
ISBN 978-92-1-133790-7

This publication has not been formally edited.

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Introduction to the Digest of Case Law on the United Nations Sales Convention

NOTE BY THE SECRETARIAT

1. The United Nations Convention on the International Sale of Goods, 1980 (the Convention, or CISG) has become in 25 years an important tool for international trade. The Convention provides a uniform framework for contracts of sale of goods between parties whose places of business are in different States. By defining rights and obligations of the parties in a transparent and easily understandable manner, the Convention furthers predictability in international trade law, thus reducing transaction costs.

2. The Convention has, as at 31 December 2007, 70 States parties, which come from all legal traditions, have very different economies, and together account for over two thirds of global commercial exchanges.[1] The number of academic works dedicated to the Convention grows constantly,[2] as does the amount of related case law—currently, well over 1,000 cases are available from various sources. Its contribution to the goal of unification of international trade law is definitely significant.

3. One reason for the wide acceptance of the Convention stems from its flexibility. The drafters of the Convention achieved this flexibility through the use of different techniques, and, in particular, by adopting a neutral terminology, by promoting the general observance of good faith in international trade, by establishing as a rule that the general principles on which the Convention is based should be used when filling any gap in the set of standards created by the Convention,[3] and by recognizing the binding effects of agreed usages and established practice.[4]

4. The drafters of the Convention took special care in avoiding the use of legal concepts typical of a given legal tradition, concepts often accompanied by a wealth of well-established case law and related literature that would not be easy to transplant in different legal cultures. This drafting style results from a deliberate choice to ensure that the Convention would promote harmonization of substantive law by the largest number of States, regardless of their legal tradition.

5. Article 79 of CISG offers an example of this drafting style, as it does not refer to terms typical of the various domestic systems such as "hardship", "force majeure" or "Act of God", but provides instead a factual description of the circumstances that may excuse failure to perform. The choice of breaking down sophisticated legal concepts, often bearing elaborate domestic interpretative records, into their factual components is evident in the replacement of the term "delivery of goods" with a set of provisions relating to performance and passing of risk. Similarly, the use of the notion of "avoidance of the contract" in the Convention introduces a legal concept that may overlap on a number of well-known domestic concepts and calls for autonomous and independent interpretation.

6. Another technique used by the Convention's drafters to achieve flexibility is the adoption of rules more easily adaptable to the different trades than the equivalent domestic requirements. Thus, for instance, article 39 of CISG demands that the notice of non-conformity of goods shall be given within a "reasonable" time, instead of indicating a strict deadline to give such notice.

7. The combination of substantive provisions, terminology and drafting techniques reflected in the Convention ensures its high level of adaptability to evolving commercial practices.

8. The approach taken by the drafters of the Convention is aimed at facilitating the harmonization of international trade law. However, it also increases the need for a uniform interpretation of its text in the different jurisdictions where it is enacted. Therefore, the issue of uniform interpretation of the Convention by reference to both domestic and foreign case law requires particular attention. In this respect, it should be recalled that article 7 (1) of the Convention sets a uniform standard for interpretation of its provisions by stating: "In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application [...]."[5]

9. While this provision is paramount to set common standards for interpretation, the goal of uniform interpretation benefits greatly from the adequate diffusion of judicial decisions and arbitral awards, presented in a systematic and objective way. The positive effects of such material are manifold and reach beyond providing guidance during dispute resolution. For example, it provides valuable assistance to drafters of contracts under the Convention and facilitates its teaching and study. Moreover, it highlights the international nature of the Convention's provisions and thus fosters participation to the Convention by an even larger number of States.

10. The United Nations Commission on International Trade Law (UNCITRAL), in accordance with its mandate,[6] has undertaken the preparation of the tools necessary for a thorough understanding of the Convention and for its uniform interpretation.

11. UNCITRAL has established a reporting system for case law on UNCITRAL texts (CLOUT).[7] CLOUT was established in order to assist judges, arbitrators, lawyers, and parties to business transactions, by making available decisions of courts and arbitral tribunals interpreting

UNCITRAL texts; and in so doing, to further the uniform interpretation and application of those texts.

12. CLOUT covers case law related to conventions and model laws prepared by UNCITRAL, although the majority of its cases refers to the Convention, and to the UNCITRAL Model Law on International Commercial Arbitration, 1985.

13. A network of national correspondents, appointed by the governments that are party to at least one UNCITRAL convention or have enacted at least one UNCITRAL model law, monitors the relevant judicial decisions in the respective countries and reports them to the UNCITRAL Secretariat in the form of an abstract. So called voluntary contributors can also prepare abstracts for the attention of the Secretariat, which decides on their publication in agreement with the national correspondents. The Secretariat edits and indexes all of the abstracts received and publishes them in the CLOUT series.

14. The network of national correspondents ensures coverage of a large number of domestic jurisdictions. The availability of CLOUT in the six official languages of the United Nations—a unique feature among CISG case law reporters—greatly enhances the dissemination of the information. These two elements are key to promote uniformity of interpretation on the widest possible scale.

15. In light of the large number of CISG-related cases collected in CLOUT, the Commission requested a tool specifically designed to present selected information on the interpretation of the Convention in a clear, concise and objective manner.[8] This request originated the UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods.

16. The goal of uniform interpretation of CISG has greatly benefited from CLOUT, and it is expected that the Digest will further support it.

17. The Digest presents the information in a format based on chapters corresponding to CISG articles. Each chapter contains a synopsis of the relevant case law, highlighting common views and reporting any divergent approach. The Digest is meant to reflect the evolution of case law and, therefore, updates will be periodically released. While the CLOUT system reports cases in the form of abstracts, the present Digest makes reference also to the full text of the decision whenever this is useful to illustrate the point.

18. The Digest is the result of the cooperation between the national correspondents and the UNCITRAL Secretariat. Its first draft, prepared in 2004, greatly benefited from the contribution of Professor Franco Ferrari of the Università degli Studi di Verona, Facoltà di Giurisprudenza; Professor Harry Flechtner of the University of Pittsburgh School of Law; Professor Ulrich Magnus of the Universität Hamburg, Fachbereich Rechtswissenschaft; Professor Peter Winship of the Southern Methodist University School of Law; and Professor Claude Witz, Lehrstuhl für französisches Zivilrecht, Universität des Saarlandes. Before being published in the current format, the Digest was further updated and edited by the UNCITRAL Secretariat.

Notes

[1]United Nations Convention on Contracts for the International Sale of Goods, 1980, United Nations *Treaty Series*, vol. 1498, p. 3. CISG is deposited with the Secretary-General of the United Nations. Authoritative information on its status can be obtained from the United Nations Treaty Collection on the Internet, at http://untreaty.un.org. Similar information is also provided on UNCITRAL's website at http://www.uncitral.org.

[2]UNCITRAL prepares yearly a *Bibliography of recent writings related to the work of UNCITRAL* (for the year 2007, see United Nations document A/CN.9/626 of 25 May 2007), available on UNCITRAL's website at http://www.uncitral.org.

[3]Art. 7 CISG: "(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.
(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law."

[4]Art. 9 CISG: "(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.
(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned."

[5]This clause served as a model for similar provisions in other uniform legislative texts. See, for example, United Nations Convention on the Assignment of Receivables in International Trade, art. 7 (1) ("regard is to be had to its ... international character"; UNCITRAL Model Law on Electronic Commerce, art. 3 ("regard is to be had to its international origin"); UNCITRAL Model Law on Cross-border Insolvency, art. 8 ("regard is to be had to its international origin").

[6]UNCITRAL should be active, inter alia, in "[…] promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade [and] collecting and disseminating information on national legislation and modern legal developments, including case law, in the field of the law of international trade; […]": General Assembly resolution 2205 (XXI) of 17 December 1966, available on UNCITRAL's website at http://www.uncitral.org.

[7]Report of the United Nations Commission on International Trade Law on the work of its twenty-first session, New York, 11-20 April 1988, United Nations document A/43/17, paras. 98-109. CLOUT reports are published as United Nations documents A/CN.9/SER.C/ABSTRACTS/1 to A/CN.9/SER.C/ABSTRACTS/72. The seventy-two CLOUT reports are also available on UNCITRAL's website at http://www.uncitral.org/clout/showSearchDocument.do?lf=898&lng=en.

[8]Report of the United Nations Commission on International Trade Law on its thirty-fourth session, 25 June-13 July 2001, A/56/17, paras. 391, 395, available on the UNCITRAL website http://www.uncitral.org/english/sessions/unc/unc-34/A-56-17e.pdf

The Convention as a Whole; Overview of Digest*

OVERVIEW OF THE CONVENTION

1. The United Nations Convention on Contracts for the International Sale of Goods (the "CISG" or "Convention") is a convention or multi-lateral treaty that contains uniform legal rules to govern international sale of goods. It has, at the time of this writing, attracted an extremely large and diverse group of Contracting States.[1] Where the CISG governs a transaction under its rules of applicability (see articles 1-6 of the Convention), the rules of the Convention bind the parties to the transaction except to the extent that the parties have effectively excluded the CISG or derogated from its provisions (see article 6).

THE STRUCTURE OF THE CONVENTION

2. The text of the Convention is introduced by a Preamble[2] and concludes with an Authentic Text and Witness clause.[3] In between are the 101 substantive articles of the CISG, which are organized into four Parts.

3. Part I ("Sphere of application and general provisions"), which encompasses articles 1-13 of the Convention, is subdivided into two Chapters: Chapter I ("Sphere of application"), which covers articles 1-6, and Chapter II ("General provisions"), which includes articles 7-13.

4. Articles 14-24 comprise Part II of the Convention ("Formation of contract"). Part II is not further subdivided.

5. The largest part of the Convention is Part III ("Sale of goods"), which covers articles 25-88. Part III is organized into five chapters. Chapter I ("General provisions") consists of articles 25-29. Chapter II ("Obligations of the seller") is comprised of articles 30-52, and itself is subdivided into Section I ("Delivery of goods and handing over of documents," articles 31-34), Section II ("Conformity of goods and third party claims," articles 35-44), and Section III ("Remedies for breach of contract by the seller," articles 45-52). Chapter III ("Obligations of the buyer") incorporates articles 53-65, and in turn is subdivided into Section I ("Payment of the price," articles 54-59), Section II ("Taking delivery," article 60), and Section III ("Remedies for breach of contract by the buyer," articles 61-65). Chapter IV ("Passing of risk") includes articles 66-70. Finally, Chapter V ("Provisions common to the obligations of the seller and of the buyer") encompasses articles 71-88, and is arranged into six sections: Section I ("Anticipatory breach and instalment contracts," articles 71-73); Section II ("Damages," articles 74-77); Section III ("Interest," article 78); Section IV ("Exemption," article 79-80); Section V ("Effects of avoidance," articles 81-84); and Section VI ("Preservation of the goods," articles 85-88).

6. The last Part of the Convention is Part IV ("Final provisions"), which consists of articles 89-101.

7. The following summarizes the structure of the Convention:

Preamble

Part I ("Sphere of application and general provisions") — articles 1-13

- Chapter I ("Sphere of application") — articles 1-6
- Chapter II ("General provisions") — articles 7-13

Part II ("Formation of contract") — articles 14-24

Part III ("Sale of goods") — articles 25-88

- Chapter I ("General provisions") — articles 25-29
- Chapter II ("Obligations of the seller") — articles 30-52
  - Section I ("Delivery of goods and handing over of documents") — articles 31-34
  - Section II ("Conformity of goods and third party claims") — articles 35-44
  - Section III ("Remedies for breach of contract by the seller") — articles 45-52
- Chapter III ("Obligations of the buyer") — articles 53-65
  - Section I ("Payment of the price") — articles 54-59
  - Section II ("Taking delivery") — article 60
  - Section III ("Remedies for breach of contract by the buyer") — articles 61-65
- Chapter IV ("Passing of risk") — articles 66-70
- Chapter V ("Provisions common to the obligations of the seller and of the buyer") — articles 71-88

*The present Digest was prepared using the full text of the decisions cited in the Case Law on UNCITRAL Texts (CLOUT) abstracts and other citations listed in the footnotes. The abstracts are intended to serve only as summaries of the underlying decisions and may not reflect all the points made in the Digest. Readers are advised to consult the full texts of the listed court and arbitral decisions rather than relying solely on the CLOUT abstracts.

- Section I (“Anticipatory breach and instalment contracts”) — articles 71-73
- Section II (“Damages”) — articles 74-77
- Section III (“Interest”) — article 78
- Section IV (“Exemption”) — article 79-80
- Section V (“Effects of avoidance”) — articles 81-84
- Section VI (“Preservation of the goods”) — articles 85-88

Part IV (“Final provisions”) — articles 89-101

Authentic Text and Witness clause

OVERVIEW OF THE DIGEST

8. The background to and general approach of the Digest is described in the “Introduction to the Digest of case law on the United Nations Sales Convention,” Document A/CN.9/562. The Digest itself is comprised of sections covering each of the subdivisions of the Convention (starting with this section, which covers the Convention as a whole, and including sections for each of the various clauses, Parts, Chapters and Sections described in paragraphs 2-7 above, including the Preamble and the Witness clause), and each of the individual articles that comprise the Convention except for the individual articles in Part IV (“Final provisions,” articles 89-101).

Notes

[1]For information on the States that have become parties to the Convention, see the website of the United Nations Commission on International Trade law at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html.

[2]See the Digest discussion of the Preamble *infra*.

[3]See the Digest discussion of the Witness.

Preamble

The States Parties to this Convention,

Bearing in mind the broad objectives in the resolutions adopted by the sixth special session of the General Assembly of the United Nations on the establishment of a New International Economic Order,

Considering that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

Being of the opinion that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade,

Have agreed as follows: . . . .

OVERVIEW

1. The preamble to the CISG declares its background, nature, general purposes and approaches. It begins by stating that the parties to the Convention are States, and ends by averring that the Convention is an agreement of such States. Between these two statements are three main clauses, the first two of which place the CISG in the context of broader international programmes and goals, and the third of which focuses on the specific purposes and methods of the Convention.

2. The first of the main clauses of the Preamble ("*Bearing in mind* . . .") suggests that the CISG is consistent with the "broad objectives" of the United Nations resolutions to establish a "New International Economic Order." The second ("*Considering* that . . .") indicates that the CISG project promotes "friendly relations among States" by fostering "the development of international trade on the basis of equality and mutual benefit." The latter theme is continued in the third clause, which declares that promoting "the development of international trade," along with "the removal of legal barriers in international trade," are particular purposes of the CISG, as well as anticipated results of its adoption. The third clause also describes particular aspects of the Convention that advance those goals — specifically, the status of the CISG as a set of "*uniform* rules" (emphasis added) for international sales, and its success in "tak[ing] into account the different social, economic and legal systems." The emphasis here on uniformity and on transcendence of particular legal and socio-economic traditions is amplified in Article 7(1) of the substantive CISG, which mandates that the Convention be interpreted with regard "to its international character and to the need to promote uniformity in its application."

USE OF PREAMBLE IN DECISIONS

3. Although the Preamble does not contain substantive rules of sales law, it has been invoked by tribunals in the course of resolving disputes governed by the Convention. Specifically, the Preamble has been cited to support the conclusion that certain domestic law causes of action related to a transaction governed by the CISG were pre-empted by the Convention.[1]

Notes

[1]CLOUT case No. 433 [Federal District Court, Northern District of California, United States, 30 July 2001] (see full text of decision) (the court cited language from the second main clause of the Preamble ("the development of international trade on the basis of equality and mutual benefit") and the third main clause of the Preamble ("the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade") as revealing an intent that the CISG supersede internal domestic law on matters within its scope); CLOUT case No. 579 [Federal District Court, Southern District of New York, United States, May 10, 2002] (see full text of decision) (the court cited language from the third main clause of the Preamble ("the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade") in support of its holding that the CISG preempted contract claims based on internal domestic law).

Part one

SPHERE OF APPLICATIONS AND GENERAL PROVISIONS

Chapter I

Sphere of application (articles 1-6)

OVERVIEW

1. Part 1 of the Convention addresses the question—preliminary to all others under the CISG—of the applicability of the Convention, as well as general matters such as interpretation and formality requirements. It is divided into two chapters: Chapter I, "Sphere of application," encompasses articles 1-6 of the CISG; Chapter II, "General provisions," covers articles 7-13.

CHAPTER I OF PART I: SPHERE OF APPLICATION

2. Chapter 1 of Part I of the CISG contains provisions defining the scope of the Convention. Articles 1-3 identify transactions to which the CISG does and does not apply. Articles 4 and 5 describe issues that are and are not addressed in the Convention. Article 6 contains a broad principle of party autonomy that can affect both the transactions and the issues that are governed by the CISG.

3. Several provisions of Chapter 1 implicate final provisions of the Convention, found in Part IV of the CISG covering articles 89-101. For example, application of article 1, the main provision governing the Convention's applicability, may be affected by, *inter alia*, articles 92 (declarations that a State is not bound by Part II or by Part III of the Convention),[1] article 93 (federal-state clause),[2] article 94 (declarations by States with harmonized sales law that the Convention does not apply to sales between parties located in those States),[3] article 95 (declarations that a State is not bound by article 1 (1) *(b)*),[4] article 99 (time at which the Convention enters into force),[5] and article 100 (temporal rules for applying the Convention). Similarly, both article 11 (which eliminates writing and other formality requirements) and article 12 (which creates an exception to the applicability of article 11 and other anti-formality rules of the Convention) must be applied in light of article 96 (declarations that the anti-formality rules of the Convention do not apply where a party is located in the declaring State).

Notes

[1]See the Digest for article 1, paragraph 19.

[2]Id.

[3]See the Digest for Part II, paragraph 4.

[4]See the Digest for article 1, paragraph 23.

[5]See the Digest for article 1, paragraph 19.

Article 1

1. This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

(*a*) When the States are Contracting States; or

(*b*) When the rules of private international law lead to the application of the law of a Contracting State.

2. The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

3. Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

OVERVIEW

1. This article provides some of the rules for determining whether the Convention applies. Article 1 should be read in connection with articles 2 and 3, which respectively narrow and extend the Convention's substantive sphere of application.

CONVENTION PREVAILS OVER RECOURSE TO PRIVATE INTERNATIONAL LAW

2. Both the Convention and the private international law rules of a forum address international contracts. Before examining the Convention's substantive, international and territorial sphere of application, therefore, its relationship to private international law rules must be explored. According to case law, courts of Contracting States must determine whether the Convention applies before resorting to private international law.[1] In other words, recourse to the Convention prevails over recourse to the forum's private international law.[2] This is so because, as a substantive law convention,[3] the CISG's rules are more specific and lead directly to a substantive solution,[4] whereas resort to private international law requires a two-step approach (identification of the applicable law and application thereof).

CONTRACTS GOVERNED BY THE CONVENTION

3. The Convention applies to contracts for the sale of goods. Although the Convention does not provide any definition of this type of contract,[5] a description can be derived from articles 30 and 53.[6] Thus, a contract for the sale of goods covered by the Convention can be defined as a contract "pursuant to which one party (the seller) is bound to deliver the goods and transfer the property in the goods sold and the other party (the buyer) is obliged to pay the price and accept the goods".[7] Thus, as one court put it, the essence of the contract lies in goods being exchanged for money.[8]

4. The Convention covers contracts for the delivery of goods by installments,[9] as can be derived from article 73 of the Convention, and contracts providing for the delivery of the goods sold directly from the supplier to the seller's customer.[10] Pursuant to article 29, contracts modifying a sales contract also fall within the substantive sphere of application of the Convention.[11]

5. Article 3 contains a special rule which extends—within certain limits—the Convention's substantive sphere of application to contracts for the sale of goods to be manufactured or produced as well as to contracts pursuant to which the seller is also bound to deliver labour or services.

6. Most courts considering the issue have concluded that the Convention does not apply to distribution agreements,[12] as these agreements focus on the "organization of the distribution" rather than the transfer of ownership of goods.[13] The various contracts for the sale of goods concluded in execution of a distribution agreement, can, however, be governed by the Convention,[14] even where the distribution agreement was concluded before the entry into force of the Convention.[15]

7. Franchise agreements also fall outside the Convention's sphere of application.[16]

GOODS

8. The Convention does not define "goods". Nevertheless, pursuant to article 7 (1), the concept of "goods" should be interpreted autonomously, in light of the Convention's

"international character" and "the need to promote uniformity in its application", rather than by referring to domestic law for a definition.[17]

9. According to case law, "goods" in the sense of the Convention are items that are, at the moment of delivery,[18] "moveable and tangible",[19] regardless of whether they are solid,[20] used or new,[21] inanimate or alive.[22] Intangibles, such as intellectual property rights, an interest in a limited liability company,[23] or an assigned debt,[24] have been considered not to fall within the Convention's concept of "goods". The same is true for a market research study.[25] According to one court, however, the concept of "goods" is to be interpreted "extensively,"[26] perhaps suggesting that the Convention might apply to goods that are not tangible.

10. Whereas the sale of computer hardware clearly falls within the sphere of application of the Convention,[27] the issue is not so clear when it comes to software. Some courts consider only standard software to be "goods" under the Convention;[28] another court concluded that any kind of software, including custom-made software, should be considered "goods".[29]

INTERNATIONALITY AND PLACE OF BUSINESS

11. The Convention's sphere of application is limited to contracts for the international sale of goods. According to article 1 (1), a contract for the sale of goods is international when the parties have—at the moment of the conclusion of the contract[30]—their relevant place of business in different States.[31]

12. The concept of "place of business" is critical in the determination of internationality. The Convention, however, does not define it, although it does address the problem of which of a party's multiple places of business is to be taken into account in determining internationality (article 10).

13. According to one court, "place of business" can be defined as "the place from which a business activity is de facto carried out [...]; this requires a certain duration and stability as well as a certain amount of autonomy".[32] Another court has concluded that a liaison office cannot be considered a "place of business" under the Convention.[33]

14. The internationality requirement is not met where the parties have their relevant place of business in the same country. This is true even where they have different nationalities, as article 1 (3) states that "the nationality of the parties [...] is [not] to be taken into consideration in determining the application of this Convention".[34] Also, the fact that the place of the conclusion of the contract is located in a different State from the State in which the performance takes place does not render the contract "international".[35] For the purposes of the Convention's applicability, the parties' civil or commercial character is also irrelevant.[36]

15. Where a contract for the sale of goods is concluded through an intermediary, it is necessary to establish who the parties to the contract are in order to determine whether the contract is international. As the issue of who is party to a contract is not dealt with in the CISG,[37] the question must be answered by reference to the law applicable by virtue of the rules of private international law of the forum. The places of business of the parties as determined in this fashion are the ones relevant to analyzing whether the contract is international.[38]

16. According to article 1 (2), internationality is irrelevant where "the fact that the parties have their places of business in different States [...] does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract".[39] Thus, the Convention protects the parties' reliance upon what appears to be a domestic setting for a transaction. The party that asserts that the Convention is not applicable because the internationality of the contract was not apparent must prove its assertion.[40]

AUTONOMOUS APPLICABILITY

17. The internationality of a contract for the sale of goods, by itself, is not sufficient to make the Convention applicable.[41] Article 1 (1) lists two additional alternative criteria for applicability, one of which has to be met in order for the Convention to apply. According to the criterion set forth in article 1 (1) *(a)*, the Convention is "directly"[42] or "autonomously"[43] applicable, i.e. without the need to resort to the rules of private international law,[44] when the States in which the parties have their relevant places of business are Contracting States. As the list of Contracting States grows, this criterion is leading to application of the Convention in an increasing number of cases.[45]

18. In order for the Convention to be applicable by virtue of article 1 (1) *(a)*, the parties must have their relevant place of business in a Contracting State. "If the two States in which the parties have their places of business are Contracting States, the Convention applies even if the rules of private international law of the forum would normally designate the law of a third country."[46] This is so unless the reason that the third country's law would apply is a choice of law agreement that the parties intended to exclude the Convention.[47]

19. The time when a State becomes a Contracting State is determined by article 99 and temporal rules for applying the Convention under article 1 (1) *(a)* are given in article 100. For the Convention to apply by virtue of article 1 (1) *(a)*, one must also take into account whether the States in which the parties have their relevant place of business have declared either an article 92 or an article 93 reservation. Where one State has made an article 92 reservation declaring that it is not bound by a specified part of the CISG, the Convention as a whole cannot be applicable by virtue of article 1 (1) *(a)*. Rather, one must determine on the basis of article 1 (1) *(b)* whether the part of the Convention to which the reservation relates applies to the transaction.[48] The same is true mutatis mutandis if a party is located in a territory of a Contracting State as to which the State has declared, pursuant to article 93, that the Convention does not extend.[49]

INDIRECT APPLICABILITY

20. In Contracting States the Convention can also be applicable—by virtue of article 1 (1) *(b)*—where only one (or neither) party has its relevant place of business in Contracting States,[50] as long as the rules of private international law lead to the law of a Contracting State.[51] Since the relevant rules of private international law are those of the forum,[52] it will depend on the domestic rules of private international law whether the parties are allowed to choose the applicable law, whether one has to look into the rules of private international of the law designated by the rules of private international of the forum (renvoi), etc.

21. Where the private international law rules of the forum are based upon the 1980 Rome Convention on the Law Applicable to Contractual Obligations,[53] the parties' choice of the law of a Contracting State can lead to the applicability of the Convention by virtue of article 1 (1) *(b)*,[54] since article 3 of the Rome Convention recognizes party autonomy.[55] This is also true where the rules of private international law of the forum are those laid down in the 1955 Hague Convention on the Law Applicable to International Sales,[56] as article 2[57] of this convention also obliges judges to follow the choice of law made by the parties.[58]

22. The Convention may be selected by the parties as the law applicable to the contract.[59] Where the parties did not make a choice of law or where their choice is not valid, one has to resort to the criteria set forth by the rules of private international law of the forum to determine whether the Convention is applicable by virtue of article 1 (1) *(b)*. Thus, under article 4 (1) of the 1980 Rome Convention, one has to apply the law "most closely connected" to the contract;[60] according to article 4 (2), it is presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has its habitual residence at the time of conclusion of the contract. For this reason, the Convention has often been applied by courts in contracting States to the Rome Convention when the seller, i.e. the party that has to effect the characteristic performance,[61] had its place of business in a Contracting State to the Convention.[62] Under the 1955 Hague Convention, absent a choice of law the law of the seller applies,[63] except in cases where the seller receives the order for the goods in the buyer's country, in which case the law of the buyer governs.[64]

23. At the 1980 Diplomatic Conference, a delegate argued that countries with special legislation on international trade should be allowed to avoid "the effect which article 1 (100) *(b)* would have on the application of their special legislation".[65] As a consequence, article 95 was introduced to give Contracting States the opportunity to choose not to be bound by article 1 (1) *(b)*.[66] Judges located in Contracting States that have declared an article 95 reservation will not apply the Convention by virtue of article 1 (1) *(b)*; this does not, however, affect the Convention's applicability in such States by virtue of article 1 (1) *(a)*.[67]

24. Although the Convention does not bind non-Contracting-States, it has been applied in courts of non-Contracting States where the forum's rules of private international law led to the law of a Contracting State.[68]

Notes

[1]CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (see full text of the decision).

[2]For this interpretation, see CLOUT case No. 380 [Tribunale di Pavia, Italy, 29 December 1999]; Landgericht Zwickau, Germany, 19 March 1999, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/519.htm; CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998]; CLOUT case No. 345 [Landgericht Heilbronn, Germany, 15 September 1997]; CLOUT case No. 84 [Oberlandesgericht Frankfurt am Main, Germany, 20 April 1994] (see full text of the decision).

[3]CLOUT case No. 424 [Oberster Gerichtshof, Austria, 9 March 2000], also available on the Internet at http://www.cisg.at/6_31199z.htm; Tribunale d'appello, Lugano, Switzerland, 8 June 1999, available on the Internet at http://www.unilex.info/case.cfm?pid=1&do=case&id=483&step=FullText.

[4]For this approach, see CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (see full text of the decision); CLOUT case No. 608 [Trib. Rimini, Italy, 26 November 2002], also in *Giurisprudenza Italiana*, 2003, 896 ff.

[5]See CLOUT case No. 106 [Oberster Gerichtshof, Austria, 10 November 1994] (see full text of the decision).

[6]See Rechtbank Rotterdam, Netherlands, 1 November 2001, *Nederlands Internationaal Privaatrecht*, 2002, No. 114; available on the Internet at Kantonsgericht Wallis, Switzerland, 11 March 1996, Unilex; CLOUT case No. 608 [Trib. Rimini, Italy, 26 November 2002], also in *Giurisprudenza Italiana*, 2003, 896 ff.

[7]See CLOUT case No. 106 [Oberster Gerichtshof, Austria, 10 November 1994] (see full text of the decision); for a reference to the buyer's obligation mentioned in the definition cited in the text, see Rechtbank Koophandel, Hasselt, Belgium, 2 May 1995, available on the Internet at http://www.law.kuleuven.be/ipr/eng/cases/1995-05-02.html .

[8]CLOUT case No. 328 [Kantonsgericht des Kantons Zug, Switzerland, 21 October 1999] (see full text of the decision).

[9]See CLOUT case No. 293 [Schiedsgericht der Hamburger freundlichen Arbitrage, Germany, 29 December 1998], also in *Internationales Handelsrecht*, 2001, 337; CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998]; CLOUT case No. 238 [Oberster Gerichtshof, Austria, 12 February 1998]; CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, Germany, 21 March, 21 June 1996] (see full text of the decision); Landgericht Ellwangen, Germany, 21 August 1995, unpublished; CLOUT case No. 154 [Cour d'appel Grenoble, France, 22 February 1995].

[10]See CLOUT case No. 269 [Bundesgerichtshof, Germany, 12 February, 1998] (see full text of the decision); CLOUT case No. 261 [Berzirksgericht der Sanne, Switzerland, 20 February 1997].

[11]See CLOUT case No. 297 [Oberlandesgericht München, Germany, 21 January 1998]; CLOUT case No. 133 [Oberlandesgericht München, Germany, 8 February 1995]; CLOUT case No. 303 [Arbitration—International Chamber of Commerce, award No. 7331 1994], *Journal du droit international*, 1995, 1001ff.; CLOUT case No. 5 [Landgericht Hamburg, Germany, 26 September 1990].

[12]See CLOUT case No. 297 [Oberlandesgericht München, Germany, 21 January 1998] (see full text of the decision); CLOUT case No. 295 [Oberlandesgericht Hamm, Germany, 5 November 1997]; CLOUT case No. 273 [Oberlandesgericht München, Germany, 9 July 1997] (see full text of the decision); CLOUT case No. 169 [Oberlandesgericht Düsseldorf, Germany, 11 July 1996]; CLOUT case No. 126 [Fovárosi Biróság, Hungary, 19 March 1996]; CLOUT case No. 281 [Oberlandesgericht Koblenz, Germany, 17 September 1993] (see full text of the decision); Hof Amsterdam, Netherlands, 16 July 1992, *Nederlands Internationaal Privaatrecht* 1992, Nr. 420; CLOUT case No. 420 [Federal District Court, Eastern District of Pennsylvania, United States of America, 29 August 2000]; Hof Arnhem, Netherlands, 27 April 1999, *Nederlands Internationaal Privaatrecht* 1999, Nr. 245, available on Uniles; Rechtsbank Gravenhage, Netherlands, 2 July 1997, *Nederlands Internationaal Privaatrecht* 1999, n. 68, 78-80, available on Unilex. One court has applied the CISG to a distributorship agreement. See CLOUT case No. 379 [Corte di Cassazione, Italy, 14 December 1999]. For a case in which the issue was raised but not resolved, see CLOUT case No. 187 [Federal District Court, Southern District of New York, United States, 23 July 1997]. See also CLOUT case No. 480 [Cour d'appel Colmar, France, 12 June 2001] ("collaboration agreement" under which supplier was required to deliver to the buyer at least 20,000 covers for truck air conditioners, with the possibility of additional quantities depending on the needs of the buyer's customer, was a contract for sale governed by the CISG; the title that the parties chose for their agreement was not dispositive, and the fact that the quantity might be increased beyond the stated amount depending on the needs of the buyer's customer did not prevent application of the Convention; the contract designated the parties as buyer and seller, specified the precise goods and a method for calculating the price, set a minimum quantity of goods to be delivered by the seller, and implied an obligation for buyer to take delivery, so it was a "contract for the sale of goods" for purposes of applying the Convention).

[13]CLOUT case No. 192 [Obergericht des Kantons Luzern, Switzerland, 8 January 1997] (see full text of the decision). But see CLOUT case No. 630 [Court of Arbitration of the International Chamber of Commerce, Zurich, Switzerland, July 1999] (holding that a framework agreement was governed by the CISG because it provided for future sales and deliveries) (see full text of the decision).

[14]See CLOUT case No. 295 [Oberlandesgericht Hamm, Germany, 5 November 1997]; CLOUT case No. 273 [Oberlandesgericht München, Germany, 9 July 1997] (see full text of the decision); CLOUT case No. 169 [Oberlandesgericht Düsseldorf, Germany, 11 July 1996]; CLOUT case No. 204 [Cour d'appel Grenoble, France, 15 May 1996]; CLOUT case No. 281 [Oberlandesgericht Koblenz, Germany, 17 September 1993] (see full text of the decision); ICC Arbitral Award, Milan, Italy, December 1998, nr. 8908, in *ICC International Court of Arbitration Bulletin*, vol. 10, no. 2, pp. 83-87 (Fall 1999), available on Unilex; ICC Arbitral Award 1997, Paris, 23 January 1997, nr. 8611/HV/JK, unpublished, available on Unilex.

[15]CLOUT case No. 281 [Oberlandesgericht Koblenz, Germany, 17 September 1993] (see full text of the decision).

[16]See CLOUT case No. 192 [Obergericht des Kantons Luzern, Switzerland, 8 January 1997].

[17]See the Digest for article 7, paragraph 2.

[18]See CLOUT case No. 152 [Cour d'appel Grenoble, France, 26 April 1995] (see full text of the decision); CLOUT case No. 608 [Trib. Rimini, Italy, 26 November 2002], also in *Giurisprudenza Italiana*, 2003, 896 ff.

[19]See CLOUT case No. 328 [Kantonsgericht des Kantons Zug, Switzerland, 21 October 1999] (see full text of the decision); CLOUT case No. 380 [Tribunale di Pavia, Italy, 29 December 1999] (see full text of the decision); CLOUT case No. 168 [Oberlandesgericht Köln, Germany, 21 March 1996] (see full text of the decision); CLOUT case No. 122 [Oberlandesgericht Köln, Germany, 26 August 1994]; CLOUT case No. 106 [Oberster Gerichtshof, Austria, 10 November 1994] (see full text of the decision); CLOUT case No. 608 [Trib. Rimini, Italy, 26 November 2002], also in *Giurisprudenza Italiana*, 2003, 896 ff.

[20]See CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996], applying the Convention to the international sale of propane gas.

[21]See CLOUT case No. 168 [Oberlandesgericht Köln, Germany, 21 March 1996] (used car); Landgericht Köln, Germany, 16 November 1995, unpublished.

[22]See CLOUT case No. 100 [Rechtbank Arnhem, Netherlands, 30 December 1993] (live lambs); CLOUT case No. 280 [Oberlandesgericht Jena, Germany, 26 May 1998] (live fish); CLOUT case No. 312 [Cour d'appel Paris, France, 14 January 1998] (circus elephants). Compare CLOUT case No. 106 [Oberster Gerichtshof, Austria, 10 November 1994] (chinchilla pelts); CLOUT case No. 227 [Oberlandesgericht Hamm, Germany, 22 September 1992] (bacon). For a decision that deems animals to be "goods" in the sense of the Convention, see Landgericht Flensburg, Germany, 19 January 2001, *Internationales Handelsrecht*, 2001, 67 et seq.

[23]See CLOUT case No. 161 [Arbitration—Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 20 December 1993].

[24]See CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (see full text of the decision).

[25]See CLOUT case No. 122 [Oberlandesgericht Köln, Germany, 26 August 1994].

[26]CLOUT case No. 281 [Oberlandesgericht Koblenz, Germany, 17 September 1993] (see full text of the decision).

[27]See Landgericht München, Germany, 29 May 1995, *Neue Juristische Wochenschrift* 1996, 401 f.; Landgericht Heidelberg, Germany, 3 July 1992,Unilex.

[28]See CLOUT case No. 122 [Oberlandesgericht Köln, Germany, 26 August 1994] (see full text of the decision); CLOUT case No. 131 [Landgericht München, Germany, 8 February 1995].

[29]See CLOUT case No. 281 [Oberlandesgericht Koblenz, Germany, 17 September 1993] (see full text of the decision).

[30]See Oberlandesgericht Dresden, Germany, 27 December 1999, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/511.htm.

[31]See CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (see full text of the decision); CLOUT case No. 168 [Oberlandesgericht Köln, Germany, 21 March 1996] (see full text of the decision); CLOUT case No. 106 [Oberster Gerichtshof, Austria, 10 November 1994] ; CLOUT case No. 608 [Trib. Rimini, Italy, 26 November 2002], also in *Giurisprudenza Italiana*, 2003, 896 ff.

[32]Oberlandesgericht Stuttgart, Germany, 28 February 2000, *Internationales Handelsrecht*, 2001, 66; CLOUT case No. 608 [Trib. Rimini, Italy, 26 November 2002], also in *Giurisprudenza Italiana*, 2003, 896 ff.; for a similar definition see CLOUT case No. 106 [Oberster Gerichtshof, Austria, 10 November 1994] (see full text of the decision); for a court decision stating that the phrase "place of business" requires the parties to "really" do business out of that place, see CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000], also available on the Internet at http://www.cisg.law.pace.edu/cisg/text/000413g1german.html.

[33]See CLOUT case No. 158 [Cour d'appel Paris, France, 22 April 1992].

[34]For references to the irrelevance of the parties' nationality, see CLOUT case No. 445 [Bundesgerichtshof, Germany, 31 October 2001], also in *Internationales Handelsrecht*, 2002, 14 et seq.; Rechtbank Koophandel Veurne, Belgium, 25 April 2001, available on the Internet at http://www.law.kuleuven.ac.be/int/tradelaw/WK/2001-04-25.htm; Court of Arbitration of the Bulgarian Chamber of Commerce and Industry, award No. 56/1995, available on the Internet at http://www.unilex.info/case.cfm?pid=1&do=case&id=421&step=FullText.

[35]See Oberlandesgericht Köln, Germany, 27 November 1991, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/.

[36]See CLOUT case No. 445 [Bundesgerichtshof, Germany, 31 October 2001], also in *Internationales Handelsrecht*, 2002, 16.

[37]For court decisions stating that issues of agency law and related matters are not dealt with by the Convention, see CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (see full text of the decision); CLOUT case No. 189 [Oberster Gerichtshof, Austria, 20 March 1997] (see full text of the decision); CLOUT case No. 335 [Appellationsgericht Tessin, Switzerland, 12 February 1996], also in *Schweizerische Zeitschrift für europäisches und internationales Recht* 1996, 135 ff.; CLOUT case No. 334 [Obergericht des Kantons Thurgau, Switzerland, 19 December 1995]; Landgericht Kassel, Germany, 22 June 1995, unpublished; see CLOUT Case No. 410 [Amtsgericht Alsfeld, Germany, 12 May 1995] also in *Neue Juristische Wochenschrift Rechtsprechungs-Report* 1996, 120 f.; CLOUT case No. 80 [Kammergericht Berlin, Germany, 24 January 1994] (see full text of the decision); CLOUT case No. 95 [Zivilgericht Basel-Stadt, Switzerland, 21 December 1992] (see full text of the decision); CLOUT case No. 5 [Landgericht Hamburg, Germany, 26 September 1990].

[38]See Oberlandesgericht Köln, Germany, 13 November 2000, available on the Internet at http://www.cisg.law.pace.edu/cisg/text/001113g1german.html.

[39]For a reference to this provision, see CLOUT case No. 425 [Oberster Gerichtshof, Austria, 21 March 2000], also available on the Internet at http://www.cisg.at/10_34499g.htm; CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (see full text of the decision).

[40]See CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (see full text of the decision).

[41]See CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (see full text of the decision).

[42]See Bundesgericht, Switzerland, 11 July 2000, available on the Internet at http://www.cisg.law.pace.edu/cisg/text/000711s1german.html; CLOUT case No. 261 [Berzirksgericht der Sanne, Switzerland, 20 February 1997].

[43]See CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (see full text of the decision); CLOUT case No. 189 [Oberster Gerichtshof, Austria, 20 March 1997] (see full text of the decision).

[44]See CLOUT case No. 268 [Bundesgerichtshof, Germany, 11 December 1996] (see full text of the decision).

[45]For recent court decisions applying the Convention by virtue of art. 1 (1) *(a)*, see Hof Beroep Gent, Belgium, 31 January 2002, available on the Internet at http://www.law.kuleuven.be/ipr/eng/cases/2002-01-31.html; CLOUT case No. 398 [Cour d'appel Orléans, France, 29 March 2001] (see full text of the decision); Landgericht Trier, Germany, 7 December 2000, *Internationales Handelsrecht* 2001, 35; CLOUT case No. 431 [Oberlandesgericht Oldenburg, Germany, 5 December 2000], also in *Recht der internationalen Wirtschaft* 2001, 381 f.; CLOUT case No. 432 [Landgericht Stendal, Germany, 12 October 2000], also in *Internationales Handelsrecht* 2001, 30 ff.; Tribunal Commercial Montargis, France, 6 October 2000, available on the Internet at http://witz.jura.uni-sb.de/CISG/decisions/061000v.htm; CLOUT case No. 428 [Oberster Gerichtshof, Austria, 7 September 2000], also in *Internationales Handelsrecht* 2001, 42 ff.; CLOUT case No. 429 [Oberlandesgericht Frankfurt am Main, Germany, 30 August 2000], also in *Recht der internationalen Wirtschaft* 2001, 383 f.; Sixth Civil Court of First Instance, City of Tijuana, State of Baja California, Mexico, 14 July 2000, *Internationales Handelsrecht* 2001, 38 f.; CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (see full text of the decision); CLOUT case No. 427 [Oberster Gerichtshof, Austria, 28 April 2000], also in *Zeitschrift für Rechtsvergleichung* 2000, 188 f.; CLOUT case No. 426 [Oberster Gerichtshof, Austria, 13 April 2000], also in *Zeitschrift für Rechtsvergleichung* 2000, 231; CLOUT case No. 397 [Audiencia Provincial de Navarra, Spain, 27 March 2000] , *Revista General de Derecho* 2000, 12536 ff.; see CLOUT case No. 425 [Oberster Gerichtshof, Austria, 21 March 2000], also in *Internationales Handelsrecht* 2001, 40 f.; CLOUT case No. 424 [Oberster Gerichtshof, Austria, 9 March 2000], also in *Internationales Handelsrecht* 2001, 39 f.; Oberlandesgericht Stuttgart, Germany, 28 February 2000, *Internationales Handelsrecht* 2001, 65 ff.; CLOUT case No. 395 [Tribunal Supremo, Spain, 28 January 2000] (see full text of the decision); Hanseatisches Oberlandesgericht Hamburg, Germany, 26 January 2000, *OLG-Report Hamburg* 2000, 464 f.; CLOUT case No. 416, [Minnesota [State] District Court, United States, 9 March 1999] (see full text of the decision); CLOUT case No. 430 [Oberlandesgericht München, Germany, 3 December 1999], also in *Internationales Handelsrecht* 2001, 25 f.; CLOUT case No. 359 [Oberlandesgericht Koblenz, 18 November 1999], also in *OLG-Report Koblenz* 2000, 281; Oberster Gerichtshof, Austria, 12 November 1999, *Zeitschrift für Rechtsvergleichung* 2000, 78; CLOUT case No. 319 [Bundesgerichtshof, Germany, 3 November 1999] (see full text of the decision); CLOUT case No. 313 [Cour d'appel Grenoble, France, 21 October 1999], also available on the Internet at http://witz.jura.uni-sb.de/CISG/ decisions/211099.htm; CLOUT case No. 328 [Kantonsgericht des Kantons Zug, Switzerland, 21 October 1999] (see full text of the decision); Amtsgericht Stendal, Germany, 12 October 1999, unpublished; CLOUT case No. 332 [OG Kanton Basel-Landschaft, Switzerland, 5 October 1999], also in *Schweizerische Zeitschrift für europäisches und internationales Recht* 2000, 115 f.; CLOUT case No. 341 [Ontario Superior Court of Justice, Canada, 31 August 1999] (see full text of the decision); CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999], also in *Zeitschrift für Rechtsvergleichung* 2000, 31 f.; Oberster Gerichtshof, Austria, 29 June 1999, *Transportrecht-Internationales Handelsrecht* 1999, 48 ff.; CLOUT case No. 333 [Handelsgericht des Kantons Aargau, Switzerland, 11 June 1999] (see full text of the decision); CLOUT case No. 336 [Appelationsgericht Kanton Tessin, Switzerland, 8 June 1999], see also *Schweizerische Zeitschrift für europäisches und internationales Recht* 2000, 120; CLOUT case No. 315 [Cour de Cassation, France, 26 May 1999] (see full text of the decision); CLOUT case No. 265 [Arbitration—Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 25 May 1999]; CLOUT case No. 314 [Cour d'appel Paris, France, 21 May 1999]; Oberster Gerichtshof, Austria, 19 March 1999, *Zeitschrift für Rechtsvergleichung* 2000, 33; CLOUT case No. 418 [Federal District Court, Eastern District of Louisiana, United

States, 17 May 1999] (see full text of the decision); CLOUT case No. 362 [Oberlandesgericht Naumburg, Germany, 27 April 1999] see also, *Transportrecht-Internationales Handelsrecht* 2000, 22 f.; CLOUT case No. 325 [Handelsgericht des Kantons Zürich, Switzerland, 8 April 1999] (see full text of the decision); CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999]; Landgericht Zwickau, Germany, 19 March 1999, unpublished; CLOUT case No. 306 [Oberster Gerichtshof, Austria, 11 March 1999]; CLOUT case No. 327 [Kantonsgericht des Kantons Zug, Switzerland, 25 February 1999] (see full text of the decision); CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999] (see full text of the decision); CLOUT case No. 243 [Cour d'appel Grenoble, France, 4 February 1999] (see full text of the decision); CLOUT case No. 293 [Arbitration—Schiedsgericht der Hamburger freundschaftlichen Arbitrage, 29 December 1998]; CLOUT case No. 339 [Landgericht Regensburg, Germany, 24 September 1998] (see full text of the decision); CLOUT case No. 645 [Corte di Appello, Milano, Italy, 11 December 1998], also in *Rivista di Diritto Internazionale Privato e Processuale* 1999, 112 ff.; Comisión para la protección del comercio exterior de Mexico, Mexico, 30 November 1998, unpublished; CLOUT case No. 346 [Landgericht Mainz, Germany, 26 November 1998]; CLOUT case No. 270 [Bundesgerichtshof, Germany, 25 November 1998]; CLOUT case No. 248 [Schweizerisches Bundesgericht, Switzerland, 28 October 1998] (see full text of the decision); CLOUT case No. 419 [Federal District Court, Northern District of Illinois, United States, 27 October 1998] (see full text of the decision); CLOUT case No. 244 [Cour d'appel Paris, France, 4 March 1998] (see full text of the decision); CLOUT case No. 240 [Oberster Gerichtshof, Austria, 15 October 1998]; CLOUT case No. 340 [Oberlandesgericht Oldenburg, Germany, 22 September 1998], see also *Transportrecht-Internationales Handelsrecht* 2000, 23 ff.; CLOUT case No. 252 [Handelsgericht des Kantons Zürich, Switzerland, 21 September 1998] (see full text of the decision); CLOUT case No. 263 [Bezirksgericht Unterrheintal, Switzerland, 16 September 1998] (see full text of the decision); CLOUT case No. 285 [Oberlandesgericht Koblenz, Germany, 11 September 1998] (see full text of the decision); CLOUT case No. 318 [Oberlandesgericht Celle, Germany, 2 September 1998] (see full text of the decision); Oberlandesgericht Bamberg, Germany, 19 August 1998, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/; CLOUT case No. 644 [Corte di Cassazione, Italy, 7 August 1998], also in Unilex; CLOUT case No. 344 [Landgericht Erfurt, Germany, 29 July 1998] (see full text of the decision); CLOUT case No. 242 [Cour de Cassation, France, 16 July 1998] (see full text of the decision); CLOUT case No. 305 [Oberster Gerichtshof, Austria, 30 June 1998] (see full text of the decision); CLOUT case No. 255 [Tribunal Cantonal du Valais, Switzerland, 30 June 1998] (see full text of the decision); CLOUT case No. 222 [Federal Court of Appeals for the Eleventh Circuit, United States, 29 June 1998] (see full text of the decision); CLOUT case No. 256 [Tribunal Cantonal du Valais, Switzerland, 29 June 1998] (see full text of the decision); Oberster Gerichtshof, Austria, 25 June 1998, *Zeitschrift für Rechtsvergleichung* 1999, 248 f.; CLOUT case No. 338 [Oberlandesgericht Hamm, Germany, 23 June 1998] (see full text of the decision); CLOUT case No. 237 [Arbitration—Arbitration Institute of the Stockholm Chamber of Commerce, 5 June 1998] (see full text of the decision); CLOUT case No. 290 [Oberlandesgericht Saarbrücken, Germany, 3 June 1998] (see full text of the decision); CLOUT case No. 280 [Oberlandesgericht Jena, Germany, 26 May 1998] (see full text of the decision); Landgericht Aurich, Germany, 8 May 1998, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/; Corte di Cassazione, Italy, 8 May 1998, *Rivista di Diritto Internazionale Privato e Processuale* 1999, 290 ff.: CLOUT case No. 413 [Federal District Court, Southern District of New York, United States, 6 April 1998] (see full text of the decision); CLOUT case No. 272 [Oberlandesgericht Zweibrücken, Germany, 31 March 1998] (see full text of the decision); CLOUT case No. 245 [Cour d'appel Paris, France, 18 March 1998] (see full text of the decision); CLOUT case No. 232 [Oberlandesgericht München, Germany, 11 March 1998]; CLOUT case No. 421 [Oberster Gerichtshof, Austria, 10 March 1998], see also in *Zeitschrift für Rechtsvergleichung* 1998, 161 f.; Hoge Raad, Netherlands, 20 February 1998, *Nederlands Juristenblad* 1998, 566 f.; CLOUT case No. 269 [Bundesgerichtshof, Germany, 12 February 1998] (see full text of the decision); Arbitration Court attached to the Bulgarian Chamber of Commerce and Industry, award No. 11/1996, unpublished; Landgericht Bückeburg, Germany, 3 February 1998, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/; CLOUT case No. 288 [Oberlandesgericht München, Germany, 28 January 1998] (see full text of the decision); CLOUT case No. 259 [Kantonsgericht Freiburg, Switzerland, 23 January 1998] (see full text of the decision); CLOUT case No. 297 [Oberlandesgericht München, Germany, 21 January 1998] (see full text of the decision); Trbi. Comm. Besançon, France, 19 January 1998, available on the Internet at http://witz.jura.uni-sb.de/CISG/decisions/190198v.htm; CLOUT case No. 253 [Cantone del Ticino Tribunale d'appello, Switzerland, 15 January 1998] (see full text of the decision); CLOUT case No. 312 [Cour d'appel, France, 14 January 1998]; CLOUT case No. 257 [Tribunal Cantonal du Vaud, Switzerland, 24 December 1997] (see full text of the decision); CLOUT case No. 254 [Handelsgericht des Kantons Aargau, Switzerland, 19 December 1997] (see full text of the decision); Trib. Grande Instance Colmar, France, 18 December 1997, unpublished; Landgericht Bayreuth, Germany, 11 December 1997, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/; Schiedsgericht der Börse für landwirtschaftliche Produkte in Wien, award No. S 2/97, *Zeitschrift für Rechtsvergleichung* 1988, 211 ff.; CLOUT case No. 220 [Kantonsgericht Nidwalden, Switzerland, 3 December 1997] (see full text of the decision); CLOUT case No. 221 [Zivilgericht des Kantons Basel-Stadt, Switzerland, 3 December 1997] (see full text of the decision); CLOUT case No. 207 [Cour de Cassation, France, 2 December 1997] (see full text of the decision); CLOUT case No. 295 [Oberlandesgericht Hamm, Germany, 5 November 1997]; CLOUT case No. 246 [Audiencia Provincial de Barcelona, Spain, 3 November 1997] (see full text of the decision); CLOUT case No. 247 [Audiencia Provincial de Córdoba, Spain, 31 October 1997] (see full text of the decision); CLOUT case No. 219 [Tribunal Cantonal Valais, Switzerland, 28 October 1997] (see full text of the decision); Trib. Comm. Paris, France, 28 October 1997, http://witz.jura.uni-sb.de/CISG/decisions/281097v.htm; Landgericht Erfurt, Germany, 28 October 1997, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/; CLOUT case No. 218 [Kantonsgericht Zug, Switzerland, 16 October 1997] (see full text of the decision); Landgericht Hagen, Germany, 15 October 1997, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/; CLOUT case No. 248 [Schweizerisches Bundesgericht, Switzerland, 28 October 1998] (see full text of the decision); Hof s'Hertogenbosch, Netherlands, 2 October 1997, *Nederlands Internationaal Privaatrecht* 1998, No. 103; Hoge Raad, Netherlands, 26 September 1997, *Nederlands Juristenblad* 1997, 1726 f.; CLOUT case No. 217 [Handelsgreicht des Kantons Aargau, Switzerland, 26 September 1997] (see full text of the decision); CLOUT case No. 345 [Landgericht Heilbronn, Germany, 15 September 1997]; CLOUT case No. 307 [Oberster Gerichtshof, Austria, 11 September 1997] (see full text of the decision); Oberster Gerichtshof, Austria, 8 September 1997, Unilex; CLOUT case No. 284 [Oberlandesgericht Köln, Germany, 21 August 1997] (see full text of the decision); CLOUT case No. 216 [Kantonsgericht St. Gallen, Switzerland, 12 August 1997] (see full text of the decision); Landgericht Göttingen, Germany, 31 July 1997, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/; Hof s'Hertogenbosch, Netherlands, 24 July 1997, *Nederlands Internationaal Privaatrecht* 1998, No. 125; CLOUT case No. 187 [Federal District Court, Southern District of New York, United States, 23 July 1997] (see full text of the decision); CLOUT case No. 236 [Bundesgerichtshof, Germany, 23 July 1997] (see full text of the decision); Landgericht Saarbrücken, Germany, 18 July 1997, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/; Rechtbank Arnhem, Netherlands, 17 July 1997, *Nederlands Internationaal Privaatrecht* 1998, No. 107; CLOUT case No. 273 [Oberlandesgericht München, Germany, 9 July 1997] (see full text of the decision); CLOUT case No. 287 [Oberlandesgericht München, Germany, 9 July 1997]; CLOUT case No. 215 [Bezirksgericht St. Gallen, Switzerland, 3 July 1997] (see full text of the decision); CLOUT case No. 172 [Fovárosi Biróság, Hungary, 1 July 1997] (see full text of the decision); CLOUT case No. 235 [Bundesgerichtshof,

Germany, 25 June 1997] (see full text of the decision); CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997]; Landgericht München, Germany, 23 June 1997, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/; Landgericht Hamburg, Germany, 19 June 1997, *Recht der internationalen Wirtschaft* 1997, 873 f.; CLOUT case No. 239 [Oberster Gerichtshof, Austria, 18 June 1997]; CLOUT case No. 173 [Fovárosi Biróság, Hungary, 17 June 1997] (see full text of the decision); Hof Arnhem, 17 June 1997, *Nederlands Internationaal Privaatrecht* 1997, No. 341; Landgericht Paderborn, Germany, 10 June 1997, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/; CLOUT case No. 174 [Arbitration—Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 8 May 1997]; Landgericht München, Germany, 6 May 1997, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/; CLOUT case No. 275 [Oberlandesgericht Düsseldorf, Germany, 24 April 1997] (see full text of the decision); Landgericht Frankenthal, Germany, 17 April 1997, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/; CLOUT case No. 189 [Oberster Gerichtshof, Austria, 20 March 1997] (see full text of the decision); Rechtbank Zwolle, Netherlands, 5 March 1997, *Nederlands Internationaal Privaatrecht* 1997, No. 230; CLOUT case No. 261 [Berzirksgericht der Sanne, Switzerland, 20 February 1997]; CLOUT case No. 396 [Audencia Provincial de Barcelona, Spain, 4 February 1997] (see full text of the decision); CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997] (see full text of the decision); Pretura Torino, Italy, 30 January 1997, *Giurisprudenza Italiana* 1998, 982 ff., also available on the INTERNET at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/970130i3.html; CLOUT case No. 192 [Obergericht des Kantons Luzern, Switzerland, 8 January 1997] (see full text of the decision); CLOUT case No. 311 [Oberlandesgericht Köln, Germany, 8 January 1997] (see full text of the decision); CLOUT case No. 206 [Cour de Cassation, France, 17 December 1996] (see full text of the decision); Rechtbank Koophandel Kortrijk, Belgium, 16 December 1996, Unilex; CLOUT case No. 268 [Bundesgerichtshof, Germany, 11 December 1996]; Landgericht München, Germany, 9 December 1996, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/; CLOUT case No. 229 [Bundesgerichtshof, Germany, 4 December 1996] (see full text of the decision); Rechtbank Rotterdam, Netherlands, 21 November 1996, *Nederlands Internationaal Privaatrecht* 1997, No. 223; Amtsgericht Koblenz, Germany, 12 November 1996, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/; Oberlandesgericht Wien, Austria, 7 November 1996, unpublished; Landgericht Heidelberg, Germany, 2 October 1996, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/; Oberlandesgericht Düsseldorf, Germany, 13 September 1996, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/; CLOUT case No. 169 [Oberlandesgericht Düsseldorf, Germany, 11 July 1996] (see full text of the decision); CLOUT case No. 193 [Handelsgericht des Kantons Zürich, Switzerland, 10 July 1996] (see full text of the decision); Land-gericht Paderborn, Germany, 25 June 1996, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/; Amtsgericht Bottropp, Germany, 25 June 1996, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/; Landgericht Hamburg, Germany, 17 June 1996, Unilex; CLOUT case No. 168 [Oberlandesgericht Köln, Germany, 21 March 1996] (see full text of the decision); CLOUT case No. 143 [Fovárosi Biróság, Hungary, 21 May 1996]; CLOUT case No. 204 [Cour d'appel Grenoble, France, 15 May 1996]; Arbitration Court attached to the Bulgarian Chamber of Commerce and Industry, award No. 56/1995, unpublished; Landgericht Aachen, Germany, 19 April 1996, Unilex; Landgericht Duisburg, Germany, 17 April 1996, *Recht der internationalen Wirtschaft* 1996, 774 ff.; CLOUT case No. 171 [Bundesgerichtshof, Germany, 3 April 1996] (see full text of the decision); CLOUT case No. 337 [Landgericht Saarbrücken, Germany, 26 March 1996]; Tribunale di Busto Arsizio, Italy, 31 December 2001, *Rivista di Diritto Internazionale Privato e Processuale* 2003, pp. 150-155 (UNILEX) (Ecuador and Italy); Corte d'Appello di Milano, Italy, 23 January 2001, *Rivista di Diritto Internazionale Privato e Processuale*, 2001, 1008 ff. (Finland and Italy, question not regarding part II of Convention).

[46]United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980, Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee, 1981, 15.

[47]For an analysis of the issue of exclusion of the Convention, see the Digest for article 6.

[48]See CLOUT case No. 309 [Østre Landsret, Denmark, 23 April 1998]; CLOUT case No. 143 [Fovárosi Biróság, Hungary, 21 May 1996]; CLOUT case No. 228 [Oberlandesgericht Rostock, Germany, 27 July 1995]; ICC Court of Arbitration, award No. 7585/92; Unilex.

[49]Upon accession to the Convention Canada declared, pursuant to article 93, that the Convention would be applicable in some but not all of its territorial units. Since accession Canada has extended the application of the Convention to specific territorial units not covered by its original accession

[50]United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980, Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee, 1981, 15.

[51]For cases referring to art. 1 (1) *(b)*, see CLOUT case No. 631 [Supreme Court of Queensland, Australia, [2000] QSC 421 (17 November 2000)] (Malaysian and Australian parties chose law applying in Brisbane); Cámara Nacional de Apelaciones en lo Comercial, Argentina, 24 April 2000, available on the Internet at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/000424a1.html; CLOUT case No. 400 [Cour d'appel Colmar, France, 24 October 2000]; Trib. Pavia, Italy, 29 December 1999, Corriere giuridico 2000, 932 f.; CLOUT case No. 348 [Oberlandesgericht Hamburg, Germany, 26 November 1999] (see full text of the decision); CLOUT case No. 294 [Oberlandesgericht Bamberg, Germany, 13 January 1999] (see full text of the decision); CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998]; CLOUT case No. 274 [Oberlandesgericht Celle, Germany, 11 November 1998]; CLOUT case No. 309 [Østre Landsret, Denmark 23 April 1998]; Corte d'Appello Milano, Italy, 20 March 1998, *Rivista di Diritto Internazionale Privato* 1998, 170 ff.; CLOUT case No. 238 [Oberster Gerichtshof, Austria, 12 February 1998] ; CLOUT case No. 224 [Cour de Cassation, France, 27 January 1998] (see full text of the decision); Hoge Raad, Netherlands, 7 November 1997, *Nederlands Internationaal Privaatrecht* 1998, No. 91; Rechtbank Koophandel, Kortrijk, Belgium, 6 October 1997, Unilex; CLOUT case No. 283 [Oberlandesgericht Köln, Germany, 9 July 1997]; Rechtbank Zutphen, Netherlands, 29 May 1997, *Nederlands Internationaal Privaatrecht* 1997, No. 110; CLOUT case No. 227 [Oberlandesgericht Hamm, Germany, 22 September 1992] (see full text of the decision); CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997] (see full text of the decision); Rechtbank Koophandel, Kortrijk, Belgium, 6 January 1997, Unilex; CLOUT case No. 205 [Cour d'appel Grenoble, France, 23 October 1996], also in Unilex; Rechtbank Koophandel, Hasselt, Belgium, 9 October 1996, Unilex; Schiedsgericht der Handelskammer Hamburg, Germany, Arbitration, 21 June 1996, *Recht der internationalen Wirtschaft* 1996, 771 ff.; Hof Leeuwarden, Netherlands, 5 June 1996, *Nederlands Internationaal Privaatrecht* 1996, No. 404; Landgericht Oldenburg, Germany, 27 March 1996, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/; CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, Germany, 21 March, 21 June 1996]; Landgericht Bad Kreuznach, Germany, 12 March 1996, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/; CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (see full text of the decision); Landgericht Siegen , Germany, 5 December

1995, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/; Rechtbank Koophandel, Hasselt, Belgium, 8 November 1995, Unilex; Landgericht Hamburg, Germany, 23 October 1995, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/; Rechtbank Koophandel, Hasselt, Belgium, 18 October 1995, *Rechtskundig Weekblad* 1995, 1378 f.; Trib. comm. Nivelles, Belgium, 19 September 1995, Unilex; Rechtbank Almelo, Netherlands, 9 August 1995, *Nederlands Internationaal Privaatrecht* 1995, No. 520; CLOUT case No. 276 [Oberlandesgericht Frankfurt am Main, Germany, 5 July 1995] (see full text of the decision); CLOUT case No. 262 [Kanton St. Gallen, Gerichtskommission Oberrheintal, Switzerland, 30 June 1995]; Landgericht Kassel, Germany, 22 June 1995, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/; CLOUT case No. 152 [Cour d'appel Grenoble, France, 26 April 1995]; Amtsgericht Wangen, Germany, 8 March 1995, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/; Rechtbank Zwolle, Netherlands, 1 March 1995, *Nederlands Internationaal Privaatrecht* 1996, No. 95; Rechtbank Middelburg, Netherlands, 25 January 1995, *Nederlands Internationaal Privaatrecht* 1996, No. 127; CLOUT case No. 155 [Cour de Cassation, France, 4 January 1995] (see full text of the decision); Amtsgericht Mayen, Germany, 6 September 1994, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/; Landgericht Düsseldorf, Germany, 25 August 1994, Unilex; CLOUT case No. 302 [ICC Court of Arbitration, award No. 7660/JK], see also Unilex; CLOUT case No. 93 [Arbitration-Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft—Wien, 15 June 1994]; CLOUT case No. 94 [Arbitration-Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft—Wien, 15 June 1994]; CLOUT case No. 92 [Arbitration—Ad hoc tribunal, 19 April 1994]; CLOUT case No. 120 [Oberlandesgericht Köln, Germany, 22 February 1994] (see full text of the decision); CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994]; CLOUT case No. 80 [Kammergericht Berlin, Germany, 24 January 1994] ; CLOUT case No. 100 [Rechtbank Arnhem, Netherlands, 30 December 1993]; CLOUT case No. 156 [Cour d'appel Paris, France, 10 November 1993] (see full text of the decision); CLOUT case No. 281 [Oberlandesgericht Koblenz, Germany, 17 September 1993]; CLOUT case No. 49 [Oberlandesgericht Düsseldorf, Germany, 2 July 1993]; CLOUT case No. 25 [Cour d'appel Grenoble, France, 16 June 1993]; CLOUT case No. 201 [Richteramt Laufen des Kantons Berne, Switzerland, 7 May 1993]; CLOUT case No. 310 [Oberlandesgericht Düsseldorf, Germany, 12 March 1993]; CLOUT case No. 99 [Rechtbank Arnhem, Netherlands, 25 February 1993]; CLOUT case No. 292 [Oberlandesgericht Saarbrücken, Germany, 13 January 1993] (see full text of the decision); CLOUT case No. 48 [Oberlandesgericht Düsseldorf, Germany, 8 January 1993]; CLOUT case No. 95 [Zivilgericht Basel-Stadt, Switzerland, 21 December 1992] (see full text of the decision); CLOUT case No. 317 [Oberlandesgericht Karlsruhe, Germany, 20 November 1992]; CLOUT case No. 227 [Oberlandesgericht Hamm, Germany 22 September 1992] (see full text of the decision); CLOUT case No. 56 [Canton of Ticino Pretore di Locarno-Campagna, Switzerland, 27 April 1992] (see full text of the decision); CLOUT case No. 158 [Cour d'appel Paris, France, 22 April 1992] ; CLOUT case No. 98 [Rechtbank Roermond, Netherlands, 19 December 1991]; CLOUT case No. 55 [Canton of Ticino Pretore di Locarno-Campagna, Switzerland, 16 December 1991, cited as 15 December in CLOUT case No. 55]; CLOUT case No. 316 [Oberlandesgericht Koblenz, Germany, 27 September 1991]; CLOUT case No. 2 [Oberlandesgericht Frankfurt am Main, Germany, 17 September 1991] (see full text of the decision).

[52]See CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (see full text of the decision).

[53]For the text of this Convention, see *Official Journal* L 266 , 9 October 1980, 1 et seq.

[54]See Hof Beroep, Gent, Belgium, 15 May 2002, available on the Internet at http://www.law.kuleuven.be/ipr/eng/cases/2002-05-15.html; CLOUT case No. 409 [Landgericht Kassel, Germany, 15 February 1996] (see full text of the decision); ICC Court Arbitration, award No. 8324/95, *Journal du droit international* 1996, 1019 ff.; Rechtbank s'Gravenhage, Netherlands, 7 June 1995, *Nederlands Internationaal Privaatrecht* 1995, Nr. 524; CLOUT case No. 48 [Oberlandesgericht Düsseldorf, Germany, 8 January 1993]; CLOUT case No. 281 [Oberlandesgericht Koblenz, Germany, 17 September 1993].

[55]See article 3 of the Rome Convention:

> "1. A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.
>
> 2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under this article or of other provisions of this Convention. Any variation by the parties of the law to be applied made after the conclusion of the contract shall not prejudice its formal validity under article 9 or adversely affect the rights of third parties.
>
> 3. The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law of that country which cannot be derogated from by contract, hereinafter called "mandatory rules".
>
> 4. The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of articles 8, 9 and 11."

[56]1955 Hague Convention on the Law Applicable to International Sale of Goods, 510 U.N.T.S. 149, No. 7411 (1964).

[57]See article 2 of the Hague Convention: "A sale shall be governed by the domestic law of the country designated by the Contracting Parties. Such designation must be contained in an express clause, or unambiguously result from the provisions of the contract. Conditions affecting the consent of the parties to the law declared applicable shall be determined by such law."

[58]For cases applying the United Nations Sales Convention by virtue of a choice of law acknowledged by the judges on the grounds of article 2 of the 1995 Hague Convention, see Trib. Comm. Bruxelles, Belgium, 13 November 1992, Unilex.

[59]See, for example, Netherlands Arbitration Institute, Arbitral Award, 15 October 2002, available on Unilex.

[60]For cases referring to "closest connection", see CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994] (see full text of the decision); Landgericht Düsseldorf, Germany, 25 August 1994, available on the Internet at http://www.unilex.info/case.cfm?pid=1&do=case&id=150&step=FullText; Rechtbank Roermond, Netherlands, 6 May 1993, Unilex; CLOUT case No. 316 [Oberlandesgericht Koblenz, Germany, 27 September 1991] (see full text of the decision); CLOUT case No. 1 [Oberlandesgericht Frankfurt am Main, Germany, 13 June 1991] (see full text of the decision).

[61]For cases expressly pointing out that the seller is the party that has to effect the characteristic performance, see Landgericht Berlin, Germany, 24 March 1998, available on the Internet at http://www.unilex.info/case.cfm?pid=1&do=case&id=440&step=FullText; Landgericht München, Germany, 6 May 1997, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/341.htm;

Rechtbank Amsterdam, Netherlands, 5 October 1994, *Nederlands Internationaal Privaatrecht*, 1995, No. 231; CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994] (see full text of the decision); CLOUT case No. 317 [Oberlandesgericht Düsseldorf, Germany, 12 March 1993] (see full text of the decision); CLOUT case No. 6 [Landgericht Frankfurt am Main, Germany, 16 September 1991] (see full text of the decision); Landgericht Frankfurt am Main, Germany, 2 May 1990, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/183.htm.

[62]For cases applying the Convention on the basis of the presumption referred to in the text, see, e.g. Cour d'appel Mons, Belgium, 8 March 2001, available on the Internet at http://www.law.kuleuven.ac.be/int/tradelaw/WK/2001-03-08.htm; Landgericht Bad Kreuznach, Germany, 12 March 1996, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/517.htm; Landgericht Frankfurt am Main, Germany, 6 July 1994, available on the Internet at http://www.unilex.info/case.cfm?pid=1&do=case&id=189&step=FullText; CLOUT case No. 50 [Landgericht Baden-Baden, Germany, 14 August 1991] (see full text of the decision).

[63]See Rechtbank Hasselt, Belgium, 9 October 1996, Unilex; Rechtbank Hasselt, Belgium, 8 November 1995, Unilex; CLOUT case No. 152 [Cour d'appel Grenoble, France, 26 April 1995]; Rechtbank Hasselt, Belgium, 18 October 1995, *Rechtskundig Weekblad* 1995, 1378 f.; Trib. Comm. Bruxelles, Belgium, 5 October 1994, Unilex; KG Wallis, Switzerland, 6 December 1993, Unilex; CLOUT case No. 201 [Richteramt Laufen des Kantons Berne, Switzerland, 7 May 1993]; CLOUT case No. 56 [Canton of Ticino Pretore di Locarno-Campagna, Switzerland, 27 April 1992] (see full text of the decision).

[64]Cour de Cassation, France, 26 June 2001, available on the Internet at http://witz.jura.uni-sb.de/CISG/decisions/2606011v.htm; Trib. Verona, Italy, 19 December 1997, *Rivista Veronese di Giurisprudenza Economica e dell'Impresa* 1998, 22 ff.

[65]United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980, Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee, 1981, 229.

[66]To date the following States have declared an article 95 reservation: China, Czech Republic, Saint Vincent and the Grenadines, Singapore, Slovakia, United States of America. When it acceded to the Convention Canada declared an article 95 reservation with respect to a single province – British Columbia – but it later withdrew that declaration. Germany has declared that it will not apply article 1 (1) *(b)* in respect of any State that has made a declaration that it would not apply article 1 (1) *(b)*.

[67]See CLOUT case No. 417 [Federal District Court, Northern District of Illinois, United States, 7 December 1999]; CLOUT case No. 416 [Minnesota [State] District Court, United States, 9 March 1999]; CLOUT case No. 419 [Federal District Court, Northern District of Illinois, United States, 27 October 1998]; CLOUT case No. 222 [Federal Court of Appeals for the Eleventh Circuit, United States, 29 June 1998]; CLOUT case No. 413 [Federal District Court, Southern District of New York, United States, 6 April 1998]; CLOUT case No. 187 [Federal District Court, Southern District of New York, United States, 23 July 1997]; CLOUT case No. 138 [Federal Court of Appeals for the Second Circuit, United States, 6 December 1995]; CLOUT case No. 86 [Federal District Court, Southern District of New York, United States 22 September 1994]; CLOUT case No. 85 [Federal District Court, Northern District of New York, United States, 9 September 1994]; CLOUT case No. 24 [Federal Court of Appeals for the Fifth Circuit, United States, 15 June 1993]; CLOUT case No. 23 [Federal District Court, Southern District of New York, United States, 14 April 1992].

[68]See Rechtbank Koophandel, Kortrijk, Belgium, 16 December 1996, Unilex; Rechtbank Koophandel, Hasselt, Belgium, 9 October 1996, Unilex; Rechtbank Koophandel, Hasselt, Belgium, 8 November 1995, Unilex; Rechtbank Koophandel, Hasselt, Belgium, 18 October 1995, *Rechtskundig Weekblad* 1995, 1378 f.; Trib. Comm. Nivelles, Belgium, 19 September 1995, Unilex; Trib. Comm. Bruxelles, Belgium, 5 October 1994, Unilex; Rechtbank Koophandel, Hasselt, Belgium, 16 March 1994, Unilex; Rechtbank Koophandel, Hasselt, Belgium, 23 February 1994, Unilex; Trib. Comm. Bruxelles, Belgium, 13 November 1992, Unilex; CLOUT case No. 98 [Rechtbank Roermond, Netherlands, 19 December 1991]; Amtsgericht Ludwigsburg, Germany, 21 December 1990, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/; CLOUT case No. 5 [Landgericht Hamburg, Germany, 26 September 1990]; Rechtbank Dordrecht, Netherlands, 21 November 1990, *Nederlands Internationaal Privaatrecht* 1991, No. 159; Landgericht Hildesheim, Germany, 20 July 1990, published at the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/; Landgericht Frankfurt am Main, Germany, 2 May 1990, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/; CLOUT case No. 7 [Amtsgericht Oldenburg in Holstein, Germany, 24 April 1990]; CLOUT case No. 46 [Landgericht Aachen, Germany, 3 April 1990]; Oberlandesgericht Koblenz, Germany, 23 February 1990, *Recht der internationalen Wirtschaft* 1990, 316 ff.; Rechtbank Alkmaar, Netherlands, 8 February 1990, *Nederlands Internationaal Privaatrecht* 1990, No. 460; Rechtbank Alkmaar, Netherlands, 30 November 1989, *Nederlands Internationaal Privaatrecht* No. 289; CLOUT case No. 4 [Landgericht Stuttgart, Germany, 31 August 1989]; CLOUT case No. 3 [Landgericht München, Germany, 3 July 1989].

Article 2

This Convention does not apply to sales:

(*a*) Of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;

(*b*) By auction;

(*c*) On execution or otherwise by authority of law;

(*d*) Of stocks, shares, investment securities, negotiable instruments or money;

(*e*) Of ships, vessels, hovercraft or aircraft;

(*f*) Of electricity.

OVERVIEW

1. This provision identifies sales that are excluded from the Convention's sphere of application. The exclusions are of three types: those based on the purpose for which the goods were purchased, those based on the type of transaction, and those based on the kinds of goods sold.[1]

CONSUMER SALES

2. According to article 2 *(a)*, a sale falls outside the Convention's sphere of application if it relates to goods which at the time of the conclusion of the contract are intended to be used personally, in the family or in the household. It is the buyer's intention at the time of the conclusion of the contract that is relevant,[2] rather than the buyer's actual use of the goods.[3] Thus, the purchase of a car[4] or a recreational trailer[5] for personal use falls outside the Convention's sphere of application.[6]

3. If the goods are purchased by an individual for a commercial or professional purpose, the sale does not fall outside the Convention's sphere of application. Thus, the following situations are governed by the Convention: the purchase of a camera by a professional photographer for use in his business; the purchase of a soap or other toiletries by a business for the personal use of its employees; the purchase of a single automobile by a dealer for resale.[7]

4. If goods are purchased for the aforementioned "personal, family or household use" purposes, the Convention is inapplicable "unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use".[8] If this "unless" clause is satisfied the CISG applies, provided the other requirements for its applicability are met. This narrows the reach of the article 2 *(a)* exception, and leads to the possibility of a conflict between domestic consumer protection law and the Convention in those cases where applicability of the domestic law does not require that the seller either knew or ought to have known of the buyer's intended use.[9]

OTHER EXCLUSIONS

5. The exclusion of sales by auction (article 2 *(b)*) covers auctions resulting from authority of law as well as private auctions. Sales at commodity exchanges do not fall under the exclusion, as they merely constitute a particular way of concluding the contract.

6. Under article 2 *(c)* sales on judicial or administrative execution or otherwise by authority of law are excluded from the Convention's sphere of application as such sales are normally governed by mandatory laws of the State under whose authority the execution is made.

7. The exclusion of sales of stocks, investment securities, and negotiable instruments (article 2 *(d)*) is intended to avoid a conflict with mandatory rules of domestic law.[10] Documentary sales do not fall within this exclusion.

8. Under article 2 *(e)* sales of ships,[11] vessels, aircraft,[12] and hovercraft are also excluded from the Convention. However, sales of parts of ships, vessels, aircraft, and hovercraft—including essential components, such as engines[13]—may be governed by the Convention since exclusions from the Convention's sphere of application must be interpreted restrictively. According to one arbitral tribunal, the sale of a decommissioned military submarine is not excluded by article 2 *(e)*.[14]

9. Although the sale of electricity is excluded from the Convention's sphere of application (article 2 *(f)*), a court has applied the Convention to a sale of propane gas.[15]

Notes

[1]United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980, Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee, 1981, 16 (hereinafter "Official Records").

[2]See CLOUT case No. 445 [Bundesgerichtshof, Germany, 31 October 2001], also in *Internationales Handelsrecht*, 2002, 16.

[3]See CLOUT case No. 190 [Oberster Gerichtshof, Austria, 11 February 1997].

[4]See CLOUT case No. 213 [Kantonsgericht Nidwalden, Switzerland, 5 June 1996]; CLOUT case No. 190 [Oberster Gerichtshof, Austria, 11 February 1997].

[5]See Rechtbank Arnhem, 27 May 1993, *Nederlands Internationaal Privaatrecht*, 1994, No. 261.

[6]See, however, Landgericht Düsseldorf, 11 October 1995, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg, applying the Convention on the sale of a generator destined for personal use.

[7]For these examples, see Official Records, *supra* note 1, at 16.

[8]See CLOUT case No. 445 [Bundesgerichtshof, Germany, 31 October 2001], also in *Internationales Handelsrecht*, 2002, 16.

[9]Id.

[10]For decisions excluding the Convention's applicability to the sale of shares, see CLOUT case No. 260, Switzerland, 1998; Zurich Chamber of Commerce Arbitral Tribunal, ZHK 273/95, *Yearbook Commercial Arbitration*, 1998, 128 ff.

[11]For cases of inapplicability of the Convention to contract for the sale of ships, see Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, award in case No. 236/1997 of 6 April 1998 available on the Internet at http://cisgw3.law.pace.edu/cases/980406r1.html; Yugoslav Chamber of Economy Arbitration Proceeding 15 April 1999, award No. T-23/97, available on the Internet at http://cisgw3.law.pace.edu/cases/990415y1.html.

[12]For the inapplicability of the Convention to a contract for the sale of an aircraft, see Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, award in case No. 255/1996 of 2 September 1997, available on the Internet at http://cisgw3.law.pace.edu/cases/970902r1.html.

[13]See CLOUT case No. 53 [Legfelsóbb Biróság, Hungary, 25 September 1992].

[14]See Russian Maritime Commission Arbitral Tribunal, 18 December 1998, available on the Internet at http://cisgw3.law.pace.edu/cisg/text/draft/981218case.html.

[15]See CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996].

Article 3

1. Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

2. This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.

OVERVIEW

1. This provision makes clear that the Convention's sphere of application encompasses some contracts that include acts in addition to the supply of goods.[1]

CONTRACTS FOR THE SALE OF GOODS TO BE MANUFACTURED OR PRODUCED

2. Under paragraph 1 of article 3, the Convention applies to contracts for the sale of goods to be manufactured or produced.[2] This makes clear that the sale of such goods is as much subject to the provisions of the Convention as the sale of ready-made goods.[3] This aspect of the Convention's sphere of application is, however, subject to a limitation: contracts for goods to be manufactured or produced are not governed by the Convention if the party who "orders" the goods supplies a "substantial part" of the materials necessary for their manufacture or production.[4] Article 3 does not provide specific criteria for determining when the materials supplied by the buyer constitute a "substantial part". One decision suggests that a purely quantitative test should be used in this determination.[5]

3. A different—albeit related—issue is whether providing instructions, designs or specifications used for producing goods is the supply of "materials necessary" for the goods' manufacture or production; if so, a sales contract in which the buyer supplies such information is excluded from the Convention's sphere of application if the "substantial part" criterion is met. In one case, a court held that the Convention was inapplicable, on the grounds of article 3 (1), to a contract under which the seller had to manufacture goods according to the buyer's design specifications.[6] The court deemed the plans and instructions that the buyer transmitted to the seller to constitute a "substantial part of the materials necessary" for the production of the goods. Other courts have found that design specifications are not considered "materials necessary for the manufacture or production of goods" within the meaning of article 3 (1).[7]

CONTRACTS FOR THE DELIVERY OF LABOUR AND SERVICES

4. Article 3 (2) extends the Convention's sphere of application to contracts in which the seller's obligations include—in addition to delivering the goods, transferring the property and handing over the documents[8]—a duty to provide labour or other services, as long as the supply of labour or services does not constitute the "preponderant part" of the seller's obligations.[9] It has been held that work done to produce the goods themselves is not to be considered the supply of labour or other services for **purposes of article 3 (2).**[10] In order to determine whether the obligations of the seller consist preponderantly in the supply of labour or services, a comparison must be made between the economic value of the obligations relating to the supply of labour and services and the economic value of the obligations regarding the goods,[11] as if two separate contracts have been made.[12] Thus, where the obligation regarding the supply of labour or services amounts to more than 50 per cent of the obligations of the seller, the Convention is inapplicable. It is on this basis that a court decided that a contract for a market study did not fall under the Convention's sphere of application.[13] On the other hand, a contract for the dismantling and sale of a second-hand hangar was deemed to fall within the Convention's sphere of application on the ground that the value of the dismantling services amounted to only 25 per cent of the total value of the contract.[14]

5. One court has stated that, because a clear calculation comparing the values of the goods and the services covered by a contract would not always be possible, other factors—such as the circumstances surrounding the conclusion of the contract and the purpose of the contract—should also be taken into account in evaluating whether the obligation to supply labour or services is preponderant.[15] Another court referred to the essential purpose of the contract as a criterion relevant in determining whether or not the Convention was applicable.[16]

Notes

[1]See United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980, Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee, 1981, 16.

[2]See Hof van Beroep Gent, Belgium, 15 May 2002, available on the Internet at http://www.law.kuleuven.be/ipr/eng/cases/2002-05-15.html; CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002 (see full text of the decisions); Oberster Gerichtshof, 18 April 2001, available on the Internet at http://www.cisg.at/7_7601d.htm; Saarländisches Oberlandesgericht Saarbrücken, 14 February 2001, *Internationales Handelsrecht*, 2001, 64; Oberlandesgericht Stuttgart, Germany, 28 February 2000, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/583.htm; CLOUT case No. 630 [Court of Arbitration of the International Chamber of Commerce, Zurich, Switzerland, July 1999]; CLOUT case No. 325 [Handelsgericht des Kantons Zürich, Switzerland, 8 April 1999]; CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999]; CLOUT case No. 252 [Handelsgericht des Kantons Zürich, Switzerland, 21 September 1998] (see full text of the decision); CLOUT case No. 337 [Landgericht Saarbrücken, Germany, 26 March 1996]; CLOUT case No. 164 [Arbitration—Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 5 December 1995]; Hof s'Hertogenbosch, Netherlands, 9 October 1995, Nederlands Internationaal Privaatrecht, 1996, No. 118; Landgericht Oldenburg, Germany, 9 November 1994, *Recht der internationalen Wirtschaft*, 1996, 65 f.; CLOUT case No. 167 [Oberlandesgericht München, Germany, 8 February 1995] (see full text of the decision); CLOUT case No. 262 [Kanton St. Gallen, Gerichtskommission Oberrheintal, Switzerland, 30 June 1995]; Landgericht Memmingen, Germany, 1 December 1993, *Praxis des internationalen Privat- und Verfahrensrechts*, 1995, 251 f.; CLOUT case No. 302 [ICC Court of Arbitration Award 7660/JK], see also *ICC Court of Arbitration Bulletin*, 1995, 69 ff.; ICC Court of Arbitration Award No. 7844/1994, *ICC Court of Arbitration Bulletin*, 1995, 72 ff.; CLOUT case No. 97 [Handelsgericht des Kantons Zürich, Switzerland, 9 September 1993]; CLOUT case No. 95 [Zivilgericht Basel-Stadt, Switzerland, 21 December 1992] (see full text of the decision).

[3]See also United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980, Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee, 1981, 17.

[4]For the applicability of the CISG in cases where reference was made to article 3 (1), but where the courts stated that the "substantial part of the materials necessary" was provided by the seller, see Landgericht München, 27 February 2002, available on the Internet at http://131.152.131.200/cisg/urteile/654.htm; CLOUT case No. 313 [Cour d'appel Grenoble, France, 21 October 1999]; Landgericht Berlin, Germany, 24 March 1998, available on the Internet at http://www.unilex.info/case.cfm?pid=1&do=case&id=440&step=FullText.

[5]See CLOUT case No. 164 [Arbitration—Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 5 December 1995] (see full text of the decision).

[6]See CLOUT case No. 157 [Cour d'appel Chambéry, France, 25 May 1993].

[7]See CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999] (see full text of the decision); CLOUT case No. 2 [Oberlandesgericht Frankfurt am Main, Germany, 17 September 1991] (see full text of the decision).

[8]For a definition of a contract for the sale of goods under the Convention, see the text of the Digest relating to art. 1.

[9]See Hof Arnhem, Netherlands, 27 April 1999, *Nederlands Internationaal Privaatrecht*, 1999, No. 245; CLOUT case No. 327 [Kantonsgericht des Kantons Zug, Switzerland, 25 February 1999]; CLOUT case No. 287 [Oberlandesgericht München, Germany, 9 July 1997] (see full text of the decision); CLOUT case No. 192 [Obergericht des Kantons Luzern, Switzerland, 8 January 1997]; CLOUT case No. 196 [Handelsgericht des Kantons Zürich, Switzerland, 26 April 1995]; CLOUT case No. 152 [Cour d'appel Grenoble, France, 26 April 1995]; CLOUT case No. 105 [Oberster Gerichtshof, Austria, 27 October 1994]; CLOUT case No. 201 [Richteramt Laufen des Kantons Berne, Switzerland, 7 May 1993]; for a decision in which article 3 (2) was cited, but in which the court did not resolve the issue of whether the contract was one for the sale of goods or one for the supply of labour and services, see Rechtbank Koophandel Hasselt, 19 September 2001, available on the Internet at http://www.law.kuleuven.ac.be/int/tradelaw/WK/2001-09-19.htm.

[10]CLOUT case No. 481 [Court d' Appel Paris, France, 14 June 2001]. See also CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002 (see full text of the decisions) (approving lower appeals court's approach that applied the Convention to contract for the sale of specially manufactured goods and rejected trial court's holding that the Convention was inapplicable because the services used to produce the goods constituted the preponderant part of the seller's obligations)

[11]See CLOUT case No. 327 [Kantonsgericht des Kantons Zug, Switzerland, 25 February 1999].

[12]For an implicit affirmation of the principle referred to in the text, see CLOUT case No. 26 [Arbitration—International Chamber of Commerce no. 7153 1992].

[13]See CLOUT case No. 122 [Oberlandesgericht Köln, Germany, 26 August 1994].

[14]See CLOUT case No. 152 [Cour d'appel Grenoble, France, 26 April 1995] (see full text of the decision).

[15]See CLOUT case No. 346 [Landgericht Mainz, Germany, 26 November 1998].

[16]See Cass. civ., Italy, 9 June 1995, no. 6499, *Foro padano*, 1997, 2 ff., available on the Internet at http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13354&x=1 and at http://www.cisg.law.pace.edu/cgi-bin/isearch.

Article 4

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.

OVERVIEW

1. The first sentence of article 4 lists matters as to which the Convention's provisions prevail over those of domestic law—i.e. the formation of contract and the rights and obligations of the parties[1]; the second sentence contains a non-exhaustive list of issues with which, except where the Convention expressly provides otherwise, it is not concerned—namely the validity of the contract or any of its provisions or any usage, as well as the effect which the contract may have on the property in the goods sold. The issues referred to in the second part of article 4 were excluded from the Convention because dealing with them would have delayed the conclusion of the Convention.[2]

2. Matters not governed by the Convention are to be settled either in conformity with the applicable uniform rules[3] or the applicable domestic law.[4]

ISSUES DEALT WITH BY THE CONVENTION

3. As far as formation of the contract is concerned, the Convention merely governs the objective requirements for concluding the contract.[5] The issue of whether a contract is validly formed, however, is subject to the applicable national rules, except for those issues for which the Convention provides exhaustive rules.[6] Thus issues such as capacity to contract[7] and the consequences of mistake, duress and fraud are left to the applicable domestic law.[8] Where, however, one party errs concerning the quality of the goods to be delivered or the solvency of the other party, the rules of the otherwise-applicable law give way to those of the Convention, since the Convention exhaustively deals with those matters.

4. Although article 4 does not mention the issue as one governed by the Convention, some courts[9] (albeit not all)[10] have concluded that burden of proof questions come within the scope of the Convention.[11] This view is based on the fact that the Convention includes at least one provision, article 79, that expressly deals with the burden of proof.[12] The issue is therefore governed by the Convention, albeit—outside of situations governed by article 79 or any other provision that expressly addresses the issue—not expressly settled in it; thus article 7 (2) requires the question to be resolved in conformity with the general principles on which the Convention is based.[13] The following general principles for allocating the burden of proof have been identified: the party that wants to derive beneficial legal consequences from a legal provision has to prove the existence of the factual prerequisites of the provision;[14] the party claiming an exception has to prove the factual prerequisites of that exception.[15]

5. These principles have led courts to conclude that a buyer who asserts that goods are non-conforming has the burden of proving the non-conformity as well as the existence of a proper notice of non-conformity.[16] Similarly, two courts decided that the buyer had to pay the price and was not entitled to damages or to avoidance of the contract for non-conformity of the goods under article 35 because the buyer had not proved the non-conformity.[17] In one case, a court decided that the buyer had lost the right to rely upon a non-conformity because it did not prove that it gave timely notice thereof to the seller.[18]

6. The aforementioned general principles have been used to allocate the burden of proof under article 42 of the CISG. Article 42 provides that the seller must deliver goods which are free from any third-party right or claim based on industrial property or other intellectual property, of which the seller knew or could not have been unaware. In two cases courts held that the buyer had the burden of proving that the seller knew or could not have been unaware of the third-party industrial or intellectual property rights.[19]

7. The Convention's general principles on burden of proof were also the basis for several decisions dealing with damages issues. One court stated that "according to the Convention the damaged buyer has the burden of proving the objective prerequisites of his claim for damages. Thus, he has to prove the damage, the causal link between the breach of contract and the damage as well as the foreseeability of the loss".[20] Other cases have stated more generally that the party claiming damages has to prove the losses suffered.[21]

VALIDITY OF THE CONTRACT AND OF USAGES

8. Although the Convention generally leaves issues concerning the validity of the contract to the applicable national law,[22] in at least one respect the Convention's provisions

may contradict domestic validity rules.[23] Article 11 provides that a contract for the international sale of goods need not be concluded in or evidenced by writing and is not subject to any other requirement of form; in some legal systems form requirements for a contract for the sale of goods are considered to be a matter of contractual validity. For the question whether domestic law requirements of "consideration" or "causa" are matters of "validity" beyond the scope of the Convention, see paragraph 10 of the Digest for Part II of the Convention.

9. The issue of whether a contract was validly concluded by a third person acting on behalf of one of the parties is left to the applicable national law, since agency is not governed by the Convention.[24] The same is true for the validity of standard contract terms.[25]

10. The validity of usages—which is not dealt with by the Convention,[26] but is left to the applicable domestic law[27]—must be distinguished from the question of how usages are defined, under what circumstances they bind the parties, and what their relationship is with the rules set forth in the Convention. The latter issues are dealt with in article 9.[28]

EFFECT ON THE PROPERTY IN THE GOODS SOLD

11. The Convention makes clear that it does not govern the passing of the property in the goods sold.[29] During the drafting process, it was deemed impossible to unify the rules on this point.[30] Thus the effect of a sales contract on the property in the goods is left to the applicable national law, to be determined by the rules of private international law of the forum.

12. The Convention does not govern the validity of a retention of title clause.[31]

OTHER ISSUES NOT DEALT WITH BY THE CONVENTION

13. The Convention itself expressly lists several examples of issues with which it is not concerned.[32] There are many other issues not governed by the Convention. Courts have identified the following additional issues as beyond the Convention's scope of application: the validity of a choice of forum clause,[33] the validity of a penalty clause,[34] the validity of a settlement agreement,[35] an assignment of receivables,[36] assignment of a contract,[37] set-off[38] (at least where the receivables do not all arise from contracts governed by the Convention),[39] the statute of limitations,[40] the issue of whether a court has jurisdiction[41] and, generally, any other issue of procedural law,[42] an assumption of debts,[43] an acknowledgement of debts,[44] the effects of the contract on third parties[45] as well as the issue of whether one is jointly liable.[46] According to some courts, the Convention does not deal with tort claims.[47]

14. One court has found that estoppel issues are not governed by the Convention,[48] but other courts have concluded that estoppel should be regarded as a general principle of the Convention.[49] A court has also ruled that the question of priority rights in the goods as between the seller and a third party creditor of the buyer was, under CISG article 4, beyond the scope of the Convention and was governed instead by applicable national law, under which the third party creditor prevailed.[50]

15. According to some courts, the issue of the currency of payment is not governed by the Convention and, in the absence of a choice by the parties,[51] is left to applicable domestic law.[52] One court found that, absent an agreement of the parties on the matter, the currency of payment is the currency of the place of payment as determined on the basis of article 57.[53]

Notes

[1]CLOUT case No. 241 [Cour de Cassation, France, 5 January 1999].

[2]See Report of the Working Group on the International Sale of Goods on the work of its ninth session (Geneva, 19-30 September 1977) (A/CN.9/142), reproduced in the UNCITRAL Yearbook, 1978, at p. 65, paras. 48-51, 66, 69.

[3]See CLOUT case No. 202 [Cour d'appel Grenoble, France, 13 September 1995], stating that the assignment of receivables is not governed by the Convention and applying the 1988 UNIDROIT Convention on International Factoring as the assignment fell under its sphere of application (see full text of the decision).

[4]See CLOUT case No. 97 [Handelsgericht des Kantons Zürich, Switzerland, 9 September 1993].

[5]See CLOUT case No. 95 [Zivilgericht Basel-Stadt, Switzerland, 21 December 1992] (see full text of the decision).

[6]See CLOUT case No. 47 [Landgericht Aachen, Germany, 14 May 1993] (see full text of the decision). See also paragraph 8 of the Digest for Part II of the Convention.

[7]See CLOUT case No. 605 [Oberster Gerichtshof, Austria, 22 October 2001], also available on the Internet at http://www.cisg.at/1_4901i.htm; CLOUT case No. 5 [Landgericht Hamburg, Germany, 26 September 1990].

[8]See Schiedsgericht der Handelskammer Zürich, Switzerland, award No. 273/95, available on the Internet at http://www.unilex.info/case.cfm?pid=1&do=case&id=396&step=FullText.

[9]See CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000]; CLOUT case No. 380 [Tribunale di Pavia, Italy, 29 December 1999]; CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999]; CLOUT case No. 196 [Handelsgericht des Kantons Zürich, Switzerland, 26 April 1995]; CLOUT case No. 97 [Handelsgericht des Kantons Zürich, Switzerland, 9 September 1993].

[10]See CLOUT case No. 261 [Berzirksgericht der Sanne, Switzerland, 20 February 1997]; CLOUT case No. 103 [Arbitration—International Chamber of Commerce no. 6653 1993].

[11]For a decision which refers to the issue of what law governs burden of proof without resolving the matter, see CLOUT case No. 253 [Cantone del Ticino Tribunale d'appello, Switzerland, 15 January 1998].

[12]For this line of argument, see Bundesgerichtshof, Germany, 9 January 2002, *Internationales Handelsrecht*, 2002, 19; CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000]; CLOUT case No. 380 [Tribunale di Pavia, Italy, 29 December 1999].

[13]See CLOUT case No. 97 [Handelsgericht des Kantons Zürich, Switzerland, 9 September 1993].

[14]For references to this principle, see CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000]; Landgericht Frankfurt, 6 July 1994, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/; CLOUT case No. 107 [Oberlandesgericht Innsbruck, Austria, 1 July 1994] (see full text of the decision); CLOUT case No. 608 [Trib. Rimini, Italy, 26 November 2002], also in *Guirisprudenza italiana*, 2003, 896 ff.

[15]CLOUT case No. 608 [Trib. Rimini, Italy, 26 November 2002], also in *Guirisprudenza italiana*, 2003, 896 ff.

[16]See CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998]; CLOUT case No. 196 [Handelsgericht des Kantons Zürich, Switzerland, 26 April 1995] (see full text of the decision).

[17]See Landgericht Düsseldorf, Germany, 25 August 1994, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/; CLOUT case No. 107 [Oberlandesgericht Innsbruck, Austria, 1 July 1994].

[18]See Rechtbank Koophandel Hasselt, Belgium, 21 January 1997, Unilex.

[19]See Rechtbank Zwolle, Netherlands, 1 March 1995, *Nederlands Internationaal Privaatrecht*, 1995, No. 95; Hof Arnhem, Netherlands, 21 May 1996, *Nederlands Internationaal Privaatrecht*, 1996, No. 398.

[20]CLOUT case No. 196 [Handelsgericht des Kantons Zürich, Switzerland, 26 April 1995] (see full text of the decision); for another case dealing with the issues of damages and burden of proof, see CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997], stating that a buyer is generally entitled to interest on the loss of profit, but that in the case at hand the buyer lost his right to interest as he did not prove the time in which the profit would have been made (see full text of the decision).

[21]See CLOUT case No. 380 [Tribunale di Pavia, Italy, 29 December 1999]; CLOUT case No. 210 [Audienca Provincial Barcelona, Spain, 20 June 1997]; Landgericht Düsseldorf, Germany, 25 August 1994, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/.

[22]See CLOUT Case No. 579 [Federal] Southern District Court for New York, United States of America, 10 May 2002], 2002 U.S. Dist. LEXIS 8411 (*Geneva Pharmaceuticals Tech. Corp. v. Barr Labs. Inc.*), also available on the Internet at http://cisgw3.law.pace.edu/cases/020510u1.html; CLOUT case No. 433 [[Federal] Northern District Court for California, 21 July 2001], 2001 U.S. Dist. LEXIS 16000, 2001 Westlaw 1182401 (*Asante Technologies, Inc. v. PMC-Sierra, Inc.*), also available at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/010727u1.html; CLOUT case No. 428 [Oberster Gerichtshof, Austria, 7 September 2000], also available at http://www.cisg.at/8_2200v.htm; Hof van Bereop Antwerpen, Belgium, 18 June 1996, available on the Internet at http://www.law.kuleuven.ac.be/int/tradelaw/WK/1996-06-18.htm.

[23]See United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980, Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee, 1981, 17.

[24]See CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (see full text of the decision); CLOUT case No. 333 [Handelsgericht des Kantons Aargau, Switzerland, 11 June 1999] (see full text of the decision); Landgericht Berlin, 24 March 1999, available on the Internet at http://www.unilex.info/case.cfm?pid=1&do=case&id=440&step=FullText; CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998] (see full text of the decision); CLOUT case No. 189 [Oberster Gerichtshof, Austria, 20 March 1997] (see full text of the decision); CLOUT case No. 335 [AG Tessin, Switzerland, 12 February 1996], also in *Schweizerische Zeitschrift für europäisches und internationales Recht*, 1996, 135 ff.; CLOUT case No. 334 [Obergericht des Kantons Thurgau, Switzerland, 19 December 1995]; CLOUT case No. 80 [Kammergericht Berlin, Germany, 24 January 1994] (see full text of the decision).

[25]See CLOUT case No. 428 [Oberster Gerichtshof, Austria, 7 September 2000], also available on the Internet at http://www.cisg.at/8_2200v.htm; Rechtbank Zutphen, Netherlands, 29 May 1997, *Nederlands Internationaal Privaatrecht*, 1998, No. 110; AG Nordhorn, Germany, 14 June 1994, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/.

[26]See CLOUT case No. 425 [Oberster Gerichtshof, 21 March 2000], also in *Internationales Handelsrecht* 2001, 40 et seq.

[27]Id.

[28]See CLOUT case No. 240 [Oberster Gerichtshof, Austria, 15 October 1998].

[29]See CLOUT case No. 613 [[Federal] Northern District for Illinois, USA 28 March 2002], also in 2002 Westlaw 655540 (*Usinor Industeel v. Leeco Steel Products, Inc.*), and on the Internet at http://cisgw3.law.pace.edu/cases/020328u1.html. But see CLOUT case No. 632 [[Federal] Bankruptcy Court, United States 10 April 2001] (citing CISG article 53 in support of the proposition that payment or non-payment of the price was significant in determining whether title to goods had passed to the buyer).

[30]See United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980, Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee, 1981, 17.

[31]See CLOUT case No. 308 [Federal Court of Australia, 28 April 1995]; CLOUT case No. 226 [Oberlandesgericht Koblenz, Germany, 16 January 1992].

[32]In addition to the issues listed in art. 4, art. 5 provides that the "Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person." See Digest art. 5.

[33]See Camara Nacional de los Apelaciones en lo Comercial, Argentina, 14 October 1993, Unilex.

[34]See Rechtbank van Koophandel Hasselt, 17 June 1998, available on the Internet at http://www.law.kuleuven.ac.be/int/tradelaw/WK/1998-06-17.htm; Hof van Beroep Antwerpen, Belgium, 18 June 1996, available on the Internet at http://www.law.kuleuven.ac.be/int/tradelaw/WK/1996-06-18.htm; Hof Arnhem, Netherlands, 22 August 1995, *Nederlands Internationaal Privaatrecht*, 1995, No. 514; CLOUT case No. 104 [Arbitration—International Chamber of Commerce no. 7197 1993].

[35]See CLOUT case No. 47 [Landgericht Aachen, Germany, 14 May 1993] (see full text of the decision).

[36]See CLOUT case No. 428 [Oberster Gerichtshof, Austria, 7 September 2000], also available on the Internet at http://www.cisg.at/8_2200v.htm; Oberster Gerichtshof, Austria, 25 June 1998, *Zeitschrift für Rechtsvergleichung*, 2000, 77; CLOUT case No. 269 [Bundesgerichtshof, Germany, 12 February 1998] (see full text of the decision); CLOUT case No. 334 [Obergericht des Kantons Thurgau, Switzerland, 19 December 1995]; Trib. Comm. Nivelles, Belgium, 19 September 1995, Unilex; CLOUT case No. 132 [Oberlandesgericht Hamm, Germany, 8 February 1995]; BG Arbon, Switzerland, 9 December 1994, Unilex.

[37]See CLOUT case No. 124 [Bundesgerichtshof, Germany, 15 February 1995] (see full text of the decision).

[38]See CLOUT case No. 605 [Oberster Gerichtshof, 22 October 2001], also in *Internationales Handelsrecht*, 2002, 27; CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (see full text of the decision); CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000] also in *Internationales Handelsrecht*, 2001, 114 f.; CLOUT case No. 232 [Oberlandesgericht München, Germany, 11 March 1998]; CLOUT case No. 259 [Kantonsgericht Freiburg, Switzerland, 23 January 1998]; Landgericht Hagen, Germany, 15 October 1997, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/; Landgericht München, Germany, 6 May 1997, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/341.htm; CLOUT case No. 273 [Oberlandesgericht München, Germany, 9 July 1997] (see full text of the decision); CLOUT case No. 275 [Oberlandesgericht Düsseldorf, Germany, 24 April 1997] (see full text of the decision); CLOUT case No. 169 [Oberlandesgericht Düsseldorf, Germany, 11 July 1996]; Landgericht Duisburg, Germany, 17 April 1996, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/; CLOUT case No. 289 [Oberlandesgericht Stuttgart, Germany, 21 August 1995]; Landgericht München, Germany, 20 March 1995, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/164.htm; Rechtbank Middelburg, Netherlands, 25 January 1995, *Nederlands Internationaal Privaatrecht*, 1996, No. 127; Amtsgericht Mayen, Germany, 19 September 1994, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/; CLOUT case No. 281 [Oberlandesgericht Koblenz, Germany, 17 September 1993]; CLOUT case No. 125 [Oberlandesgericht Hamm, Germany, 9 June 1995]; Rechtbank Roermond, Netherlands, 6 May 1993, Unilex; CLOUT case No. 99 [Rechtbank Arnhem, Netherlands, 25 February 1993].

[39]For the application of the Convention to set-off in respect of receivables arising out of contracts governed by the Convention, see CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000], also in *Internationales Handelsrecht*, 2001, 114 f.; CLOUT case No. 273 [Oberlandesgericht München, Germany, 9 July 1997] (see full text of the decision).

[40]See Rechtbank van Koophandel Ieper, 29 January 2001, available on the Internet at http://www.law.kuleuven.ac.be/int/tradelaw/WK/2001-01-29.htm; CLOUT case No. 428 [Oberster Gerichtshof, Austria, 7 September 2000], also available on the Internet at http://www.cisg.at/8_2200v.htm; CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (see full text of the decision); CLOUT case No. 297 [Oberlandesgericht München, Germany, 21 January 1998] (see full text of the decision); Oberster Gerichtshof, Austria, 25 June 1998, *Zeitschrift für Rechtsvergleichung*, 2000, 77; CLOUT case No. 345 [Landgericht Heilbronn, Germany, 15 September 1997]; CLOUT case No. 249 [Cour de Justice Genève, Switzerland, 10 October 1997]; Landgericht Düsseldorf, Germany, 11 October 1995, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/; CLOUT case No. 125 [Oberlandesgericht Hamm, Germany, 9 June 1995]; CLOUT case No. 302 [ICC Court of Arbitration, award No. 7660/KJ], see also *ICC Court of Arbitration Bulletin*, 1995, 69 ff. But see CLOUT case No. 482 (Cour d'appel Paris, France, 6 November 2001) (stating that the limitations period was a matter governed by but not expressly settled in the Convention, but resolving the issue by reference to applicable domestic law).

[41]See CLOUT case No. 196 [Handelsgericht des Kantons Zürich, Switzerland, 26 April 1995] (see full text of the decision).

[42]Bundesgericht, Switzerland, 11 July 2000, available on the Internet at http://www.cisg.law.pace.edu/cisg/text/000711s1german.html.

[43]See Oberster Gerichtshof, Austria, 24 April 1997, *Zeitschrift für Rechtsvergleichung*, 1997, 89 ff.

[44]See CLOUT case No. 338 [Oberlandesgericht Hamm, Germany, 23 June 1998].

[45]See CLOUT case No. 613 [[Federal] Northern District for Illinois, USA 28 March 2002] ,also in 2002 Westlaw 655540 (*Usinor Industeel v. Leeco Steel Products, Inc.*) and on the Internet at http://cisgw3.law.pace.edu/cases/020328u1.html; CLOUT case No. 269 [Bundesgerichtshof Germany, 12 February 1998].

[46]See Landgericht München, Germany, 25 January 1996, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/.

[47]CLOUT Case No. 579 [[Federal] Southern District Court for New York, 10 May 2002], also in 2002 U.S. Dist. LEXIS 8411 (*Geneva Pharmaceuticals Tech. Corp. v. Barr Labs. Inc.*), and on the Internet at http://cisgw3.law.pace.edu/cases/020510u1.html; CLOUT case No. 420 [Federal District Court, Eastern District of Pennsylvania, 29 August 2000].

[48]Arrondissementsrechtbank Amsterdam, Netherlands, 5 October 1994, *Nederlands Internationaal Privaatrecht*, 1995, No. 231.

[49]See CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997] (see full text of the decision); CLOUT case No. 94 [Arbitration—Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft—Wien, 15 June 1994]; CLOUT case No. 93 [Arbitration—Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft—Wien, 15 June 1994] (see full text of the decision); Hof s'Hertogenbosch, 26 February 1992, *Nederlands Internationaal Privaatrecht*, 1992, No. 354.

[50]CLOUT case No. 613 [[Federal] Northern District for Illinois] also in 2002 Westlaw 655540 (*Usinor Industeel v. Leeco Steel Products, Inc.*) and available on the Internet at http://cisgw3.law.pace.edu/cases/020328u1.html.

[51]For a case expressly referring to the fact that the parties are free to choose the currency, since the Convention does not deal with the issue, see CLOUT case No. 84 [Oberlandesgericht Frankfurt am Main, Germany, 20 April 1994] (see full text of the decision).

[52]See CLOUT case No. 605 [Oberster Gerichtshof, 22 October 2001], also available on the Internet at http://www.cisg.at/1_4901i.htm; CLOUT case No. 255 [Tribunal Cantonal du Valais, Switzerland, 30 June 1998]; CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998] (see full text of the decision).

[53]CLOUT case No. 80 [Kammergericht Berlin, Germany, 24 January 1994]; see, however, Landgericht Berlin, 24 March 1998, available on the Internet at http://www.unilex.info/case.cfm?pid=1&do=case&id=440&step=FullText, expressly stating that only a minority view holds that the Convention deals with the issue by resorting implicitly, i.e. by referring to the currency of the place of payment of the price.

Article 5

This Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person.

OVERVIEW

1. Pursuant to this provision, the Convention does not deal with liability for death or personal injury caused by the goods to any person,[1] regardless of whether the injured party is the buyer or a third party. Consequently, national law applies to those matters.

SCOPE OF THE EXCLUSION

2. Article 5 declares that the Convention does not govern liability for death or personal injury "to any person". Although this can be read to exclude a buyer's claim against the seller for pecuniary loss resulting from the buyer's liability to third parties for personal injury caused by the goods, one court has applied the Convention to such a claim.[2]

3. A claim for damage to property caused by non-conforming goods is not excluded by article 5.[3] Unlike some legal systems, however, the Convention requires a buyer to notify the seller of the lack of conformity, as specified in article 39, in order to preserve the claim.[4] Where the damage to property is not "caused by the goods", as where the buyer's property is damaged by delivery of the goods, the liability issue must be settled on the basis of applicable domestic law.

Notes

[1]See CLOUT case No. 196 [Handelsgericht des Kantons Zürich, Switzerland, 26 April 1995] (see full text of the decision).

[2]See CLOUT case No. 49 [Oberlandesgericht Düsseldorf, Germany, 2 July 1993] (see full text of the decision).

[3]See CLOUT case No. 196 [Handelsgericht des Kantons Zürich, Switzerland, 26 April 1995].

[4]See CLOUT case No. 196 [Handelsgericht des Kantons Zürich, Switzerland, 26 April 1995].

Article 6

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

INTRODUCTION

1. According to article 6 of the Convention, the parties may exclude the Convention's application (totally or partially) or derogate from its provisions. Thus even if the Convention would otherwise be applicable, in order to decide whether it applies in a particular case one must determine whether the parties have excluded the Convention or derogated from its provisions.[1] According to several courts, opting-out requires a clear expression of intent by the parties.[2]

2. By allowing the parties to exclude the Convention or derogate from its provisions, the drafters affirmed the principle that the primary source of rules for international sales contracts is party autonomy.[3] Thus the drafters clearly acknowledged the Convention's non-mandatory nature[4] and the central role that party autonomy plays in international commerce—specifically, in international sales.[5]

DEROGATION

3. Article 6 distinguishes between excluding application of the Convention entirely and derogating from some of its provisions. The former is not subject to any express limitations in the Convention, but the latter is. Where one party to a contract governed by the Convention has its place of business in a State that has made a reservation under article 96,[6] the parties may not derogate from or vary the effect of article 12. In such cases, therefore, any provision "that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply" (article 12). Otherwise, the Convention does not expressly limit the parties's right to derogate from any provision of the Convention.[7]

4. Although the Convention does not expressly so state, the parties cannot derogate from the public international law provisions of the Convention (i.e. articles 89-101) because those provisions address issues relevant to Contracting States rather than private parties. This issue, however, has not yet been addressed by case law.

EXPRESS EXCLUSION

5. The parties can expressly exclude application of the Convention. Express exclusions come in two varieties: exclusion with and exclusion without indication by the parties of the law applicable to their contract. Where the parties expressly exclude the Convention and specify the applicable law, which in some countries can occur in the course of legal proceedings,[8] the law applicable will be that designated by the rules of private international law of the forum,[9] resulting (in most countries) in application of the law chosen by the parties.[10] Where the parties expressly exclude the Convention but do not designate the applicable law, the governing law is to be identified by means of the private international law rules of the forum.

IMPLICIT EXCLUSION

6. A number of decisions have considered whether application of the Convention can be excluded implicitly. Many courts admit the possibility of an implicit exclusion.[11] Although there is no express support for this view in the language of the Convention, a majority of delegations were opposed to a proposal advanced during the diplomatic conference which would have permitted total or partial exclusion of the Convention only if done "expressly".[12] An express reference to the possibility of an implicit exclusion was eliminated from the text of the Convention merely "lest the special reference to 'implied' exclusion might encourage courts to conclude, on insufficient grounds, that the Convention had been wholly excluded".[13] According to some court decisions[14] and an arbitral award,[15] however, the Convention cannot be excluded implicitly, based on the fact that the Convention does not expressly provide for that possibility.

7. A variety of ways in which the parties can implicitly exclude the Convention—for example, by choosing the law[16] of a Non-contracting State as the law applicable to their contract[17]—have been recognized.

8. More difficult problems are posed if the parties choose the law of a Contracting State to govern their contract. An arbitral award[18] and several court decisions[19] suggest that such a choice amounts to an implicit exclusion of the Convention, because otherwise the choice would have no practical meaning. Most court decisions[20] and arbitral awards,[21] however, take a different view. They reason that the Convention is the law for international sales in the Contracting State whose law the parties chose; and that the parties' choice remains meaningful because it identifies the national law to be used for filling gaps in the Convention.[22] According to this line of decisions, the choice of the law of a Contracting State, if made without particular reference to the domestic law of that State, does not exclude the Convention's applicability. Of course, if the parties clearly chose the domestic law of a Contracting State, the Convention must be deemed excluded.[23]

9. The choice of a forum may also lead to the implicit exclusion of the Convention's applicability. Where there was evidence that the parties wanted to apply the law of the chosen forum and that forum was located in a Contracting State, however, two arbitral tribunals have applied the Convention.[24]

10. The question has arisen whether the Convention's application is excluded if the parties litigate a dispute solely on the basis of domestic law, despite the fact that all requirements for applying the Convention are satisfied. In those jurisdictions where a judge must apply the correct law even if the parties have relied on law that does not apply in the case (*jura novit curia*), the mere fact that the parties based their arguments on domestic law has not by itself lead to the exclusion of the Convention.[25] Another court has found that, if the parties are not aware of the Convention's applicability and argue on the basis of a domestic law merely because they wrongly believe that law applies, judges should apply the Convention.[26] In one country which does not recognize the principle of *jura novit curia*, a court has applied domestic sales law where the parties argued their case under that law.[27] This approach has also been adopted by a court[28] and an arbitral tribunal[29] sitting in countries that acknowledge the principle *jura novit curia*.

11. According to one court decision, the fact that the parties incorporated an Incoterm into their agreement does not constitute an implicit exclusion of the Convention.[30]

OPTING-IN

12. Although the Convention expressly empowers the parties to exclude its application in whole or in part, it does not declare whether the parties may designate the Convention as the law governing their contract when it would not otherwise apply. This issue was expressly addressed in the 1964 Hague Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, which contained a provision, article 4, that gave the parties the power to "opt in". The fact that the Convention contains no comparable provision does not necessarily mean that the parties are prohibited from "opting in". A proposal by the former German Democratic Republic during the diplomatic conference[31] that the Convention should apply even where the preconditions for its application were not met, provided the parties wanted it to be applicable, was rejected; it was noted during the discussions, however, that the proposed text was unnecessary in that the principle of party autonomy was sufficient to allow the parties to "opt in" to the Convention.

Notes

[1]See CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000]; CLOUT case No. 338 [Oberlandesgericht Hamm, Germany, 23 June 1998]; CLOUT case No. 223 [Cour d'appel Paris, France, 15 October 1997] (see full text of the decision); CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997] (see full text of the decision); CLOUT case No. 190 [Oberster Gerichtshof, Austria, 11 February 1997] (see full text of the decision); CLOUT case No. 311 [Oberlandesgericht Köln, Germany, 8 January 1997] (see full text of the decision); CLOUT case No. 211 [Tribunal Cantonal Vaud, Switzerland, 11 March 1996] (see full text of the decision); CLOUT case No. 170 [Landgericht Trier, Germany, 12 October 1995] (see full text of the decision); CLOUT case No. 106 [Oberster Gerichtshof, Austria, 10 November 1994] (see full text of the decision); CLOUT case No. 199 [Tribunal Cantonal Valais, Switzerland, 29 June 1994] (see full text of the decision); CLOUT case No. 317 [Oberlandesgericht Karlsruhe, Germany, 20 November 1992] (see full text of the decision).

[2]CLOUT case No. 433 [[Federal] Northern District Court of California, 27 July 2001], *Federal Supplement (2nd Series)* vol. 164, p. 1142 (*Asante Technologies v. PMC-Sierra*), also available on the Internet at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/010727u1.html; Tribunal de Commerce Namur, Belgium, 15 January 2002, available on the Internet at http://www.law.kuleuven.ac.be/int/tradelaw/WK/2002-01-15.htm.

[3]For a reference to this principle, see CLOUT case No. 229 [Bundesgerichtshof, Germany, 4 December 1996] (see full text of the decision).

[4]For an express reference to the Convention's non-mandatory nature, see CLOUT case No. 647 [Cassazione civile, Italy, 19 June 2000], also in *Giurisprudenza italiana*, 2001, 236; see CLOUT case No. 425 [Oberster Gerichtshof, Austria, 21 March 2000], also in *Internationales Handelsrecht*, 2001, 41; CLOUT case No. 240 [Oberster Gerichtshof, Austria, 15 October 1998] (see full text of the decision); Handelsgericht Wien, 4 March 1997, unpublished; CLOUT case No. 199 [KG Wallis, 29 June 1994], also in *Zeitschrift für Walliser Rechtsprechung*, 1994, 126.

[5]CLOUT case No. 432 [Landgericht Stendal, Germany, 12 October 2000], also in *Internationales Handelsrecht*, 2001, 32.

[6]See article 96: "A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with article 12 that any provision of article 11, article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State."

[7]For example, a court has stated that article 55, relating to open-price contracts, is only applicable where the parties have not agreed to the contrary (CLOUT case No. 151 [Cour d'appel, Grenoble, France, 26 February 1995]), while another court observed that article 39, relating to the notice requirement, is not mandatory and can be derogated from (Landgericht Gießen, Germany, 5 July 1994, *Neue Juristische Wochenschrift Rechtsprechungs-Report*, 1995, 438). Similarly, the Austrian Supreme Court has concluded that article 57 also can be derogated from (CLOUT case No. 106 [Oberster Gerichtshof, Austria, 10 November 1994]).

[8]This is true for instance in Germany, as pointed out in case law; see, for example, CLOUT case No. 122 [Oberlandesgericht Köln, Germany, 26 August 1994]; CLOUT case No. 292 [Oberlandesgericht Saarbrücken, Germany, 13 January 1993] (see full text of the decision); this is also true in Switzerland, see CLOUT case No. 331 [Handelsgericht Kanton Zürich, 10 February 1999], also in *Schweizerische Zeitschrift für Internationales und Europäisches Recht*, 2000, 111.

[9]See CLOUT case No. 231 [Bundesgerichtshof, Germany, 23 July 1997] (see full text of the decision); Oberlandesgericht Frankfurt, Germany, 15 March 1996, *Neue Juristische Wochenschrift Rechtsprechungs-Report*, 1997, 170 ff.

[10]Where the rules of private international law of the forum are those laid down either in the 1955 Hague Convention on the Law Applicable to International Sales of Goods Convention, 510 U.N.T.S. 149, in the 1980 Rome Convention on the Law Applicable to Contractual Obligations (United Nations, *Treaty Series*, vol. 1605, No. 28023), or in the 1994 Inter-American Convention on the Law Applicable to Contractual Obligations (Organization of American States Fifth Inter-American Specialized Conference on Private International Law: Inter-American Convention on the Law Applicable to International Contracts, March 17, 1994, OEA/Ser.K/XXI.5, CIDIP-V/doc.34/94 rev. 3 corr. 2, March 17, 1994, available on the Internet at http://www.oas.org/juridico/english/Treaties/b-56.html), the law chosen by the parties will govern.

[11]See CLOUT case No. 605 [Oberster Gerichtshof, Austria, 22 October 2001], also available on the Internet at http://www.cisg.at/1_7701g.htm; Cour de Cassation, France, 26 June 2001, available on the Internet at http://witz.jura.uni-sb.de/CISG/decisions/2606012v.htm; CLOUT case No. 483 [Audiencia Provincial de Alicante, Spain, 16 November 2000]; CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000]; Oberlandesgericht Dresden, Germany, 27 December 1999, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/511.htm; CLOUT case No. 273 [Oberlandesgericht München, Germany, 9 July 1997] (see full text of the decision); Landgericht München, Germany, 29 May 1995, *Neue Juristische Wochenschrift*, 1996, 401 f.; CLOUT case No. 136 [Oberlandesgericht Celle, Germany, 24 May 1995] (see full text of the decision).

[12]*Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980* (United Nations publication, Sales No. E.81.IV.3), 85-86.

[13]Ibid., 17.

[14]See Landgericht Landshut, Germany, 5 April 1995, available on the Internet at: http://www.jura.uni-freiburg.de/iprl/Convention/; [Federal] Court of International Trade, United States, 24 October 1989, 726 Fed. Supp. 1344 (*Orbisphere Corp. v. United States*), available on the Internet at: http://cisgw3.law.pace.edu/cases/891024u1.html.

[15]See CLOUT case No. 474 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, award in case No. 54/1999 of 24 January 2000], also referred to on the Internet at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/000124r1.html.

[16]Whether such a choice is to be acknowledged at all depends on the rules of private international law of the forum.

[17]See CLOUT case No. 483 [Audiencia Provincial de Alicante, Spain, 16 November 2000] (the parties implicitly excluded application of the Convention by providing that their contract should be interpreted in accordance with the law of a Non-contracting State and by submitting their petitions, statements of defence, and counterclaims in accordance with the domestic law of the forum (a Contracting State)); CLOUT case No. 49 [Oberlandesgericht Düsseldorf, Germany, 2 July 1993] (see full text of the decision).

[18]See CLOUT case No. 92 [Arbitration—Ad hoc tribunal, 19 April 1994].

[19]See Cour d'Appel Colmar, France, 26 September 1995, available on the Internet at: http://witz.jura.uni-sb.de/cisg/decisions/260995.htm; CLOUT case No. 326 [Kantonsgericht des Kantons Zug, Switzerland, 16 March 1995]; CLOUT case No. 54 [Tribunale Civile de Monza, Italy, 14 January 1993].

[20]CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002 (see full text of the decision approving lower appeals court reasoning); Hof van Beroep Gent, 15 May 2002, available on the Internet at http://www.law.kuleuven.be/ipr/eng/cases/2002-05-15.html; CLOUT case No. 482 [Cour d'appel Paris, France, 21 November 2001]; CLOUT case No. 631 [Supreme Court of Queensland, Australia, 17 November 2000]; CLOUT case No. 429 [Oberlandesgericht Frankfurt, 30 August 2000], also available on the Internet at http://cisgw3.law.pace.edu/cisg/text/000830g1german.html; CLOUT case No. 630 [Court of Arbitration of the International Chamber of Commerce, Zurich, Switzerland, July 1999] (see full text of the decision); CLOUT case No. 270 [Bundesgerichtshof, Germany, 25 November 1998]; CLOUT case No. 297 [Oberlandesgericht München, Germany, 21 January 1998] (see full text of the decision); CLOUT case No. 220 [Kantonsgericht Nidwalden, Switzerland, 3 December 1997]; CLOUT case No. 236 [Bundesgerichtshof, Germany, 23 July 1997]; CLOUT case No. 287 [Oberlandesgericht München, Germany, 9 July 1997]; CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997] (see full text of the decision); CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997] (see full text of the decision); CLOUT case No. 206 [Cour de Cassation, France, 17 December 1996] (see full text of the decision); CLOUT case No. 409 [Landgericht Kassel, Germany, 15 February 1996], also in *Neue Juristische Wochenschrift Rechtsprechungs-Report*, 1996, 1146 f.; CLOUT case No. 125 [Oberlandesgericht Hamm, Germany, 9 June 1995]; Rechtbank s'Gravenhage, the Netherlands, 7 June 1995, *Nederlands Internationaal Privaatrecht*, 1995, No. 524; CLOUT case No. 167 [Oberlandesgericht München, Germany, 8 February 1995] (see full text of the decision); CLOUT case No. 120 [Oberlandesgericht Köln, Germany, 22 February 1994]; CLOUT case No. 281 [Oberlandesgericht Koblenz, Germany, 17 September 1993]; CLOUT case No. 48 [Oberlandesgericht Düsseldorf, Germany, 8 January 1993].

[21]See ICC Court of Arbitration, award No. 9187, available on the Internet at http://www.unilex.info/case.cfm?pid=1&do=case&id=466&step=FullText; CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996]; Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 17 November 1995, Unilex; ICC Court of Arbitration, France, award No. 8324, *Journal du droit international*, 1996, 1019 ff.; ICC Court of Arbitration, France, award No. 7844, Unilex; CLOUT case No. 302 [ICC Court of Arbitration, France, award No. 7660[also inUnilex; CLOUT case No. 300 [ICC Court of Arbitration, France, award No. 7565], *Journal du droit international*, 1995, 1015 ff.; CLOUT case No. 103 [Arbitration—International Chamber of Commerce no. 6653 1993]; CLOUT case No. 93 [Arbitration—Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft—Wien, 15 June 1994].

[22]CLOUT case No. 575 [*B.P. Petroleum International Ltd. v. Empresa Estatal Petroleos de Ecuador* (*Petroecuador*), 02-20166, United States Court Of Appeals For The Fifth Circuit, 2003] U.S. App. LEXIS 12013, June 11, 2003.

[23]CLOUT case No. 429 [Oberlandesgericht Frankfurt, Germany, 30 August 2000], also available on the Internet at http://cisgw3.law.pace.edu/cisg/text/000830g1german.html; Oberlandesgericht Frankfurt, Germany, 15 March 1996, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/284.htm.

[24]CLOUT case No. 293 [Schiedsgericht der Hamburger freundlichen Arbitrage, Germany, 29 December 1998] also in *Internationales Handelsrecht*, 2001, 36-37; CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996] (see full text of the decision).

[25]See CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000]; CLOUT case No. 125 [Oberlandesgericht Hamm, Germany, 9 June 1995]; Landgericht Landshut, Germany, 5 April 1995, Unilex.

[26]See CLOUT case No. 136 [Oberlandesgericht Celle, Germany, 24 May 1995] (see full text of the decision).

[27][Oregon Court of Appeals, United States], 12 April 1995, 133 Or. App. 633 (*GPL Treatment Ltd. v. Louisiana-Pacific Group*).

[28]Cour de Cassation, France, 26 June 2001, available on the Internet at http://witz.jura.uni-sb.de/CISG/decisions/2606012v.htm.

[29]ICC Court of Arbitration, award No. 8453, *ICC Court of Arbitration Bulletin*, 2000, 55.

[30]CLOUT case No. 605 [Oberster Gerichtshof, Austria, 22 October 2001], also available on the Internet at http://www.cisg.at/1_7701g.htm.

[31]See *Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980* (United Nations publication, Sales No. E.81.IV.3), 86, 252-253.

Chapter II (articles 7-13)

General provisions

OVERVIEW

1. Chapter II of Part I of the CISG contains provisions addressed to general issues under the Convention. Two of those provisions focus on interpretation: article 7 deals with interpretation of the Convention and article 8 speaks to interpretation of the parties' statements and conduct. Article 9 addresses the parties' legal obligations arising from usages and practices established between them. Two other provisions in Chapter II are terminological, focusing on issues concerning the meaning of "place of business" (article 10) and "writing" (article 13).

2. The two remaining provisions of Chapter II deal with the Convention's informality principle: article 11 provides that the Convention does not require a writing or impose other formal requirements on contracts within its scope, and article 12 states limitations on that principle.

Article 7

1. In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

2. Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

OVERVIEW

1A. Article 7 is divided into two subparts: article 7 (1) specifies several considerations to be taken into account in interpreting the Convention; article 7 (2) describes the methodology for dealing with the Convention's "gaps"—i.e., "matters governed by this Convention which are not expressly settled in it".

INTERPRETATION OF THE CONVENTION IN GENERAL

1. Because national rules on sales diverge sharply in conception and approach, in interpreting the Convention it is important for a forum to avoid being influenced by its own domestic sales law.[1] Article 7, paragraph 1 therefore provides that, in the interpretation of the Convention, "regard is to be had to its international character and to the need to promote uniformity in its application".

THE CONVENTION'S INTERNATIONAL CHARACTER

2. According to a number of courts, article 7 (1)'s reference to the Convention's international character[2] forbids fora from interpreting the Convention on the basis of national law;[3] instead, courts must interpret the Convention "autonomously".[4] Nevertheless, some courts have stated that case law interpreting domestic sales law, although "not per se applicable," may inform a court's approach to the Convention where the language of the relevant articles of the Convention tracks that of the domestic law.[5] According to case law, reference to the Convention's legislative history,[6] as well as to international scholarly writing, is admissible in interpreting the treaty.[7]

PROMOTING UNIFORM APPLICATION

3. The mandate imposed by article 7 (1) to regard the need to promote uniform application of the Convention has been construed to require fora interpreting the CISG to take into account foreign decisions that have applied the Convention.[8] In one case, a court cited 40 foreign court decisions and arbitral awards.[9] Two decisions have each cited two foreign cases,[10] and several cases have cited a single foreign decision.[11] More recently, a court referred to 37 foreign court decisions and arbitral awards.[12]

4. Two courts have stated that foreign court decisions have merely persuasive, non-binding authority.[13]

OBSERVANCE OF GOOD FAITH IN INTERNATIONAL TRADE

5. Article 7 (1) also requires that the Convention be interpreted in a manner that promotes the observance of good faith in international trade.[14] It has been held that requiring notice of avoidance where a seller has "unambiguously and definitely" declared that it will not perform its obligations would be contrary to this mandate.[15] Although good faith is expressly referred to only in article 7 (1), relating to the Convention's interpretation, there are numerous rules in the Convention that reflect the good faith principle. The following provisions are among those that manifest the principle:

- Article 16 (2) *(b)*, which makes an offer irrevocable if it was reasonable for the offeree to rely upon the offer being held open and the offeree has acted in reliance on the offer;
- Article 21 (2), which deals with a late acceptance that was sent in such circumstances that, had its transmission been normal, it would have reached the offeror in due time;
- Article 29 (2), which in certain circumstances precludes a party from invoking a contractual provision that requires modifications or terminations of the contract to be in writing;
- Articles 37 and 46, on the right of a seller to cure non-conformities in the goods;
- Article 40, which precludes a seller from relying on the buyer's failure to give notice of non-conformity in accordance with articles 38 and 39 if the lack of conformity relates to facts of which the seller knew or could not have been unaware and which he did not disclose to the buyer;

- Article 47 (2), article 64 (2), and article 82, on the loss of the right to declare the contract avoided;
- Articles 85 to 88, which impose on the parties obligations to preserve the goods.[16]

GAP-FILLING

6. Under article 7 (2), gaps in the Convention—i.e. questions the Convention governs but for which it does not expressly provide answers—are filled, if possible, without resorting to domestic law, but rather in conformity with the Convention's general principles. Only where no such general principles can be identified does article 7 (2) permit reference to the applicable national law.[17] Matters the Convention does not govern at all are resolved by direct recourse to applicable national law.[18] Issues beyond the Convention's scope are discussed in the Digest for article 4.

GENERAL PRINCIPLES OF THE CONVENTION

Party autonomy

7. According to several courts, one of the general principles upon which the Convention is based is party autonomy.[19]

Good faith

8. Good faith has also been found to be a general principle of the Convention.[20] That general principle has led a court to state that a buyer need not explicitly declare a contract avoided if the seller has refused to perform its obligations, and that to insist on an explicit declaration in such circumstance would violate the principle of good faith, even though the Convention expressly requires a declaration of avoidance.[21] In another case, a court required a party to pay damages because the party's conduct was "contrary to the principle of good faith in international trade laid down in article 7 CISG"; the court also stated that abuse of process violates the good faith principle.[22]

9. A more recent court decision stated that the general principle of good faith requires the parties to cooperate with each other and to exchange information relevant for the performance of their respective obligations.[23]

Estoppel

10. According to some decisions, estoppel is also one of the general principles upon which the Convention is based—specifically, a manifestation of the principle of good faith.[24] According to one court, however, the Convention is not concerned with estoppel.[25]

Place of payment of monetary obligations

11. A significant number of decisions hold that the Convention includes a general principle relating to the place of performance of monetary obligations. Thus in determining the place for paying compensation for non-conforming goods, one court stated that "if the purchase price is payable at the place of business of the seller", as provided by article 57 of the Convention, then "this indicates a general principle valid for other monetary claims as well".[26] In an action for restitution of excess payments made to a seller, a court stated that there was a general principle that "payment is to be made at the creditor's domicile, a principle that is to be extended to other international trade contracts under article 6.1.6 of the UNIDROIT Principles".[27] The Supreme Court of another State, which had previously adopted the reverse position, discovered a general principle of the Convention under which, upon avoidance of a contract, "the place for performance of restitution obligations should be determined by transposing the primary obligations—through a mirror effect—into restitution obligations".[28] One decision, however, denies the existence of a Convention general principle for determining the place for performance of all monetary obligations.[29]

Currency of payment

12. One court has observed that the question of the currency of payment is governed by, although not expressly settled in, the Convention.[30] According to one view, the court noted, a general principle underlying the CISG is that, except where the parties have agreed otherwise, the seller's place of business controls all questions relating to payment, including the question of currency. However, the court also noted the view that there was no pertinent Convention general principle, and thus that applicable domestic law governed the matter. The Court did not choose which alternative was the correct approach because, on the facts of the case, each led to the same the result (payment was due in the currency of the seller's place of business).

Burden of proof

13. According to some decisions,[31] the question of which party bears the burden of proof is a matter governed by, albeit not explicitly settled in, the Convention. The issue is therefore to be settled in conformity with the general principles on which the Convention is based, provided pertinent general principles underlie the Convention.[32] According to various decisions, article 79 (1)[33] and (according to one court decision) article 2 *(a)* evidence such general principles, which have been summarized as follows: a party attempting to derive beneficial legal consequences from a provision has the burden of proving the existence of the factual prerequisites required to invoke the provision;[34] a party claiming an exception has to prove the factual prerequisites of that exception.[35] According to some courts, however, burden of proof is a matter not governed by the Convention, and is instead left to domestic law.[36]

Full compensation

14. According to some decisions the Convention is also based upon a principle of full compensation for losses in the event of breach.[37] One court restricted this general principle to cases in which, as a result of a breach, a contract is avoided.[38]

Informality

15. Several tribunals have stated that the principle of informality, evidenced in article 11, constitutes a general principle upon which the Convention is based;[39] from this principle it follows, *inter alia*, that the parties are free to modify or terminate their contract orally, in writing, or in any other form. An implied termination of the contract has been held possible,[40] and it has been held that a written contract may be modified orally.[41]

Dispatch of communications

16. The dispatch rule in article 27 applies to communications between the parties after they have concluded a contract. Under this rule, a notice, request or other communication becomes effective as soon as the declaring party releases it from its own sphere of control using an appropriate means of communication. This rule applies to a notice of non-conformity or of third-party claims (arts. 39, 43); to demands for specific performance (art. 46), price reduction (art. 50), damages (art. 45, para. 1 *(b)*) or interest (art. 78); to a declaration of avoidance (arts. 49, 64, 72, 73); to a notice fixing an additional period for performance (arts. 47, 63); and to other notices provided for in the Convention, such as those described in article 32 (1), article 67 (2), and article 88. Case law states that the dispatch principle is a general principle underlying Part III of the Convention, and thus also applies to any other communication the parties may have provided for in their contract unless they have agreed that the communication must be received to be effective.[42]

Mitigation of damages

17. Article 77 contains a rule under which a damage award can be reduced by the amount of losses that the aggrieved party could have mitigated by taking measures that were reasonable in the circumstances. The mitigation of damages principle has also been considered a general principle upon which the Convention is based.[43]

Binding usages

18. Another general principle, recognized by case law, is that informing article 9 (2), under which the parties are bound, unless otherwise agreed, by a usage of which they knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.[44]

Set-off

19. One court has suggested that the issue of set-off is governed by, although not expressly settled in, the Convention; and that the Convention contains a general principle within the meaning of article 7 (2) that permitts reciprocal claims arising under the Convention (in the case, the buyer's claims for damages and the seller's claim for the balance of the sale proceeds) to be offset.[45] According to other courts, however, the issue of set-off is not governed of the Convention.[46]

Right to interest

20. An arbitral tribunal has stated that entitlement to interest on all sums in arrears (see article 78) also constitutes a general principle of the Convention.[47] According to some tribunals, the Convention is based upon a general principle under which entitlement to interest does not require a formal notice to the debtor in default.[48] Other decisions, however, state that interest on sums in arrears is due only if a formal notice has been given to the debtor.[49]

Favor contractus

21. Commentators have also suggested that the Convention is based upon the *favor contractus* principle, pursuant to which one should adopt approaches that favor finding that a contract continues to bind the parties rather than that it has been avoided. This view appears to have been adopted by two courts: one court expressly referred to the principle of *favor contractus*;[50] the other merely stated that avoidance of the contract constitutes an "*ultima ratio*" remedy.[51]

22. Several decisions have identified article 40 as embodying a general principle of the Convention applicable to resolve unsettled issues under the Convention.[52] According to an arbitration panel, "Article 40 is an expression of the principles of fair trading that underlie also many other provisions of the Convention, and it is by its very nature a codification of a general principle".[53] Thus, the decision asserted, even if article 40 did not apply directly where goods failed to conform to a contractual warranty clause, the general principle underlying article 40 would be indirectly applicable to the situation by way of article 7 (2). In another decision, a court derived from article 40 a general principle that even a very negligent buyer deserves more protection than a fraudulent seller; it then applied the principle to hold that a seller that had misrepresented the age and mileage of a car could not escape liability under article 35 (3)[54] even if the buyer could not have been unaware of the lack of conformity at the time of the conclusion of the contract.[55]

UNIDROIT PRINCIPLES AND PRINCIPLES OF EUROPEAN CONTRACT LAW

23. One arbitral tribunal,[56] in deciding the rate of interest to apply to payment of sums in arrears, applied the rate specified in both article 7.4.9 of the UNIDROIT Principles of International Commercial Contracts and in article 4.507 of the Principles of European Contract Law, arguing that such rules had to be considered general principles on which the Convention is based. [here] In other cases,[57] arbitral tribunals referred to the UNIDROIT Principles of International Commercial Contracts to corroborate results under rules of the Convention; one court also referred to the UNIDROIT Principles of International Commercial Contracts in support of a solution reached on the basis of the Convention.[58] According to another court, the UNIDROIT Principles can help determine the precise meaning of general principles upon which the CISG is based.[59]

Notes

[1]See United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980, Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee, 1981, p. 17.

[2]For references in case law to the need to take the Convention's international character into account in the interpretation of the Convention, see CLOUT case No. 418 [Federal District Court, Eastern District of Louisiana, United States, 17 May 1999] (see full text of the decision); CLOUT case No. 138 [Federal Court of Appeals for the Second Circuit, United States, 6 December 1995] (see full text of the decision); CLOUT case No. 84 [Oberlandesgericht Frankfurt am Main, Germany, 20 April 1994] (see full text of the decision); CLOUT case No. 201 [Richteramt Laufen des Kantons Berne, Switzerland, 7 May 1993] (see full text of the decision).

[3]See CLOUT case No. 222 [Federal Court of Appeals for the Eleventh Circuit, United States, 29 June 1998] (see full text of the decision); CLOUT case No. 413 [Federal District Court, Southern District of New York, United States, 6 April 1998] (see full text of the decision); CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997] (see full text of the decision); CLOUT case No. 171 [Bundesgerichtshof, Germany, 3 April 1996] (see full text of the decision); CLOUT case No. 201 [Richteramt Laufen des Kantons Berne, Switzerland, 7 May 1993] (see full text of the decision).

[4]CLOUT case No. 333 [Handelsgericht des Kantons Aargau, Switzerland, 11 June 1999]; CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999] (see full text of the decision); CLOUT case No. 217 [Handelsgericht des Kantons Aargau, Switzerland, 26 September 1997] (see full text of the decision).

[5]CLOUT case No. 138 [Federal Court of Appeals for the Second Circuit, United States, 6 December 1995] (see full text of the decision); for a more recent case stating the same, see CLOUT Case No. 580 [[Federal] Court of Appeals (4th Circuit), 21 June 2002], 2002 U.S. App. LEXIS 12336 (*Schmitz-Werke GmbH & Co. v. Rockland Industries, Inc.; Rockland International FSC, Inc.*).

[6]See Landgericht Aachen, Germany, 20 July 1995, published on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/ (referring to the legislative history of article 78); CLOUT case No. 84 [Oberlandesgericht Frankfurt am Main, Germany, 20 April 1994] (see full text of the decision).

[7]CLOUT case No. 426 [Oberster Gerichtshof, Austria, 13 April 2000], also published on the Internet at http://www.cisg.at/2_10000w.htm.

[8]See, for example, Audiencia Provincial de Valencia, Spain, 7 June 2003.

[9]See CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000].

[10]See Rechtbank Koophandel Hasselt, 2 December 1998, published on the Internet at http://www.law.kuleuven.ac.be/int/tradelaw/WK/1998-12-02.htm; Trib. Cuneo, 31 January 1996, UNILEX.

[11]See CLOUT case No. 613 [[Federal] Northern District Court for Illinois, 28 March 2002],also in 2002 Westlaw 655540 (*Usinor Industeel, v. Leeco Steel Products, Inc.*), and published on the Internet at http://www.unilex.info/case.cfm?pid=1&do=case&id=746&step=FullText; Rechtbank Koophandel Hasselt, 6 March 2002, published on the Internet at http://www.law.kuleuven.ac.be/int/tradelaw/WK/2002-03-06s.htm; CLOUT case No. 631 [Supreme Court of Queensland, Australia, 17 November 2000] (see full text of the decision); CLOUT case No. 426 [Oberster Gerichtshof, Austria, 13 April 2000], also published on the Internet at http://www.cisg.at/2_10000w.htm; CLOUT case No. 380 [Tribunale di Pavia, Italy, 29 December 1999] (see full text of the decision); CLOUT case No. 205 [Cour d'appel Grenoble, France, 23 October 1996] (see full text of the decision).

[12]CLOUT case No. 608 [Trib. Rimini, Italy, 26 November 2002], in *Giurisprudenza italiana*, 2003, 896 ff.

[13]CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000]; CLOUT case No. 380 [Tribunale di Pavia, Italy, 29 December 1999]. See also CLOUT case No. 608 [Trib. Rimini, Italy, 26 November 2002], also in *Giurisprudenza italiana*, 2003, 896 ff.

[14]See United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980, Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee, 1981, p. 18.

[15]CLOUT case No. 595 [Oberlandesgericht München, Germany, 15 September 2004].

[16]United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980, Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee, 1981, p. 18.

[17]See ICC International Court of Arbitration, Award No. 8611/HV/JK, published on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/.

[18]See, e.g., CLOUT case No. 482 [Cour d'appel Paris, 6 November 2001], also published on the Internet at http://witz.jura.uni-sb.de/CISG/decisions/061101v.htm, expressly referring to article 7 of the Convention when stating that issues not governed by the Convention have to be solved by means of the applicable law; for a similar statement, see also Camara Nacional de Apelaciones en lo Comercial, Argentina, 24 April 2000, published on the Internet at http://www.uc3m.es/uc3m/dpto/PR/dppr03/cisg/sargen10.htm (stating the same); CLOUT case No. 333 [Handelsgericht des Kantons Aargau, Switzerland, 11 June 1999]; Rechtbank Zutphen, Netherlands, 29 May 1997, published on the Internet at http://www.unilex.info/case.cfm?pid=1&do=case&id=353&step=FullText (stating the same); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, award in case No. 38/1996 of 28 March 1997, published in English on the Internet at http://cisgw3.law.pace.edu/cases/970328r1.html; Amtsgericht Mayen, Germany, 6 September 1995, published on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/382.htm (stating the same); CLOUT case No. 97 [Handelsgericht des Kantons Zürich, Switzerland, 9 September 1993] (stating the same) (see full text of the decision).

[19]See Hof Beroep Gent, Belgium, 15 May, 2002, published on the Internet at http://www.law.kuleuven.be/ipr/eng/cases/2002-05-15.html; Rechtbank Koophandel Ieper, Belgium, 29 January 2001, published on the Internet at http://www.law.kuleuven.ac.be/int/tradelaw/WK/2001-01-29.htm; CLOUT case No. 432 [Landgericht Stendal, Germany, 12 October 2000], also in *Internationales Handelsrecht*, 2001, 32; see also CLOUT case No. 608 [Trib. Rimini, Italy, 26 November 2002], also in *Giurisprudenza italiana*, 2003, 896 ff.

[20]See Hof Beroep Gent, Belgium, 15 May 2002, published on the Internet at http://www.law.kuleuven.be/ipr/eng/cases/2002-05-15.html; Bundesgerichtshof, Germany, 9 January 2002, *Internationales Handelsrecht*, 2002, 17; CLOUT case 445 [Bundesgerichtshof,

Germany, 31 October 2001], also in *Internationales Handelsrecht*, 2002, 14 ff.; CLOUT case No. 297 [Oberlandesgericht München, Germany, 21 January 1998] (see full text of the decision); CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998] (see full text of the decision); CLOUT case No. 645 [Corte d'Appello Milano, Italy, 11 December 1998], also published on the Internet at http://www.unilex.info/case.cfm?pid=1&do=case&id=359&step=FullText; Compromex Arbitration, Mexico, 30 November 1998, published on the Internet at http://www.uc3m.es/cisg/rmexi3.htm; CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997]; Rechtbank Arnhem, 17 July 1997, published on the Internet at http://www.unilex.info/case.cfm?pid=1&do=case&id=355&step=FullText; Landgericht München, Germany, 6 May 1997, published on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/341.htm (stating the same); CLOUT case No. 337 [Landgericht Saarbrücken, Germany, 26 March 1996]; CLOUT case No. 166 [Arbitration - Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996] (see full text of the decision); CLOUT case No. 136 [Oberlandesgericht Celle, Germany, 24 May 1995] (see full text of the decision); ICC International Court of Arbitration, Award No. 8128/1995, Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, award No. VB/94124, published on the Internet at http://www.unilex.info/case.cfm?pid=1&do=case&id=217&step=FullText; CLOUT case No. 154 [Cour d'appel Grenoble, France, 22 February 1995]; *Renard Constructions v. Minister for Public Works*, Court of Appeal, New South Wales, Australia, 12 March 1992, published on the Internet at http://www.unilex.info/case.cfm?pid=1&do=case&id=57&step= FullText.

[21]See CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997].

[22]CLOUT case No. 154 [Cour d'appel Grenoble, France, 22 February 1995].

[23]CLOUT case No. 445 [Bundesgerichtshof, Germany, 31 October 2001], also in *Internationales Handelsrecht*, 2002, 14 ff.

[24]See Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, award in case No. 302/1996 of 27 July 1999, published in English on the Internet at http://cisgw3.law.pace.edu/cases/990727r1.html; CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997] (see full text of the decision); CLOUT case No. 94 [Arbitration-Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft - Wien, 15 June 1994]; CLOUT case No. 93 [Arbitration-Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft - Wien, 15 June 1994] (see full text of the decision); Hof s'Hertogenbosch, Netherlands, 26 February 1992, *Nederlands Internationaal Privaatrecht*, 1992, No. 354.

[25]Rechtbank Amsterdam, Netherlands, 5 October 1994, *Nederlands Internationaal Privaatrecht*, 1995, No. 231.

[26]CLOUT case No. 49 [Oberlandesgericht Düsseldorf, Germany 2 July 1993].

[27]Cour d'appel Grenoble, 23 October 1993, *Revue critique de droit international privé*, 1997, 756.

[28]Oberster Gerichtshof, Austria, 29 June 1999, *Transportrecht-Internationales Handelsrecht*, 1999, 48.

[29]CLOUT case No. 312 [Cour d'appel Paris, France, 14 January 1998].

[30]Landgericht Berlin, Germany, 24 March 1998, published on the Internet at http://www.unilex.info/case.cfm?pid=1&do=case&id=440&step=FullText.

[31]See CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000]; CLOUT case No. 380 [Tribunale di Pavia, Italy, 29 December 1999]; CLOUT case No. 196 [Handelsgericht des Kantons Zürich, Switzerland, 26 April 1995] (see full text of the decision); CLOUT case No. 97 [Handelsgericht des Kantons Zürich, Switzerland, 9 September 1993].

[32]See CLOUT case No. 97 [Handelsgericht des Kantons Zürich, Switzerland, 9 September 1993].

[33]CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000]; Bundesgerichtshof, Germany, 9 January 2002, Unilex; CLOUT case No. 380 [Tribunale di Pavia, Italy, 29 December 1999].

[34]For references to this principle, see CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000]; Landgericht Frankfurt, 6 July 1994, published on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/; CLOUT case No. 107 [Oberlandesgericht Innsbruck, Austria, 1 July 1994] (see full text of the decision).

[35]See CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000].

[36]See CLOUT case No. 261 [Berzirksgericht der Sanne, Switzerland, 20 February 1997]; CLOUT case No. 103 [Arbitration-International Chamber of Commerce no. 6653 1993]; in one case, a state court referred to the problem of whether the Convention is based upon a particular general principle in respect of the issue of burden of proof or whether the issue is one not governed by the Convention, but left the issue open; see CLOUT case No. 253 [Cantone del Ticino Tribunale d'appello, Switzerland, 15 January 1998].

[37]CLOUT case No. 424 [Oberster Gerichtshof, Austria, 9 March 2000], also published on the Internet at http://www.cisg.at/6_31199z.htm; CLOUT cases Nos. 93 [Arbitration—Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft - Wien, 15 June 1994] and 94 [Arbitration-Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft - Wien, 15 June 1994].

[38]CLOUT case No. 424 [Oberster Gerichtshof, Austria, 9 March 2000], also published on the Internet at http://www.cisg.at/6_31199z.htm.

[39]See Compromex Arbitration, Mexico, 29 April 1996, published on the Internet at http://www.unilex.info/case.cfm?pid=1&do=case&id=258&step=FullText and http://www.uc3m.es/cisg/rmexi2.htm.

[40]Oberster Gerichtshof, Austria, 29 June 1999, *Zeitschrift für Rechtsvergleichung*, 2000, 33.

[41]CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (see full text of the decision).

[42]Landgericht Stuttgart, Germany, 13 August 1991, published on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/33.htm (according to the contract the notice of non-conformity had to be by registered letter. The court held that that meant that the notice had to be received by the other party. Moreover, the declaring party had also to prove that the notice had been received by the other party). See also CLOUT case No. 305 [Oberster Gerichtshof, Austria, 30 June 1998].

[43]Landgericht Zwickau, 19 March 1999, published on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/519.htm; ICC Court of Arbitration, award No. 8817, published on the Internet at http://www.unilex.info/case.cfm?pid=1&do=case&id=398&step=FullText; see also CLOUT case No. 608 [Trib. Rimini, Italy, 26 November 2002], also in *Giurisprudenza italiana*, 2003, 896 ff.

[44]Rechtbank Koophandel Ieper, Belgium, 29 January 2001, published on the Internet at http://www.law.kuleuven.ac.be/int/tradelaw/WK/2001-01-29.htm.

[45]CLOUT case No. 348 [Oberlandesgericht Hamburg, Germany, 26 November 1999].

[46]See CLOUT case No. 605 [Oberster Gerichtshof, 22 October 2001], also in *Internationales Handelsrecht*, 2002, 27; CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (see full text of the decision); CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000], in *Internationales Handelsrecht*, 2001, 114 f.; CLOUT case No. 232 [Oberlandesgericht München, Germany, 11 March 1998]; CLOUT case No. 259 [Kantonsgericht Freiburg, Switzerland, 23 January 1998]; Landgericht Hagen, Germany, 15 October 1997, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/; Landgericht München, Germany, 6 May 1997, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/341.htm; CLOUT case No. 275 [Oberlandesgericht Düsseldorf, Germany, 24 April 1997] (see full text of the decision); CLOUT case No. 169 [Oberlandesgericht Düsseldorf, Germany, 11 July 1996] (see full text of the decision); Landgericht Duisburg, Germany, 17 April 1996, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/; CLOUT case No. 289 [Oberlandesgericht Stuttgart, Germany, 21 August 1995]; Landgericht München, Germany, 20 March 1995, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/164.htm; Rechtbank Middelburg, Netherlands, 25 January 1995, *Nederlands Internationaal Privaatrecht*, 1996, No. 127; Amtsgericht Mayen, Germany, 19 September 1994, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/; CLOUT case No. 281 [Oberlandesgericht Koblenz, Germany, 17 September 1993]; CLOUT case No. 125 [Oberlandesgericht Hamm, Germany, 9 June 1995]; Rechtbank Roermond, Netherlands, 6 May 1993, Unilex; CLOUT case No. 99 [Rechtbank Arnhem, Netherlands, 25 February 1993].

[47]ICC Court of Arbitration, award No. 8908, published on the Internet at http://www.unilex.info/case.cfm?pid=1&do=case&id=401&step=FullText.

[48]CLOUT case No. 217 [Handelsgericht des Kantons Aargau, Switzerland, 26 September 1997] (see full text of the decision); CLOUT case No. 80 [Kammergericht Berlin, Germany, 24 January 1994] (see full text of the decision); CLOUT case No. 56 [Canton of Ticino Pretore di Locarno Campagna, Switzerland, 27 April 1992] (see full text of the decision).

[49]Arbitral Tribunal at the Bulgarian Chamber of Commerce and Industry, award No. 11/1996, published on the Internet at http://www.unilex.info/case.cfm?pid=1&do=case&id=420&step=FullText; Landgericht Zwickau, Germany, 19 March 1999, published on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/519.htm.

[50]CLOUT case No. 248 [Schweizerisches Bundesgericht, Switzerland, 28 October 1998] (see full text of the decision).

[51]CLOUT case No. 428 [Oberster Gerichtshof, Austria, 7 September 2000], also published on the Internet at http://www.cisg.at/8_2200v.htm.

[52]See the Digest for art. 40, para. 11.

[53]CLOUT case No. 237 [Arbitration—Arbitration Institute of the Stockholm Chamber of Commerce, 5 June 1998] (see full text of the decision).

[54]Article 35 (3) provides that a seller is not liable for a lack of conformity under Article 35 (2) "if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity".

[55]CLOUT case No. 168 [Oberlandesgericht Köln, Germany, 21 March 1996].

[56]See ICC Court of Arbitration, award No. 8128, published on the Internet at http://www.unilex.info/case.cfm?pid=1&do=case&id=207&step=FullText.

[57]ICC Court of Arbitration, March 1998, award No. 9117, published on the Internet at http://www.unilex.info/case.cfm?pid=1&do=case&id=399&step=FullText; ICC Court of Arbitration, award No. 8817, published on the Internet at http://www.unilex.info/case.cfm?pid=1&do=case&id=398&step=FullText.

[58]CLOUT case No. 205 [Cour d'appel Grenoble, France, 23 October 1996] (see full text of the decision).

[59]See Rechtbank Zwolle, Netherlands, 5 March 1997, published on the Internet at http://www.unilex.info/case.cfm?pid=1&do=case&id=332&step=FullText.

Article 8

1. For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

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

3. In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

INTRODUCTION

1. Whereas article 7 addresses interpretation of and gap-filling for the Convention itself, article 8 (which according to one arbitral tribunal states rules that correspond to principles generally accepted in international commerce[1]) is concerned with the interpretation of statements and other conduct of *the parties*—provided (as expressly pointed out by the Supreme Court of one Contracting State) that the statements or conduct relate to a matter governed by the Convention.[2] Therefore, whenever a party's statement or conduct relates to a matter governed by the Convention, the interpretative criteria set forth in article 8 are to be used, whether the statements or conduct relate to matters governed by Part II (on "Formation") or Part III (on "Rights and Obligations of the Parties"). This view, supported by legislative history,[3] has been adopted in decisions: courts have resorted to the criteria set forth in article 8 to interpret statements and conduct relating to the process of formation of contract,[4] the performance of the contract,[5] and its avoidance.[6]

2. Where article 8 applies, it precludes application of domestic interpretative rules because article 8 exhaustively addresses the issue of interpretation.[7]

3. According to both legislative history[8] and case law,[9] article 8 governs not only the interpretation of unilateral acts of each party but also "is equally applicable to the interpretation of 'the contract', when the document is embodied in a single document".[10]

SUBJECTIVE INTENT OF THE PARTY (ARTICLE 8, PARAGRAPH 1)

4. Paragraphs 1 and 2 of article 8 set forth two sets of criteria. According to one court,[11] article 8 (1) permits "a substantial inquiry into the parties' subjective intent, even if the parties did not engage in any objectively ascertainable means of registering this intent". Article 8 (1) "instructs courts to interpret the 'statements ... and other conduct of a party ... according to his intent' as long as the other party 'knew or could not have been unaware' of that intent. The plain language of the Convention, therefore, requires an inquiry into a party's subjective intent as long as the other party to the contract was aware of that intent"[12] or could not have been unaware of it.[13]

5. A party that asserts article 8 (1) applies—i.e., that the other party knew or could not have been unaware of the former party's intent—must prove that assertion.[14]

6. The subjective intent of a party is irrelevant unless it is manifested in some fashion; this is the rationale behind one court's statement that "the intent that one party secretly had, is irrelevant".[15]

7. Under article 8, courts must first attempt to establish the meaning of a party's statement or conduct by looking to the intent of that party, as an arbitral tribunal has emphasized[16]; however, "most cases will not present a situation in which both parties to the contract acknowledge a subjective intent [...]. In most cases, therefore, article 8 (2) of the [Convention] will apply, and objective evidence will provide the basis for the court's decision."[17] According to one arbitral tribunal, application of article 8 (1) requires either that the parties have a close relationship and know each other well, or that the import of the statements or conduct was clear and easily understood by the other party.[18]

OBJECTIVE INTERPRETATION

8. Where it is not possible to use the subjective intent standard in article 8 (1) to interpret a party's statements or conduct, one must resort to "a more objective analysis"[19] as provided for in article 8 (2).[20] Under this provision, statements and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the

same circumstances.[21] One court has characterized the result of an interpretation based on this criterion as a “reasonable interpretation”.[22]

9. Article 8 (2) has been applied in a variety of decisions. In one case, a court inferred a buyer’s intention to be bound to a contract, as well as the quantity of goods that the buyer intended to acquire under that contract, by interpreting the buyer’s statements and conduct according to the understanding that a reasonable person of the same kind as the seller would have had in the same circumstances.[23] The court found that, absent any relevant circumstance or practice between the parties at the time the contract was concluded (which must always be taken into account), the buyer’s intention to be bound, as well as a definite quantity of goods to be sold under the contract, could be deduced from the buyer’s request to the seller to issue an invoice for goods that had already been delivered.

10. Article 14 (1) of the Convention provides that a proposal for concluding a contract must be sufficiently definite in order to constitute an offer, and that it is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price. One court has stated that, in determining whether a proposal satisfies this standard, it is sufficient if the required content would be perceived in the proposal by “‘a reasonable person of the same kind’ as the other party (offeree) . . . ‘in the same circumstances’”.[24]

11. In determining the quality of the goods required by the parties’ agreement, one Supreme Court has stated that, since the parties had a different understanding of the meaning of the contract, the contract language should be interpreted under article 8 (2)—i.e., “according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances”. The court noted that the buyer was an expert and knew that it had not been offered a new machine, but instead one built fourteen years prior to the conclusion of the contract. Although the goods did not conform to the latest technical standards, the Supreme Court reasoned that, under the standard of article 8 (2), the buyer concluded the contract with full knowledge of the technical limitations of the machinery and its accessories. For these reasons, the Supreme Court found that the machine tendered to the buyer conformed with the contract.[25]

12. Another court applied article 8 (2) to determine whether a contract permitted the buyer to satisfy its obligation for the price of goods by offering, after the payment period specified in the contract had expired, to ship its own goods to the seller. Looking first to the language of the contract and then to the interpretation suggested by the parties’ interests in the contract, the court found that the buyer was required to satisfy its obligations by the end of the contractual payment period: “the [buyer] could not have been unaware that it would have been commercially unreasonable for the [seller] to grant a respite in payment beyond the agreed period” merely because the buyer offered to ship goods to satisfy its payment obligations.[26]

13. Article 8 (2) has also been used to determine whether a seller had implicitly waived, through its behaviour, its right to argue that the buyer’s notice of lack of conformity in the goods was not timely (see article 39).[27] The fact that the seller negotiated with the buyer over the lack of conformity after receiving the notice, the court stated, did not necessarily waive the late-notice argument, but should instead be evaluated in conjunction with the other circumstances of the case. In the case at hand, however, the seller “negotiated over the amount and manner of a settlement of damages for practically 15 months—[...] without expressly or at least discernibly reserving the objection to the delay” and even “offered through legal counsel to pay compensatory damages that amount to practically seven times the value of the goods”.[28] In such circumstances, the court stated, “the [buyer] could only reasonably understand that the [seller] was seeking a settlement of the affair and would not later refer to the allegedly passed deadline as a defence to the [buyer’s] reimbursement claim”. Thus under article 8 (2) and article 8 (3), the court held, the seller had waived its right to rely on the untimeliness of the notice. Another court has stated that a waiver of the seller’s right to argue that the buyer’s notice of non-conformity was untimely cannot be assumed merely because the seller remained willing to inspect the goods at the buyer’s request.[29] This follows, the court suggested, both from the need for certainty in commercial transactions and from the principle of good faith, which also applies when interpreting the parties’ statements or other conduct.

14. One court employed article 8 (2) to interpret a “franco domicile” provision in a contract, finding that the clause addressed not only the cost of transport but also the passing of risk. The court interpreted the provision in line with the understanding that a reasonable person would have had in the same circumstances as those of the parties. In the court’s view, a buyer entitled to delivery of goods “franco domicile” would not be concerned with transporting the goods or with insurance on them during carriage. The fact that the seller obtained transport insurance, the court argued, also indicated that the seller was prepared to take the risk during carriage, as did the fact that that it had used its own means of transport in previous transactions with the buyer. The court therefore concluded that the parties intended to provide for the passage of risk at the buyer’s place of business, and accordingly to deviate from article 31 *(a)* CISG.[30]

15. Another court invoked article 8 (2) to determine whether the conduct of a party established that an agreement as to the purchase price had been reached.[31] The buyer took delivery of the goods without contesting the price specified by the seller. The court, applying article 8 (2), interpreted this conduct as acceptance of the seller’s price.

16. The interpretive standard in article 8 (2) has also been applied in determining whether a loss suffered by the aggrieved party should be considered foreseeable under article 74 of the Convention.[32]

CONSIDERATIONS RELEVANT IN INTERPRETING STATEMENTS OR OTHER CONDUCT OF A PARTY

17. According to article 8 (3), in determining a party’s intent or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case. Such circumstances specifically

include[33] the negotiations, any practices which the parties have established between themselves, usages, and any subsequent conduct of the parties.[34] Several decisions[35] have noted that these criteria should be taken into account when interpreting a statement or other conduct under the standards of either article 8 (1)[36] or article 8 (2).[37]

18. The express reference in article 8 (3) to the parties' negotiations as an element to be taken into account in interpreting their statements or other conduct did not prevent one court from indicating that the "parol evidence rule" applies in transactions governed by the Convention.[38] This rule, which despite its name applies to both parol and written evidence, seeks to give legal effect to the contracting parties' intentions if they have adopted a written agreement as the final (a "partial integration"), or even final and complete (a "complete integration"), expression of their agreement. If the written agreement is determined to be a complete integration, the parol evidence rule prohibits a party from introducing evidence of prior agreements or negotiations that would contradict, or even would add consistent additional terms to, the writing. Decisions by other courts in the same State take a contrary position.[39] One of those courts[40] stated that "the parol evidence rule is not viable in CISG cases in light of article 8 of the Convention"[41] because "article 8 (3) expressly directs courts to give 'due consideration [...] to all relevant circumstances of the case including the negotiations' to determine the intent of the parties. Given article 8 (1)'s directive to use the intent of the parties to interpret their statements and conduct, article 8 (3) is a clear instruction to admit and consider parol evidence regarding the negotiations to the extent they reveal the parties' subjective intent". According to another court, article 8 (3) "essentially rejects [...] the parol evidence rule".[42] Yet another court stated that "contracts governed by the CISG are freed from the limits of the parol evidence rule and there is a wider spectrum of admissible evidence to consider in construing the terms of the parties' agreement".[43]

19. After pointing out the problems that may arise under the Convention with respect to parol evidence, a court has stated that the parties can avoid such problems by including in their written agreement a merger clause that extinguishes prior agreements and understandings not expressed in the writing.[44]

20. As several courts have pointed out[45], subsequent conduct by the parties may show what a statement was intended to mean when it was made. In one case,[46] a court referred to a buyer's subsequent conduct to infer an intention to be bound to a contract, as well as to determine the quantity of goods covered by that contract, under the interpretive approach in article 8 (2) (i.e., the understanding that a reasonable person of the same kind as the seller would have had in the same circumstances). The court held that, absent any relevant contrary circumstance or practice between the parties, a party's intention to be bound could be shown by its conduct after the conclusion of the contract. In particular, it held that the buyer's request to the seller to issue an invoice for textiles the seller had delivered to a third party (as contemplated by the parties' arrangement) was sufficient evidence of the buyer's intention to be bound. The fact that the buyer delayed two months before complaining about the quantity of goods delivered to the third party, furthermore, gave the court good grounds to conclude that the contract covered that quantity.

21. According to one court, reference to the circumstances listed in article 8 (3) may lead to the conclusion that a party's silence amounted to acceptance of an offer.[47]

22. In addition to the elements expressly catalogued in article 8 (3), the good faith principle referred to in article 7 (1) (where it is mentioned as pertinent to the interpretation of the Convention itself) must also, according to one court, be taken into account in interpreting statements or other conduct of the parties.[48]

STANDARD CONTRACT TERMS AND THE LANGUAGE OF STATEMENTS

23. Article 8 has also been invoked in addressing the question whether standard contract terms employed by one party became part of a contract. In one case,[49] the Supreme Court of a Contracting State held that the question was governed by the Convention's rules on interpretation rather than by domestic law. Citing article 8 of the Convention, the court stated that whether a party's standard contract terms are part of its offer must be determined by reference to how a "reasonable person of the same kind as the other party" would have understood the offer; under this criterion, the court asserted, standard terms become part of an offer only if the offeree is able "to become aware of them in a reasonable manner," and if the intention to incorporate such terms is "apparent to the recipient of the offer". In addition, according to the court, the Convention "requires the user of general terms and conditions to transmit the text or make it available to the other party".[50]

24. In reaching similar conclusions regarding the incorporation of standard terms under the Convention, another court also addressed the issue of the language in which the standard terms are expressed.[51] The court stated that incorporation of standard terms must be determined by interpreting the contract in light of article 8. To be effective, the court averred, a reference by one party to its standard terms must be sufficient to put a reasonable person of the same kind as the other party in a position to understand the reference and to gain knowledge of the standard terms. According to the court, one relevant circumstance is the language in which the standard terms are written. In the case before the court, the seller's standard contract terms were not in the language of the contract, and the court asserted that the seller should have given the buyer a translation. Because the seller had not done so, its standard contract terms did not become part of the contract. A similar approach was adopted by another court, which stated that standard contract terms written in a language different from that of the contract do not bind the other party.[52]

25. The language issue was also dealt with in another decision[53] in which the court held that a case-by-case approach must be employed in determining the effectiveness of a notice written in a language other than the language in which the contract was made or the language of the addressee. Under article 8 (2) and article 8 (3), the court asserted, the question must be evaluated from the

perspective of a reasonable person, giving due consideration to usages and practices observed in international trade. The mere fact that a notice was in a language that was neither that of the contract nor that of the addressee did not necessarily prevent the notice from being effective: the notice language might be one normally used in the pertinent trade sector, and thus potentially binding on the parties under article 9; or, as in the case before the court, the recipient might reasonably have been expected to request from the sender explanations or a translation.

26. Another court[54] has held that, if a party accepts statements relating to the contract in a language different from the one used for the contract, the party is bound by the contents of such statements; it is the party's responsibility to acquaint itself with those contents.

Notes

[1]CLOUT case No. 303 [Arbitration-International Chamber of Commerce no. 7331 1994] (see full text of the decision).

[2]See Oberster Gerichtshof, 24 April 1997, published on the Internet at http://www.cisg.at/2_10997m.htm.

[3]United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980, Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee, 1981, 18, stating that "Article [8] on interpretation furnishes the rules to be followed in interpreting the meaning of any statement or other conduct of a party which falls within the scope of application of this Convention. Interpretation of the statements or conduct of a party may be necessary to determine whether a contract has been concluded, the meaning of the contract, or the significance of a notice given or other act of a party in the performance of the contract or in respect of its termination".

[4]See CLOUT case No. 429 [Oberlandesgericht Frankfurt, Germany, 30 August 2000], also published on the Internet at http://cisgw3.law.pace.edu/cisg/text/000830g1german.html; CLOUT case No. 424 [Oberster Gerichtshof, Austria, 9 March 2000], also published on the Internet at http://www.cisg.at/6_31199z.htm; Landgericht Zwickau, Germany, 19 March 1999, published on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/519.htm; CLOUT case No. 189, Austria, 1997; CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996]; CLOUT case No. 334 [Obergericht des Kantons Thurgau, Switzerland, 19 December 1995]; CLOUT case No. 330 [Handelsgericht des Kantons St. Gallen, Switzerland, 5 December 1995] (see full text of the decision); CLOUT case No. Vibracoes106 [Oberster Gerichtshof, Austria, 10 November 1994].

[5]CLOUT case No. 270 [Bundesgerichtshof, Germany, 25 November 1998] (dealing with the issue of whether the offer to pay damages on the seller's part constitutes a waiver of the seller's right to rely on articles 38 and 39).

[6]CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997] (dealing with the issue of whether a certain conduct amounted to avoidance of the contract) (see full text of the decision).

[7]CLOUT case No. 5 [Landgericht Hamburg, Germany, 26 September 1990] (see full text of the decision).

[8]United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980, Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee, 1981, 18.

[9]CLOUT case No. 303 [Arbitration-International Chamber of Commerce no. 7331 1994] (see full text of the decision).

[10]United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980, Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee, 1981, 18; see Bundesgericht, Switzerland, 22 December 2000, published on the Internet at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/001222s1.html.

[11]CLOUT case No. 222 [Federal Court of Appeals for the Eleventh Circuit, United States, 29 June 1998].

[12]CLOUT case No. 222 [Federal Court of Appeals for the Eleventh Circuit, United States, 29 June 1998] (internal citation in quoted material omitted) (see full text of the decision); for other cases in which the part of article 8 (1) referred to in the text was cited, see CLOUT case No. 313 [Cour d'appel Grenoble, France, 21 October 1999] (see full text of the decision); CLOUT case No. 268 [Bundesgerichtshof, Germany, 11 December 1996]. For an express reference to the "subjective" interpretation, see CLOUT case No. 429 [Oberlandesgericht Frankfurt, Germany, 30 August 2000], also published on the Internet at http://cisgw3.law.pace.edu/cisg/text/000830g1german.html.

[13]For references to this part of article 8, paragraph 1, see CLOUT case No. 215 [Bezirksgericht St. Gallen, Switzerland, 3 July 1997] (see full text of the decision).

[14]CLOUT case No. 215 [Bezirksgericht St. Gallen, Switzerland, 3 July 1997] (see full text of the decision).

[15]CLOUT case No. 5 [Landgericht Hamburg, Germany, 26 September 1990] (see full text of the decision).

[16]ICC Court of Arbitration, award No. 8324, published on the Internet at http://www.unilex.info/case.cfm?pid=1&do=case&id=240&step=FullText.

[17]CLOUT case No. 222 [Federal Court of Appeals for the Eleventh Circuit United States, 29 June 1998] (see full text of the decision).

[18]ICC Court of Arbitration, award No. 8324, published on the Internet at http://www.unilex.info/case.cfm?pid=1&do=case&id=240&step=FullText.

[19]Id.; for other cases that refer expressly to interpretation under article 8 (2) as being on a more "objective" basis, see CLOUT case No. 607 [Oberlandesgericht Köln, 16 July 2001], also published on the Internet at http://www.cisg.law.pace.edu/cisg/text/010716g1german.html; Bundesgericht, Switzerland, 22 December 2000, published on the Internet at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/001222s1.html; CLOUT case No. 429 [Oberlandesgericht Frankfurt, Germany, 30 August 2000], also published on the Internet at http://cisgw3.law.pace.edu/cisg/text/000830g1german.html; CLOUT case No. 222 [Federal Court of Appeals for the Eleventh Circuit,

United States, 29 June 1998] (see full text of the decision); Hoge Raad, Netherlands, 7 November 1997, published on the Internet at http://www.unilex.info/case.cfm?pid=1&do=case&id=333&step=FullText; CLOUT case No. 409 [Landgericht Kassel, Germany, 15 February 1996], also published on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/190.htm.

[20]It may well be that neither article 8 (1) nor article 8 (2) leads to an interpretation wanted by a party: see Hoge Raad, Netherlands, 7 November 1997, published on the Internet at http://www.unilex.info/case.cfm?pid=1&do=case&id=333&step=FullText.

[21]Landgericht Zwickau, Germany, 19 March 1999, published on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/519.htm; CLOUT case No. 189 [Oberster Gerichtshof, Austria, 20 March 1997]; Hoge Raad, Netherlands, 7 November 1997, published on the Internet at http://www.unilex.info/case.cfm?pid=1&do=case&id=333&step=FullText; CLOUT case No. 215 [Bezirksgericht St. Gallen Switzerland 3 July 1997] (see full text of the decision); CLOUT case No. 166 [Arbitration - Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996] (see full text of the decision); Arbitration Court of the Chamber of Commerce and Industry of Budapest, Arbitration, award No. Vb 94124, published on the Internet at http://www.unilex.info/case.cfm?pid=1&do=case&id=217&step=FullText; CLOUT case No. 308 [Federal Court of Australia 28 April 1995] (see full text of the decision); CLOUT case No. 106 [Oberster Gerichtshof, Austria, 10 November 1994].

[22]CLOUT case No. 273 [Oberlandesgericht München, Germany, 9 July 1997].

[23]CLOUT case No. 215 [Bezirksgericht St. Gallen, Switzerland, 3 July 1997] (see full text of the decision).

[24]CLOUT case No. 106 [Oberster Gerichtshof, Austria, 10 November 1994].

[25]Bundesgericht, Switzerland, 22 December 2000, published on the Internet at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/001222s1.html.

[26]Oberlandesgericht Dresden, Germany, 27 December 1999, published on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/511.htm (internal citations to Convention omitted).

[27]CLOUT case No. 270 [Bundesgerichtshof, Germany, 25 November 1998].

[28]*Id*. (internal citations to Convention omitted) (see full text of the decision).

[29]CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998] (see full text of the decision).

[30]CLOUT case No. 317 [Oberlandesgericht Karlsruhe, Germany, 20 November 1992].

[31]CLOUT case No. 151 [Cour d'appel Grenoble, France, 26 February 1995].

[32]CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002], also published on the Internet at http://131.152.131.200/cisg/urteile/643.htm.

[33]According to the *Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980* (United Nations publication, Sales No. E.81.IV.3), 18, the list to be found in article 8, paragraph 3 is not an exhaustive list of elements to be taken into account in interpreting statements or other conduct by the parties.

[34]For references to article 8, paragraph 3, see CLOUT case No. 215 [Bezirksgericht St. Gallen, Switzerland, 3 July 1997]; CLOUT case No. 106 [Oberster Gerichtshof, Austria, 10 November 1994].

[35]In arbitration, see ICC Court of Arbitration, award No. 8324/1995, published on the Internet at http://www.unilex.info/case.cfm?pid=1&do=case&id=240&step=FullText.

[36]CLOUT case No. 268 [Bundesgerichtshof, Germany, 11 December 1996], expressly stating that the elements referred to in article 8, paragraph 3 have to be taken into account when interpreting a statement or other conduct by a party in the light of article 8, paragraph 1 (see full text of the decision).

[37]CLOUT case No. 106 [Oberster Gerichtshof, Austria, 10 November 1994].

[38]CLOUT case No. 24 [Federal Court of Appeals for the Fifth Circuit, United States, 15 June 1993].

[39]See CLOUT case No. 222 [Federal Court of Appeals for the Eleventh Circuit, United States, 29 June 1998]; CLOUT case No. 578 [Federal Western District Court for Michigan, United States of America, 17 December 2001] also in 2001 Westlaw 34046276 (*Shuttle Packaging Systems v. Tsonakis*), and on the Internet at http://cisgw3.law.pace.edu/cases/011217u1.html; CLOUT case No. 419 [Federal District Court, Northern District of Illinois, United States, 27 October 1998].

[40]CLOUT case No. 222 [Federal Court of Appeals for the Eleventh Circuit, United States, 29 June 1998].

[41]Id. (see full text of the decision).

[42]CLOUT case No. 23 [Federal District Court, Southern District of New York, United States, 14 April 1992] (see full text of the decision).

[43]CLOUT case No. 413 [Federal District Court, Southern District of New York, United States, 6 April 1998] (see full text of the decision).

[44]CLOUT case No. 222 [Federal Court of Appeals for the Eleventh Circuit, United States, 29 June 1998] (see full text of the decision).

[45]CLOUT case No. 215 [Bezirksgericht St. Gallen, Switzerland, 3 July 1997]; CLOUT case No. 5 [Landgericht Hamburg, Germany, 26 September 1990] (see full text of the decision).

[46]CLOUT case No. 215 [Bezirksgericht St. Gallen, Switzerland, 3 July 1997] (see full text of the decision).

[47]CLOUT case No. 23 [Federal District Court, Southern District of New York, United States, 14 April 1992].

[48]CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998] (see full text of the decision); Arbitral Tribunal of the Hamburg Chamber of Commerce, Arbitration, 21 June 1996, published on the Internet at http://www.unilex.info/case.cfm?pid=1&do=case&id=196&step=FullText.

[49]CLOUT case 445 [Bundesgerichtshof, Germany, 31 October 2001], also published on the Internet at http://www.unilex.info/case.cfm?pid=1&do=case&id=736&step=Abstract.

[50]Id.

[51]See CLOUT case No. 345 [Landgericht Heilbronn, Germany, 15 September 1997].

[52]Rechtbank Koophandel Hasselt, Belgium, 2 June 1999, published on the Internet at http://www.law.kuleuven.ac.be/int/tradelaw/WK/1999-06-02.htm.

[53]CLOUT case No. 132 [Oberlandesgericht Hamm, Germany, 8 February 1995].

[54]CLOUT case No. 409 [Landgericht Kassel, Germany, 15 February 1996], also published on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/190.htm.

Article 9

1. The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

2. The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

INTRODUCTION

1. This provision describes the extent to which parties to an international sales contract governed by the CISG are bound by usages, as well as by practices that the parties have established between themselves.[1] Usages to which the parties have "agreed", along with practices that the parties have established, are covered by article 9 (1); usages that the parties "have impliedly made applicable to their contract" are addressed in article 9 (2).

2. The validity of usages is outside the Convention's scope;[2] the Convention addresses only their applicability.[3] As a consequence, the validity of usages is governed by applicable domestic law.[4] If a usage is valid, it prevails over the provisions of the Convention, regardless of whether the usage is governed by article 9 (1) or by article 9 (2).[5]

USAGES AGREED TO AND PRACTICES ESTABLISHED BETWEEN THE PARTIES

3. Under article 9 (1), the parties are bound by any usage to which they have agreed. Such an agreement need not be explicit,[6] but—as one court has stated[7]—may be implicit.

4. According to the same court, article 9 (1)—unlike article 9(2)—does not require that a usage be internationally accepted in order to be binding; thus the parties are bound by local usages to which they have agreed as much as by international usages.[8] The same court (in a different case) has stated that usages need not be widely known in order to be binding under article 9 (1) (as opposed to article 9 (2)).[9]

5. According to article 9 (1), the parties are also bound by practices established between themselves—a principle that, according to one arbitral tribunal, "was extended to all international commercial contracts by the UNIDROIT Principles".[10] Article 1.9 (1) of those Principles provides that "the parties are bound by any usage to which they have agreed and by any practices which they have established between themselves."

6. Several decisions provide examples of practices binding under article 9 (1). An arbitral panel has found that a seller was required to deliver replacement parts promptly because that had become "normal practice" between the parties.[11] In another case, an Italian seller had been filling the buyer's orders for many months without inquiring into the buyer's solvency; thereafter, the seller assigned its foreign receivables to a factor and, because the factor did not accept the buyer's account, the seller suspended its business relationship with the buyer; a court held that, based on a practice established between the parties, the seller was required to take the buyer's interest into account in restructuring its business, and thus the seller was liable for abruptly discontinuing its relationship with the buyer.[12] In a different decision, the same court ruled that a seller could not invoke the rule in CISG article 18 which provides that silence does not amount to acceptance because the parties had established a practice in which the seller filled the buyer's orders without expressly accepting them.[13]

7. The Convention does not define when practices become "established between the parties". According to some courts, a practice is binding on the parties pursuant to article 9 (1) only if the parties' relationship has lasted for some time and the practice has appeared in multiple contracts. One court asserted that article 9 (1) "would require a conduct regularly observed between the parties […] [of] a certain duration and frequency [...]. Such duration and frequency does not exist where only two previous deliveries have been handled in that manner. The absolute number is too low".[14] Another court dismissed a seller's argument that reference on two of its invoices to the seller's bank account established a practice between the parties requiring the buyer to pay at the seller's bank. The court held that, even if the invoices arose from two different contracts between the parties, they were insufficient to establish a practice under article 9 (1) of the Convention. According to the court, an established practice requires a long lasting relationship involving more contracts of sale.[15] Another court has stated that one prior transaction between the parties did not establish "practices" in the sense of article 9 (1).[16] According to a different court, however, "[i]t is generally possible that intentions of one party, which are expressed in preliminary business conversations only and which are not expressly agreed upon by the parties, can become "practices" in the sense of article 9 of the Convention already at the beginning of a business relationship and

thereby become part of the first contract between the parties. This, however, requires at least (article 8) that the business partner realizes from these circumstances that the other party is only willing to enter into a contract under certain conditions or in a certain form".[17]

8. Several courts have stated that the party alleging the existence of a binding practice or usage bears the burden of proving that the requirements of article 9 (1) are met.[18]

BINDING INTERNATIONAL TRADE USAGES (Article 9 (2))

9. By virtue of article 9 (2), parties to an international sales contract may be bound by a trade usage even in the absence of an affirmative agreement thereto, provided the parties "knew or ought to have known" of the usage and the usage is one that, in international trade, "is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned." One court has construed article 9 (2) as providing that "the usages and practices of the parties or the industry are automatically incorporated into any agreement governed by the Convention, unless expressly excluded by the parties".[19]

10. Usages that are binding on the parties pursuant to article 9 (2) prevail over conflicting provisions of the Convention.[20] On the other hand, contract clauses prevail over conflicting usages, even if the usages satisfy the requirements of article 9 (2), because party autonomy is the primary source of rights and obligations under the Convention, as the introductory language of article 9 (2) confirms.[21]

11. As noted in paragraph 9 of this Digest, to be binding under article 9 (2) a usage must be known by (or be one that ought to have been known to) the parties, and must be widely known and regularly observed in international trade. According to one court this does not require that a usage be international: local usages applied within commodity exchanges, fairs and warehouses may be binding under article 9 (2) provided they are regularly observed with respect to transactions involving foreign parties.[22] The court also stated that a local usage observed only in a particular country may apply to a contract involving a foreign party if the foreign party regularly conducts business in that country and has there engaged in multiple transactions of the same type as the contract at issue.

12. The requirement that the parties knew or ought to have known of a usage before it will be binding under article 9 (2) has been described as requiring that the parties either have places of business in the geographical area where the usage is established or continuously transact business within that area for a considerable period.[23] According to an earlier decision by the same court, a party to an international sales contract need be familiar only with those international trade usages that are commonly known to and regularly observed by parties to contracts of the same specific type in the specific geographic area where the party has its place of business.[24]

13. There is no difference in the allocation of burden of proof under article 9 (1) and (2):[25] the party that alleges the existence of a binding usage has to prove the required elements, at least in those legal systems that consider the issue one of fact.[26] If the party that bears the burden fails to carry it, an alleged usage is not binding. Thus where a buyer failed to prove the existence of an international trade usage to treat a party's silence after receiving a commercial letter of confirmation as consent to the terms in the letter, a contract was found to have been concluded on different terms.[27] In another case, a party's failure to prove an alleged usage that would have permitted the court to hear the party's claim led the court to conclude that it lacked jurisdiction.[28] Similarly, a court has held that, although the Convention's rules on concluding a contract (articles 14-24) can be modified by usages, those rules remained applicable because no such usage had been proven.[29] Where a buyer failed to prove a trade usage setting the place of performance in the buyer's country, furthermore, the place of performance was held to be in the seller's State.[30] And the European Court of Justice has stated that, in order for silence in response to a letter of confirmation to constitute acceptance of the terms contained therein, "it is necessary to prove the existence of such a usage on the basis of the criteria set out" in article 9 (2) of the Convention.[31]

14. There are several examples of fora finding that the parties are bound by a usage pursuant to article 9 (2). In one case, an arbitral tribunal held that a usage to adjust the sales price was regularly observed by parties to similar contracts in the particular trade concerned (minerals).[32] In another decision, a court held that a bill of exchange given by the buyer had resulted in a modification of the contract, pursuant to article 29 (1) of the Convention, which postponed the date of payment until the date the bill of exchange was due;[33] the court indicated that an international trade usage binding under article 9 (2) supported its holding. In yet another case, a court stated that there was a usage in the particular trade concerned which required the buyer to give the seller an opportunity to be present when the buyer examined the goods.[34]

15. Several decisions have referred to usages when addressing the question of the interest rate to be applied to late payments. One court has twice invoked international usages binding under article 9 (2) of the Convention to solve the issue. In the first decision, the court stated that payment of interest "at an internationally known and used rate such as the Prime Rate" constituted "an accepted usage in international trade, even when it is not expressly agreed between the parties".[35] In the second decision, the court adopted the same position and commented that the "Convention attributes [to international trade usages] a hierarchical position higher than that of the provisions of the Convention".[36]

LETTERS OF CONFIRMATION, INCOTERMS, AND THE UNIDROIT PRINCIPLES

16. Several cases have invoked article 9 in determining whether silence in response to a letter of confirmation signifies agreement to the terms contained in the letter. In response to an argument seeking recognition of a usage that such silence constituted consent to terms in a confirmation, one court stated that "[d]ue to the requirement of

internationality referred to in article 9 (2) CISG, it is not sufficient for the recognition of a certain trade usage if it is only valid in one of the two Contracting States. Therefore, [in order to bind the parties], the rules on commercial letters of confirmation would have to be recognized in both participating States and it would have to be concluded that both parties knew the consequences [...]. It is not sufficient that the trade usage pertaining to commercial letters of confirmation exists only at the location of the recipient of the letter […]".[37] Because the contractual effects of silence in response to a letter of confirmation were not recognized in the country of one party, the court found that the terms in the confirmation had not become part of the contract. Although the court noted that domestic doctrines attributing significance to silence in response to a confirmation had no relevance in the context of international sales law, the court nevertheless suggested that "a letter of confirmation can have considerable importance in the evaluation of the evidence". Another court noted that a letter of confirmation binds the parties only "if this form of contract formation can be qualified as commercial practice under article 9 of the Convention".[38] The court held that such a usage, binding under article 9 (2), existed in the case: both parties were located in countries in which "the contractual effect of commercial communications of confirmation" was recognized; furthermore, the "parties recognized the legal effects of such a communication" and for that reason should have expected that "they might be held to those legal effects".[39] Yet another court rejected the idea that domestic rules on the effects of silence in response to a letter of confirmation can be relevant when the Convention is applicable.[40]

17. One court has commented on the relationship between article 9 (2) and INCOTERMS.[41] After asserting that "INCOTERMS are incorporated into the Convention through article 9 (2)", the court stated that, pursuant to article 9 (2), "INCOTERMS definitions should be applied to the contract despite the lack of an explicit INCOTERMS reference in the contract." Thus by incorporating a "CIF" term in their contract, the court held, the parties intended to refer to the INCOTERMS definition thereof.[42] Similar statements occur in an arbitral award[43] and in a decision of a court in a different State.[44] In the latter decision, the court interpreted an FOB clause by referring to the INCOTERMS even though the parties had not expressly referenced the INCOTERMS.

18. One court has held that the UNIDROIT Principles of International Commercial Contracts constitute usages of the kind referred to in article 9 (2) of the Convention.[45] Similarly, an arbitral tribunal stated that the UNIDROIT Principles reflect international trade usages.[46]

Notes

[1]See also United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980, Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee, 1981, 19.

[2]CLOUT case No. 605 [Oberster Gerichtshof, Austria, 22 October 2001], also published on the Internet at http://www.cisg.at/1_4901i.htm.

[3]See CLOUT case No. 425 [Oberster Gerichtshof, Austria, 21 March 2000], also published on the Internet at http://www.cisg.at/10_34499g.htm.

[4]See CLOUT case No. 425[Oberster Gerichtshof, Austria, 21 March 2000], also published on the Internet at http://www.cisg.at/10_34499g.htm; CLOUT case No. 240 [Oberster Gerichtshof, Austria, 15 October 1998] (see full text of the decision).

[5]See Rechtbank Koophandel Ieper, Belgium, 18 February 2002, published on the Internet at http://www.law.kuleuven.ac.be/int/tradelaw/WK/2002-02-18.htm; Rechtbank Koophandel Veurne, Belgium, 25 April 2001, published on the Internet at http://www.law.kuleuven.ac.be/int/tradelaw/WK/2001-04-25.htm; Rechtbank Koophandel Ieper, Belgium, 29 January 2001, published on the Internet at http://www.law.kuleuven.ac.be/int/tradelaw/WK/2001-01-29.htm; CLOUT case No. 425 [Oberster Gerichtshof, Austria, 21 March 2000], also published on the Internet at http://www.cisg.at/10_34499g.htm; Juzgado Nacional de Primera Instancia en lo Comercial No. 10, Argentina, 6 October 1994, published on the Internet at http://www.uc3m.es/uc3m/dpto/PR/dppr03/cisg/sargen8.htm.

[6]For a case in which the parties expressly chose to be bound by trade usages, see China International Economic and Trade Arbitration Commission, Arbitration, award relating to 1989 Contract #QFD890011, published on the Internet at http://www.cisg.law.pace.edu/cases/900000c1.html (in the case at hand the parties chose to be bound by a FOB clause).

[7]CLOUT case No. 425 [Oberster Gerichtshof, Austria, 21 March 2000], also published on the Internet at http://www.cisg.at/10_34499g.htm.

[8]Id.

[9]CLOUT case No. 240 [Oberster Gerichtshof, Austria, 15 October 1998] (see full text of the decision).

[10]ICC Court of Arbitration, award No. 8817, published on the Internet at http://www.unilex.info/case.cfm?pid=1&do=case&id=398&step=FullText.

[11]ICC Court of Arbitration, award No. 8611/HV/JK, published on the Internet at http://www.unilex.info/case.cfm?pid=1&do=case&id=229&step= FullText.

[12]CLOUT case No. 202, France [Cour d'appel Grenoble, France, 13 September 1995] (see full text of the decision).

[13]CLOUT case No. 313 [Cour d'appel Grenoble, France, 21 October 1999] (see full text of the decision).

[14]CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000] (see full text of the decision).

[15]CLOUT case No. 221 [Zivilgericht des Kantons Basel-Stadt, Switzerland, 3 December 1997] (see full text of the decision).

[16]Landgericht Zwickau, Germany, 19 March 1999, published on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/519.htm.

[17]CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (see full text of the decision).

[18]CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000] (see full text of the decision); CLOUT case No. 347 [Oberlandesgericht Dresden, Germany, 9 July 1998].

[19]CLOUT case No. 579 [U.S. [Federal] District Court, Southern District of New York, 10 May 2002], also published on the Internet at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/020510u1.html#vi.

[20]CLOUT case No. 425 [Oberster Gerichtshof, Austria, 21 March 2000], also published on the Internet at http://www.cisg.at/10_34499g.htm; CLOUT case No. 240 [Oberster Gerichtshof, Austria, 15 October 1998].

[21]See CLOUT case No. 292 [Oberlandesgericht Saarbrücken, Germany, 13 January 1993] (see full text of the decision).

[22]CLOUT case No. 175 [Oberlandesgericht Graz, Austria, 9 November 1995].

[23]CLOUT case No. 425 [Oberster Gerichtshof, Austria, 21 March 2000], also published on the Internet at http://www.cisg.at/10_34499g.htm.

[24]CLOUT case No. 240 [Oberster Gerichtshof, Austria, 15 October 1998] (see full text of the decision).

[25]See paragraph 8 *supra*.

[26]CLOUT case No. 425 [Oberster Gerichtshof, Austria, 21 March 2000], also published on the Internet at http://www.cisg.at/10_34499g.htm.

[27]See CLOUT case No. 347 [Oberlandesgericht Dresden, Germany, 9 July 1998].

[28]CLOUT case No. 221 [Zivilgericht des Kantons Basel-Stadt, Switzerland, 3 December 1997].

[29]CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (see full text of the decision).

[30]Hjesteret, Denmark, 15 February 2001, published on the Internet at http://www.unilex.info/case.cfm?pid=1&do=case&id=751&step=FullText.

[31]*Mainschiffahrts-Genossenschaft eb (MSG) v. Les Gravihres Rhinanes SARL*, 20 February 1997, European Community Reports I 927 n.34 (1997).

[32]ICC Court of Arbitration, award No. 8324, published on the Internet at http://www.unilex.info/case.cfm?pid=1&do=case&id=240&step=FullText.

[33]CLOUT case No. 5 [Landgericht Hamburg, Germany, 26 September 1990] (see full text of the decision).

[34]See Helsinki Court of Appeal, Finland, 29 January 1998, published on the Internet at http://www.utu.fi/oik/tdk/xcisg/tap4.html#engl.

[35]Juzgado Nacional de Primera Instancia en lo Comercial No. 10, Argentina, 23 October 1991, published on the Internet at http://www.unilex.info/case.cfm?pid=1&do=case&id=184&step=FullText.

[36]Juzgado Nacional de Primera Instancia en lo Comercial No. 10, Argentina, 6 October 1994, published on the Internet at http://www.unilex.info/case.cfm?pid=1&do=case&id=178&step=FullText.

[37]CLOUT case No. 276 [Oberlandesgericht Frankfurt am Main, Germany, 5 July 1995].

[38]CLOUT case No. 95 [Zivilgericht Basel-Stadt, Switzerland, 21 December 1992].

[39]Id.

[40]Landgericht Frankfurt, Germany, 6 July 1994, published on the Internet at http://www.unilex.info/case.cfm?pid=1&do=case&id=189&step=FullText.

[41]CLOUT Case No. 447 [Federal District Court, Southern District of New York, United States of America, 26 March 2002], also published on the Internet at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/020326u1.html.

[42]Id.

[43]Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, award in case No. 406/1998 of 6 June 2000, , published on the Internet at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/000606r1.html.

[44]Corte d'appello Genova, Italy, 24 March 1995, published on the Internet at http://www.unilex.info/case.cfm?pid=1&do=case&id=198&step=FullText.

[45]International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, award in case No. 229/1996 of 5 June 1997, summarized on the Internet at http://www.unilex.info/case.cfm?pid=1&do=case&id=669&step=Abstract.

[46]ICC Court of Arbitration, award No. 9333, published on the Internet at http://www.unilex.info/case.cfm?pid=1&do=case&id=400&step=Abstract.

Article 10

For the purposes of this Convention:

(a) If a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;

(b) If a party does not have a place of business, reference is to be made to his habitual residence.

OVERVIEW

1. Article 10 provides two rules that address the location of party: if a party has multiple places of business, the rule in article 10 *(a)* identifies which is relevant for purposes of the Convention; article 10 *(b)*, on the other hand, states that a party which does not have a place of business is deemed located at the party's habitual residence.[1] These rules are helpful, as the location of the relevant place of business is important under various provisions of the Convention, including the main provision governing the convention's applicability (article 1).[2]

APPLICATION OF ARTICLE 10 (A)

2. Article 10 *(a)* has been cited in various decisions,[3] but it has actually been applied in determining the relevant place of business in only a few cases. One court used the provision to decide whether a contract concluded between a seller in France and a buyer with places of business both in the United States of America and in Belgium was governed by the Convention.[4] The court reasoned that, since the invoice was sent to the buyer's Belgian place of business and since it was in Dutch (a language known only at the buyer's Belgian offices), the Belgian place of business was most closely connected to the contract and its performance; the Convention, therefore, applied. The court also noted that, because the Convention was in force in the United States of America, the Convention would apply even if the buyer's relevant place of business was in that country.

3. Another court[5] employed article 10 *(a)* to determine whether a sales contract was international under the Convention. The contract arose out of a purchase order sent by a buyer with its place of business in France to an individual, also located in France, that represented the seller, which had its offices in Germany. In deciding whether the contract was "between parties whose places of business are in different States" for purposes of article 1 of the Convention, the court noted that "the order confirmations emanating from the seller, the invoices, and the deliveries of the goods were made from the seat of the seller in Germany"; thus even assuming that the seller had a place of business in France, the court reasoned, "the place of business 'which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract' […] is indeed the place of business whose seat is in [Germany]." Thus, the court concluded, "[t]he international character of the disputed contract is as a consequence established."

4. In another case[6] a court was called upon to decide whether the Convention applied to the claim of a German manufacturer of floor covering who demanded that the Spanish buyer pay for several deliveries. The buyer argued that it had contracted only with an independent company located in Spain, thus raising the question whether there was an international sales contract within the meaning of article 1 of the Convention. As the buyer was aware, the Spanish company with whom it allegedly dealt had links with the German plaintiff, including the fact that members of the Spanish company's board overlapped with those of the German seller. The court concluded that the contract was an international one subject to the Convention. It found that the German manufacturer rather than the Spanish company was the buyer's contracting partner and, because the Spanish company lacked legal authority to bind the German seller, the Spanish company did not constitute a separate place of business of the seller. Even if the Spanish company was such a place of business, the court reasoned, the seller's German place of business had the closest relationship to the contract and its performance given the German manufacturer's "control over the formation and performance of the contract, which the [buyer] was well aware of." Thus the court found that the seller's German place of business was the relevant one under article 10 *(a)*.

5. In another decision[7] the court invoked article 10 *(a)* in holding that, if a party has multiple places of business, it is not always the principal one that is relevant in determining whether a contract is governed by the Convention.

APPLICATION OF ARTICLE 10 (B)

6. Article 10 *(b)* has been cited in only once decision, in which the court merely described the text of the provision.[8]

Notes

[1]United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980, Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee, 1981, 19.

[2]For provisions referring to a party's "place of business", see articles 1 (1), 12, 20 (2), 24, 31 *(c)*, 42 (1) *(b)*, 57 (1) *(a)* and (2), 69 (2), 90, 93 (3), 94 (1) and (2), and 96.

[3]See CLOUT case No. 433 [[Federal] Northern District Court of California, 27 July 2001], *Federal Supplement (2nd Series)* vol. 164, p.1142 (*Asante Technologies v. PMC-Sierra*), also available on the Internet at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/010727u1.html (merely quoting the text of article 10 (a)); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, award in case No. 2/1995 of 11 May 1997, published on the Internet at http://cisgw3.law.pace.edu/cases/970511r1.html (citing article 10 *(a)* in deciding that a party's relevant place of business was in Switzerland rather than in England—without, however, specifying any reason for the decision).

[4]Rechtbank Koophandel Hasselt, Belgium, 2 June 1999, published on the Internet at http://www.law.kuleuven.ac.be/int/tradelaw/WK/1999-06-02.htm.

[5]CLOUT case No. 400 [Cour d'appel Colmar, France, 24 October 2000] (see full text of the decision).

[6]Oberlandesgericht Stuttgart, Germany, 28 February 2001, published on the Internet at http://www.cisg.law.pace.edu/cisg/text/000228g1german.html.

[7]CLOUT case No. 261 [Berzirksgericht der Sanne, Switzerland, 20 February 1997].

[8]CLOUT case No. 106 [Oberster Gerichtshof, Austria, 10 November 1994] (see full text of the decision).

Article 11

A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.

INTRODUCTION

1. Subject to article 12, article 11 provides that a contract of sale need not be concluded in writing and is not subject to any other specific requirement as to form.[1] The provision thus establishes the principle of freedom from form requirements[2]—or in other words, as one court has stated, "[u]nder article 11 CISG, a contract of sale can be concluded informally".[3] According to case law this means that a contract can be concluded orally[4] and through the conduct of the parties.[5] Article 11 has also been invoked in holding that a party's signature was not required for a valid contract.[6]

2. As was noted in the Digest for article 7,[7] several tribunals have stated that the freedom-from-form-requirements rule that article 11 establishes with regard to concluding a contract constitutes a general principle upon which the Convention is based.[8] Under this principle, the parties are free to modify or terminate their contract in writing, orally, or in any other form. Even an implied termination of the contract has been held possible,[9] and it has been held that a written contract may be orally modified.[10]

3. As the Convention's drafting history states, despite the informality rule in article 11 "[a]ny administrative or criminal sanctions for breach of the rules of any State requiring that such contracts be in writing, whether for purposes of administrative control of the buyer or seller, for purposes of enforcing exchange control laws, or otherwise, would still be enforceable against a party which concluded the non-written contract even though the contract itself would be enforceable between the parties."[11]

FORM REQUIREMENTS AND EVIDENCE OF THE CONTRACT

4. Article 11 also frees the parties from domestic requirements relating to the means to be used in proving the existence of a contract governed by the Convention. Indeed, as various courts have emphasized, "the contract can be proven by any means".[12] As a consequence, domestic rules requiring a contract to be evidenced in writing in order to be enforceable are superseded; one court, for instance, stated that "[u]nder the CISG, evidence of the oral conversations between [seller] and [buyer], relating to the terms of the purchase [. . .], could be admitted to establish that an agreement had been reached between [the parties]."[13]

5. It is up to those presiding over the tribunal to determine—within the parameters of the procedural rules of the forum—how to evaluate the evidence presented by the parties.[14] It is on this basis that one court[15] stated that a judge may attribute more weight to a written document than to oral testimony.

6. For comments on the applicability of the parol evidence rule under the Convention, see the Digest for article 8.[16]

LIMITS TO THE PRINCIPLE OF FREEDOM-FROM-FORM-REQUIREMENTS

7. According to article 12, the Convention's elimination of form requirements does not apply if one party has its relevant place of business in a State that made a declaration under article 96.[17] Different views exist as to the effects of an article 96 reservation. According to one view, the mere fact that one party has its place of business in a State that made an article 96 reservation does not necessarily mean that the domestic form requirements of that State apply.[18] Under this view, the rules of private international of the forum will dictate what, if any, form requirements must be met: if those rules lead to the law of a State that made an article 96 reservation, then the form requirements of that State must be complied with; but if the applicable law is that of a Contracting State that did not make an article 96 reservation, the freedom-from-form-requirements rule laid down in article 11 would apply, as several decisions have stated.[19] According to an opposing view, however, the fact that one party has its relevant place of business in a State that made an article 96 reservation subjects the contract to writing requirements, and the contract can only be modified in writing.[20]

Notes

[1]See CLOUT case No. 424 [Oberster Gerichtshof, Austria, 9 March 2000], also published on the Internet at http://www.cisg.at/6_31199z.htm; CLOUT case No. 215 [Bezirksgericht St. Gallen, Switzerland, 3 July 1997] (see full text of the decision); CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (see full text of the decision); CLOUT case No. 308 [Federal Court of Australia, 28 April 1995] (see full text of the decision); CLOUT case No. 137 [Oregon [State] Supreme Court, United States, 11 April 1996]; for similar statements, see United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980,

Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee, 1981, 20.

[2]See Bundesgericht, Switzerland, 15 September 2000, published on the Internet at http://www.bger.ch/index.cfm?language=german&area=Jurisdiction&theme=system&page=content&maskid=220.

[3]CLOUT case No. 95 [Zivilgericht Basel-Stadt, Switzerland, 21 December 1992] (see full text of the decision).

[4]See CLOUT case No. 222 [Federal Court of Appeals for the Eleventh Circuit United States 29 June 1998] (see full text of the decision); CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (see full text of the decision); CLOUT case No. 134 [Oberlandesgericht München, Germany, 8 March 1995]; for an example of a case where an oral contract was held to be valid, see CLOUT case No. 120 [Oberlandsgericht Köln, Germany, 22 February 1994], also published on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/127.htm.

[5]For this statement, see Hof van Beroep Gent, Belgium, 15 May 2002, published on the Internet at http://www.law.kuleuven.be/ipr/eng/cases/2002-05-15.html; CLOUT case No. 134 [Oberlandesgericht München, Germany, 8 March 1995].

[6]CLOUT case No. 330 [Handelsgericht des Kantons St. Gallen, Switzerland, 5 December 1995].

[7]See para. 15 of the Digest for article 7

[8]See Compromex Arbitration, Mexico, 29 April 1996, published on the Internet at http://www.unilex.info/case.cfm?pid=1&do=case&id=258&step=FullText and at http://www.uc3m.es/cisg/rmexi2.htm; CLOUT case No.176 [Oberster Gerichtshof, Austria, 6 February 1996] (see full text of the decision).

[9]CLOUT case No. 422 [Oberster Gerichtshof, Austria, 29 June 1999], *Zeitschrift für Rechtsvergleichung,* 2000, 33.

[10]Hof van Beroep Gent, Belgium, 15 May 2002, published on the Internet at http://www.law.kuleuven.be/ipr/eng/cases/2002-05-15.html; CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (see full text of the decision).

[11]United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March–11 April 1980, Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee, 1981, 20.

[12]See Rechtbank van Koophandel Hasselt, Belgium, 22 May 2002, published on the Internet at http://www.law.kuleuven.ac.be/int/tradelaw/WK/2002-05-22.htm; Rechtbank van Koophandel Kortrijk, Belgium, 4 April 2001, published on the Internet at http://www.law.kuleuven.be/ipr/eng/cases/2001-04-04.html; CLOUT case No. 330 [Handelsgericht des Kantons St. Gallen, Switzerland, 5 December 1995]; CLOUT case No. 134 [Oberlandesgericht München, Germany, 8 March 1995].

[13]CLOUT case No. 414 [Federal District Court, Southern District of New York, United States, 8 August 2000] (see full text of the decision).

[14]See Rechtbank van Koophandel Kortrijk, Belgium, 4 April 2001, published on the Internet at http://www.law.kuleuven.be/ipr/eng/cases/2001-04-04.html; LG Memmingen, 1 December 1993, published on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/73.htm.

[15]Rechtbank van Koophandel Hasselt, Belgium, 22 May 2002, published on the Internet at http://www.law.kuleuven.ac.be/int/tradelaw/WK/2002-05-22.htm.

[16]See paragraph 18 of the Digest for article 8.

[17]See Rechtbank van Koophandel, Hasselt, Belgium, 2 May 1995, published on the Internet at http://www.law.kuleuven.be/ipr/eng/cases/1995-05-02.html.

[18]Rechtbank Rotterdam, the Netherlands, 12 July 2001, *Nederlands Internationaal Privaatrecht*, 2001, No. 278.

[19]Rechtbank Rotterdam, the Netherlands, 12 July 2001, *Nederlands Internationaal Privaatrec*ht, 2001, No. 278; Hoge Raad, the Netherlands, 7 November 1997, published on the Internet at http://www.unilex.info/case.cfm?pid=1&do=case&id=333&step=FullText; CLOUT case No. 52 [Fovárosi Biróság, Hungary 24 March 1992].

[20]The High Arbitration Court of the Russian Federation, Arbitration, 16 February 1998, referred to on the Internet at http://cisgw3.law.pace.edu/cases/980216r1.html; Rechtbank van Koophandel Hasselt, Belgium, 2 May 1995, published on the Internet at http://www.law.kuleuven.be/ipr/eng/cases/1995-05-02.html.

Article 12

Any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from or vary the effect of this article.

INTRODUCTION

1. Some States consider it important that contracts and related matters—such as contract modifications, consensual contract terminations, and even communications that are part of the contract formation process—be in writing. Articles 12 and 96 of the Convention permit a Contracting State to make a declaration that recognizes this policy: a reservation under article 96 operates, as provided in article 12, to prevent the application of any provision of article 11, article 29 or Part II of the Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing where any party has his place of business in that Contracting State.[1] Article 96, however, limits the availability of the reservation to those Contracting States whose legislation requires contracts of sale to be concluded in or evidenced by writing.

2. As provided in the second sentence of article 12, and as confirmed by both the drafting history of the provision[2] and case law, article 12—unlike most provisions of the Convention—cannot be derogated from.[3]

SPHERE OF APPLICATION AND EFFECTS

3. Both the language and the drafting history of article 12 confirm that, under the provision, an article 96 reservation operates only against the informality effects of article 11, article 29, or Part II of this Convention; thus article 12 does not cover all notices or indications of intention under the Convention, but is confined to those that relate to the expression of the contract itself, or to its formation, modification or termination by agreement.[4]

4. Article 12 provides that the Convention's freedom-from-form-requirements principle is not directly applicable where one party has its relevant place of business in a State that made a declaration under article 96,[5] but different views exist as to the further effects of such a reservation. According to one view, the mere fact that one party has its place of business in a State that made an article 96 reservation does not necessarily bring the form requirements of that State into play;[6] instead, the applicable form requirements—if any—will depend on the rules of private international of the forum. Under this approach, if PIL rules lead to the law of a State that made an article 96 reservation, the form requirements of that State will apply; where, on the other hand, the law of a contracting State that did not make an article 96 reservation is applicable, the freedom-from-form-requirements rule of article 11 governs.[7] The opposing view is that, if one party has its relevant place of business in an article 96 reservatory State, writing requirements apply.[8]

Notes

[1]For this statement, albeit with reference to the draft provisions contained in the 1978 Draft Convention, see United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March–11 April 1980, Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee, 1981, 20.

[2]See United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March–11 April 1980, Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee, 1981, 20: "Since the requirement of writing in relation to the matters mentioned in article 11 [draft counterpart of the Convention's article 12] is considered to be a question of public policy in some States, the general principle of party autonomy is not applicable to this article. Accordingly, article 11 [draft counterpart of the Convention's article 12] cannot be varied or derogated from by the parties."

[3]CLOUT case No. 482 [Cour d'appel, Paris, France, 6 November 2001], also published on the Internet at http://witz.jura.uni-sb.de/CISG/decisions/061101v.htm; CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000], expressly stating that article 12—as well as the final provisions—cannot be derogated from (see full text of the decision).

[4]See United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March–11 April 1980, Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee, 1981, 20.

[5]See Rechtbank van Koophandel Hasselt, Belgium, 2 May 1995, published on the Internet at http://www.law.kuleuven.be/ipr/eng/cases/1995-05-02.html .

[6]Rechtbank Rotterdam, the Netherlands, 12 July 2001, *Nederlands Internationaal Privaatrecht*, 2001, No. 278.

[7]Rechtbank Rotterdam, the Netherlands, 12 July 2001, *Nederlands Internationaal Privaatrec*ht, 2001, No. 278; Hoge Raad, the Netherlands, 7 November 1997, published on the Internet at http://www.unilex.info/case.cfm?pid=1&do=case&id=333&step=FullText; CLOUT case No.52 [Fovárosi Biróság Hungary 24 March 1992].

[8]The High Arbitration Court of the Russian Federation, Arbitration, 16 February 1998, referred to on the Internet at http://cisg3w.law.pace.edu/cases/980216r1.html; Rechtbank van Koophandel Hasselt, Belgium, 2 May 1995, published on the Internet at http://www.law.kuleuven.be/ipr/eng/cases/1995-05-02.html.

Article 13

For the purposes of this Convention "writing" includes telegram and telex.

OVERVIEW

1. The purpose of article 13 of the Convention, which is based on article 1 (3) *(g)* of the 1974 UNCITRAL Convention on the Limitation Period in the International Sale of Goods, is to ensure that communications taking the form of a telegram or telex are treated as "writings", and thus (in their form) can satisfy applicable writing requirements if such exist.

APPLICATION

2. The provision has rarely been referred to in case law. One court, in deciding whether avoidance of a lease contract via telefax met a writing requirement in applicable domestic law, stated that, had the Convention governed, the telefax would be considered sufficient on the basis of article 13; but the court also held that article 13 applied only to international sales contracts, and should not be extended by analogy to leases or other non-sales contracts.[1] The same court later reaffirmed its view that article 13 should not be applied by analogy, reasoning that the provision contains an exception and that exceptions must be interpreted restrictively.[2]

Notes

[1]See Oberster Gerichtshof, Austria, 2 July 1993, published on the Internet at http://www.unilex.info/case.cfm?pid=1&do=case&id=165&step=FullText.

[2]Oberster Gerichtshof, Austria, 26 April 1997, published on the Internet at http://www.cisg.at/6_51296.htm.

Part two

FORMATION OF THE CONTRACT

OVERVIEW

1. Part II of the Sales Convention sets out rules for the formation of an international sales contract. Timing requirements for the application of these rules are set out in article 100 (a). Under the rules of Part II, a contract is concluded when an acceptance of an offer becomes effective. CISG article 23. The first four articles of Part II (articles 14-17) deal with the offer, while the following five articles (articles 18-22) deal with the acceptance. The final two articles (articles 23-24) address the time when a contract is concluded and when a communication "reaches" the addressee, respectively. One court has described these provisions as embodying "a liberal approach to contract formation and interpretation, and a strong preference for enforcing obligations and representations customarily relied upon by others in the industry".[1]

2. A number of decisions have applied the offer-acceptance paradigm of Part II to proposals to modify a sales contract (article 29)[2] or to proposals to terminate the contract.[3] Several decisions have distinguished between the conclusion of the sales contract and an agreement to arbitrate disputes arising under that contract.[4]

PERMITTED RESERVATIONS BY CONTRACTING STATES

3. A Contracting State may declare that it is not bound by Part II of the Sales Convention. CISG article 92. Denmark, Finland, Iceland, Norway and Sweden have made this declaration. Where this declaration comes into play, a majority of decisions apply the forum's rules of private international law to determine whether the parties have concluded a contract. The relevant national law may be either domestic contract law (which will be the case if the applicable national law is that of a declaring State)[5] or the Convention (which will be the case if the applicable national law is that of a Contracting State).[6] Several decisions do not go through a private international law analysis. One decision expressly rejects a private international law analysis and instead applies the principles underlying Part II of the Convention.[7] Several decisions apply Part II, without analysis, to a contract between a party with a place of business in a Contracting State that has made a declaration and one that has a place of business in a Contracting State that has not done so.[8] In the absence of a dispute about whether a contract had been concluded, one court declined to analyse the effect of article 92.[9]

4. Two or more Contracting States that have the same or closely-related legal rules on sales matters may declare that the Convention is not to apply to sales contracts or to their formation where the parties have their places of business in these States. CISG article 94 (1). A Contracting State may also make such a declaration if it has the same or closely-related legal rules as those of a non-Contracting State. CISG article 94 (2). Such a non-Contracting State may, when it becomes a Contracting State, declare that the Convention shall continue to be inapplicable to sales contracts (of the formation thereof) with persons in the earlier-declaring Contracting State. CISG article 94 (3). Denmark, Finland, Norway and Sweden made declarations that the Convention—including its contract-formation rules—is inapplicable with respect to contracts between parties located in those states or in Iceland. When Iceland became a Contracting State it declared that it would continue this arrangement.

EXCLUSIVITY OF PART II

5. Part II sets out rules for the conclusion of a contract. Part II does not state that compliance with its provisions is the exclusive way to conclude an enforceable contract governed by the Sales Convention. Article 55 in Part III of the Convention recognizes that a contract may be validly concluded even though it does not expressly or implicitly fix or make provision for determining the price. Several cases have examined the relation of article 55 to the requirement in article 14 that a proposal to conclude a contract must expressly or implicitly fix or make provision for determining the price. See the Digests for articles 14 and 55.

6. The parties' conduct may establish that they intended a mutually-binding arrangement even if Part II does not govern. One court, recognizing that Finland had made an article 92 declaration, nevertheless applied the principles underlying the Convention rather than national contract law and found that the conduct of a Finnish seller and a German buyer evidenced an enforceable contract.[10]

7. Several decisions have recognized that one party's promise may be enforced under the applicable national law doctrine of promissory estoppel. One court found that a supplier would be bound by its promise to supply raw materials when in reliance on this promise the promisee sought and received administrative approval to manufacture generic drugs.[11] Another court considered a similar claim but concluded that the party seeking to enforce a promise had not established its case.[12]

VALIDITY OF CONTRACT; FORMAL REQUIREMENTS

8. Part II governs the formation of the contract of sale but, except as otherwise expressly provided by the Convention, is not concerned with the validity of the contract or any of its provisions or of any usage. CISG article 4 *(a)*. Consequently, domestic law applicable by virtue of the rules of private international law will govern issues of validity. See paragraph 3 of the Digest for article 4.

9. The Convention expressly provides that a contract of sale need not be concluded in writing and is not subject to any other requirement as to form. CISG article 11. Thus article 11 prevents the application of domestic law formality requirements to the conclusion of a contract under the CISG. See the paragraphs 1 and 8 of the Digest for article 11. A Contracting State may declare that this rule does not apply where any party has his place of business in that State. CISG articles 12, 96. See also the Digest for article 12.

10. Part II is silent on the need for "consideration" or a "causa". One case found, applying domestic law under article 4 *(a)* of the Convention, that a buyer seeking to enforce a contract had alleged sufficient facts to support a finding that there was "consideration" for an alleged contract.[13]

INCORPORATING STANDARD TERMS

11. The Convention does not include special rules addressing the legal issues raised by the use of standard contract terms prepared in advance for general and repeated use.[14] Some Contracting States have adopted special legal rules on the enforceability of standard terms[15]. Notwithstanding these special rules, a majority of courts apply the provisions of Part II of the Convention and its rules of interpretation in article 8 to determine whether the parties have agreed to incorporate standard terms into their contract.[16] Several of these decisions expressly conclude that the Convention displaces recourse to national law on the issue of whether the parties have agreed to incorporate standard terms into their contract.[17] Nevertheless, several courts have applied the special national legal rules to determine the enforceability of standard terms in contracts otherwise governed by the Convention,[18] while several others have noted that the standard terms would be enforceable under either national law or the Convention.[19] Several decisions recognize, however, that the Convention does not govern the substantive validity of a particular standard term—a matter left to applicable national law by virtue of article 4 *(a)*.[20]

12. Several decisions rely on the Convention's rules on interpretation to require the user of standard terms to send a copy of the terms to the other party or otherwise make them reasonably available.[21] One decision expressly rejects the proposal that a party has an obligation to search out standard terms referred to by the other party on the grounds that to do so would contradict the principle of good faith in international trade and the parties' general obligations to cooperate and to share information.[22] A decision held that a seller's standard terms were incorporated into the contract where the buyer was familiar with those terms from the parties' prior dealings and the seller had expressly referred to the terms in his offer.[23] Another decision relies on article 24 to conclude that standard terms do not "reach" the addressee unless in a language agreed to by the parties, used by the parties in their prior dealings, or customary in the trade.[24] Several other decisions give no effect to standard terms when they are not translated into the language of the other party.[25] Another decision refers to the "general principle" that ambiguities in the standard terms are to be interpreted against the party relying upon them.[26]

COMMERCIAL LETTERS OF CONFIRMATION

13. In a few Contracting States there is a recognized usage of trade that gives effect to a letter of confirmation sent by a merchant to another merchant notwithstanding the recipient's silence. The commercial letter of confirmation may conclude the contract or, if the contract had already been concluded, establish the terms of the contract in the absence of intentional misstatement by the sender or prompt objection to its terms. Courts have disagreed about the effect to be given to these usages when the transaction is governed by the Convention. Several decisions have refused to give effect to a local trade usage that would give effect to the letter of confirmation because the usage was not international.[27] However, one court found, without analysis of the scope of the trade usage, that the recipient was bound,[28] and another court gave effect to the usage, under both paragraphs (1) and (2) of article 9, when the seller and buyer each had its place of business in a jurisdiction that recognized such a usage.[29] Another court applied the contract formation provisions of the Convention to find that the recipient of the letter of confirmation had accepted its terms by accepting the goods.[30] Yet another court concluded that the Convention was silent on the effect of a confirmation letter that incorporated standard terms; the court therefore applied domestic law to determine whether the standard terms were applicable.[31] Even if a letter of confirmation is not given full effect, it may be relevant for the evaluation of evidence of the parties' intent.[32]

INTERPRETATION OF STATEMENTS OR CONDUCT

14. A person may make a proposal for concluding a contract or may accept such a proposal by a statement or by conduct. CISG articles 14 (1) and 18 (1). Numerous cases apply the rules of article 8 to the interpretation of a party's statements or other conduct before the conclusion of a contract.[33]

15. Several courts have had to identify the party proposing to conclude a contract governed by the Convention. They have usually done so by interpreting the statements or conduct of the parties in accordance with article 8 of the Convention.[34] The issue may also arise when an agent acts for a principal.[35] Whether a person is entitled to bring a legal action to enforce contractual obligations is a distinct issue.[36]

Notes

[1][Federal] Southern District Court of New York, United States, 10 May 2002, *Federal Supplement (2nd Series)* 201, 236 at 283.

[2]CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998] (see full text of the decision); CLOUT case No. 347 [Oberlandesgericht Dresden, Germany, 9 July 1998]; CLOUT case No. 193 [Handelsgericht des Kantons Zürich, Switzerland, 10 July 1996]; CLOUT case No. 133 [Oberlandesgericht München, Germany, 8 February 1995] (see full text of the decision); CLOUT case No. 203 [Cour d'appel, Paris, France, 13 December 1995].

[3]CLOUT case No. 120 [Oberlandesgericht Köln, Germany, 22 February 1994]; CIETAC award No. 75, 1 April 1993, Unilex, also available on the INTERNET at http://www.cisg.law.pace.edu/cgi-bin/isearch..

[4]Tribunal Supremo, Spain, 26 May 1998, available on the Internet at http://www.uc3m.es/cisg/respan10.htm (conclusion of sales contract established but not agreement to arbitrate); Tribunal Supremo, Spain, 17 February 1998, available on the Internet at http://www.uc3m.es/cisg/respan8.htm (conclusion of sales contract established under Sales Convention but agreement to arbitrate not established under 1958 New York Convention).

[5]Turku Hovioikeus (Court of Appeal), Finland, 12 April 2002, available on the Internet at http://cisgw3.law.pace.edu/cases/020412f5.html (transaction between Finnish seller and German buyer; Finnish law applicable); CLOUT case No. 143 [Fovárosi Biróság, Hungary 21 May 1996] (transaction between Swedish seller and Hungarian buyer; Swedish law applicable); CLOUT case No. 228 [Oberlandesgericht Rostock, Germany, 27 July 1995] (transaction between Danish seller and German buyers; Danish law applicable). *See also* CLOUT case No. 419 [Federal District Court, Northern District of Illinois, United States, 27 October 1998] (transaction between Swedish seller and US buyer; although US state law would apply to contract formation, the issue before the court was whether domestic parol evidence rule excluded testimony and art. 8 (3)—in Part I—preempted that rule).

[6]CLOUT case No. 309 [Østre Landsret Denmark, 23 April 1998] (transaction between Danish seller and French buyer; French law applicable); CLOUT case No. 301 [Arbitration—International Chamber of Commerce No. 7585 1992] (transaction between Italian seller and Finnish buyer; Italian law applicable).

[7]CLOUT case No. 134 [Oberlandesgericht München, Germany, 8 March 1995] (contract between Finnish seller and German buyer).

[8]CLOUT case No. 362 [Oberlandesgericht Naumburg, Germany, 27 April 1999] (contract between Danish seller and German buyer) (see full text of the decision); Chansha Intermediate Peoples' Court Economic Chamber, China, 1995, Unilex (negotiations between Chinese seller and Swedish buyer); CLOUT case No. 121 [Oberlandesgericht Frankfurt a.M., Germany, 4 March 1994] (negotiations between German seller and Swedish buyer).

[9]CLOUT case No. 201 [Richteramt Laufen des Kantons Berne, Switzerland, 7 May 1993] (contract between Finnish seller and German buyer) (see full text of the decision). *See also* Hjesteret (Supreme Court), Denmark, 15 February 2001, available on the Internet at http://www.cisg.dk/hdl5022001danskversion.htm (transaction between Italian seller and Danish buyer; issue of whether court had jurisdiction resolved by reference to art. 31).

[10]CLOUT case No. 134 [Oberlandesgericht München, Germany, 8 March 1995].

[11][Federal] Southern District Court of New York, United States, 21 August 2002, 2002 Westlaw 1933881, 2002 US Dist. LEXIS 15442 (accepting that claim stated an enforceable cause of action for promissory estoppel when it alleged breach of "(1) a clear and definite promise, (2) the promise is made with the expectation that the promisee will rely on it, (3) the promisee in fact reasonably relied on the promise, and (4) the promisee suffered a definite and substantial detriment as a result of the reliance").

[12]CLOUT case No. 173 [Fovárosi Biróság,, Hungary, 17 June 1997] (considering and rejecting a claim that there had been a breach of promise that would be enforceable if the promise reasonably induced the other party to change its position in reliance on the promise).

[13][Federal] Southern District Court of New York, United States, 10 May 2002, *Federal Supplement (2nd Series)* 201, 236 at 283 ff. (quoting definition of consideration as "bargained-for exchange of promises or performance").

[14]For a definition of "standard terms" see art. 2.19 (2) of the UNIDROIT Principles of International Commercial Contracts (1994).

[15]See, e.g., the German *Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen* (AGBG) [Unfair Contract Terms Act].

[16]CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002] (see full text of the decision, approving reasoning of lower appeals court); CLOUT case No. 445 [Bundesgerichtshof, Germany, 31 October 2001], also in *Neue Juristische Wochenschrift,* 2001, 370 ff.; CLOUT case No. 362 [Oberlandesgericht Naumburg, Germany, 27 April 1999] (standard terms in purported acceptance); Rb 's-Hertogenbosch, Netherlands, 2 October 1998, Unilex (in ongoing relationship buyer not bound by seller's amended general conditions because seller failed to inform buyer of amendment); CLOUT case No. 222 [Federal Court of Appeals for the Eleventh Circuit, United States, 29 June 1998] (standard terms on back of seller's form not enforceable if both parties know buyer did not intend to incorporate them in contract) (see full text of the decision); CLOUT case No. 272 [Oberlandesgericht Zweibrücken, Germany, 31 March 1998] (applying art. 8 to determine whether standard terms incorporated in contract); CLOUT case No. 232 [Oberlandesgericht München, Germany, 11 March 1998] (buyer, by performing contract, accepted seller's standard terms that modified buyer's offer) (see full text of the decision); CLOUT case No. 345 [Landgericht Heilbronn, Germany, 15 September 1997]; CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (buyer did not agree to 'framework agreement' drafted by seller to govern subsequent sales); CLOUT case No. 203 [Cour d'appel, Paris, France, 13 December 1995] (standard term on back of form not binding on recipient); Tribunal Commercial Nivelles, Belgium, 19 September 1995, Unilex (buyer should have been aware that seller's offers incorporated standard terms); Cámara Nacional de Apelaciones en lo Comercial, Argentina, 14 October 1993, Unilex (standard terms on back of "pro forma" invoice accepted by other party when recipient objected to one part of invoice but not to standard terms). See also Rechtbank van Koophandel Hasselt, Belgium, 18 October 1995 (seller's standard terms in invoice sent with goods a unilateral act to which buyer had not consented). For analysis of the effect of conflicting terms when each party uses standard terms (the so-called "battle of the forms"), see the Commentary to article 19.

[17]CLOUT case No. 445 [Bundesgerichtshof, Germany, 31 October 2001], also in *Neue Juristische Wochenschrift,* 2001, 370 ff.; CLOUT case No. 345 [Landgericht Heilbronn, Germany, 15 September 1997]. See also CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002 (approving reasoning of lower appeals court that applied Convention provisions exclusively in determining whether seller's standard terms were incorporated into the contract) (see full text of the decision).

[18]CLOUT case No. 318 [Oberlandesgericht Celle, Germany, 2 September 1998] (applying German law as the law applicable by virtue of the forum's rules of private international law) (see full text of the decision); Landgericht Duisburg, Germany, 17 April 1996, Unilex (applying Italian law as the law applicable by virtue of the forum's private international law rules); Landgericht München, Germany, 29 May 1995, Unilex (applying German law as the law applicable by virtue of the forum's rules of private international law); Rechtbank van Koophandel Hasselt, Belgium, 24 January 1995, Unilex (applying German law as the law applicable by virtue of the forum's private international law rules).

[19]CLOUT case No. 361 [Oberlandesgericht Braunschweig, Germany, 28 October 1999] (standard terms enforceable under both applicable domestic law and the Convention) (see full text of the decision); Gerechtshof 's-Hertogenbosch, Netherlands, 24 April 1996, Unilex (standard terms enforceable under both applicable domestic law and the Convention).

[20]CLOUT case No. 428 [Oberster Gerichtshof, Austria, 7 September 2000], also in Unilex (validity of standard terms determined by national law subject to condition that any derogation from Convention's fundamental principles ineffective even if valid under applicable national law); CLOUT case No. 272 [Oberlandesgericht Zweibrücken, Germany, 31 March 1998] (national law, rather than Convention, determines validity of exemption clause in standard terms); CLOUT case No. 345 [Landgericht Heilbronn, Germany, 15 September 1997] (national law governs validity of standard term limiting liability); Amtsgericht Nordhorn, Germany, 14 June 1994, Unilex (standard terms on back of form incorporated in contract but validity of terms to be determined under domestic law). See also CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997] (citing both art. 4 and art. 14 ff., court leaves open issue of whether standard terms were enforceable). See generally paragraph 1 of the Digest for article 4.

[21]CLOUT case No. 445 [Bundesgerichtshof, Germany, 31 October 2001], also in *Neue Juristische Wochenschrift,* 2001, 370 ff.; Hof Arnhem, Netherlands, 27 April 1999, Unilex (deposit of standard terms in Dutch court did not bind non-Dutch party but standard terms printed in Dutch on back of invoice are binding); Rb 's-Hertogenbosch, Netherlands, 2 October 1998, Unilex (if numerous prior sales between parties have been subject to the general conditions of one party and that party amends those general conditions, that party must inform the other party of the changes).

[22]CLOUT case No. 445 [Bundesgerichtshof, Germany, 31 October 2001], also in Neue Juristische Wochenschrift, 2001, 370 ff.

[23]CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002 (see full text of the decision approving reasoning of lower appeals court).

[24]CLOUT case No. 132 [Oberlandesgericht Hamm, Germany, 8 February 1995] (discussion of "language risk" in light of art. 8).

[25]CLOUT case No. 345 [Landgericht Heilbronn, Germany, 15 September 1997] (in transaction between German seller and Italian buyer seller's standard terms in German language not incorporated in contract and validity of those in Italian language determined by German law as the as the law applicable by virtue of the forum's private international law rules); Amtsgericht Kehl, Germany, 6 October 1995, Unilex (standard terms in German language only sent by a German buyer to an Italian seller).

[26]CLOUT case No. 165 [Oberlandesgericht Oldenburg, Germany, 1 February 1995] (see full text of the decision).

[27]CLOUT case No. 347 [Oberlandesgericht Dresden, Germany, 9 July 1998]; CLOUT case No. 276 [Oberlandesgericht Frankfurt a. M., Germany, 5 July 1995]. See also Landgericht Duisburg, Germany, 17 April 1996, Unilex (doubts existence of international usage recognizing incorporation of standard terms into contract by letter of confirmation); Opinion of Advocate General Tesauro, *EC Reports*, 1997, I-911 ff. (adopting by analogy article 9 (2)'s standard for an "international usage").

[28]Oberlandesgericht Saarbrücken, Germany, 14 February 2001, Unilex.

[29]CLOUT case No. 95 [Zivilgericht Basel-Stadt, Switzerland, 21 December 1992].

[30]CLOUT case No. 292 [Oberlandesgericht Saarbrücken, Germany. 13 January 1993] (citing art. 18 (1)) (see full text of the decision).

[31]Arrondissemenetsrechttbank Zutphen, Netherlands, 29 May 1997, Unilex. See also Rechtbank van Koophandel Hasselt, Belgium, 24 January 1995, Unilex (German law applicable to issue of whether standard terms referred to in letter of confirmation are effective).

[32]CLOUT case No. 276 [Oberlandesgericht Frankfurt a.M., Germany, 5 July 1995].

[33]See, e.g., CLOUT case No. 417 [Federal District Court, Northern District of Illinois, United States, 7 December 1999] (art. 8) (see full text of the decision); CLOUT case No. 306 [Oberster Gerichtshof, Austria, 11 March 1999] (citing art. 8 (1)); CLOUT case No. 413 [Federal District Court, Southern District of New York, United States, 6 April 1998] (art. 8 (3)) (see full text of the decision); Hoge Raad, Netherlands, 7 November 1997, Unilex (arts. 8 (1), (2)); CLOUT case No. 189 [Oberster Gerichtshof, Austria, 20 March 1997] (art. 8 (2)); Landgericht Oldenburg, Germany, 28 February 1996, Unilex (art. 8 (2)); CLOUT case No. 334 [Obergericht des Kantons Thurgau, Switzerland, 19 December 1995] (art. 8 (1), (2) and (3)); CLOUT case No. 308 [Federal Court of Australia, 28 April 1995] (arts. 8 (1), (2)) (see full text of the decision); CLOUT case No. 106 [Oberster Gerichtshof, Austria, 10 November 1994] (art. 8 (2), (3)); CLOUT case No. 23 [Federal District Court, Southern District of New York, United States, 14 April 1992] (art. 8 (3)); CLOUT case No. 227 [Oberlandesgericht Hamm Germany, 22 September 1992] (art. 8 (2)).

[34]Oberlandesgericht Frankfurt, Germany, 30 August 2000, Unilex (citing art. 8, court states that invoice intended by sender to be offer on its behalf rather than on behalf of its parent company with whom recipient had been dealing did not bind the recipient who was unaware of this intent and it was not established that a reasonable person in position of recipient would so understand the communication); Oberlandesgericht Stuttgart, Germany, 28 February 2000, available on the Internet at http://www.cisg-online.ch/cisg/urteile/583.htm (citing art. 8 (1) and (3), court states that negotiations and subsequent conduct of the parties indicated that buyer intended to conclude the contract with foreign company rather than local company with same Board members); Hoge Raad, Netherlands, 7 November 1997, Unilex (citing arts. 8 (1) and (2)), court concludes no contract had been concluded when a person, intending to make an offer, made a payment to a seller who did not know and could not have been aware that the payor was making a payment on its own behalf rather than on behalf of a buyer with whom the seller had ongoing business relations and reasonable person in same circumstances would not so understand communication). See also Comisión para la Protección del Comercio Exterior de México, Mexico, 29 April 1996, Unilex (without express reference to art. 8, commission refers to surrounding circumstances to identify seller); CLOUT case No. 330 [Handelsgericht des Kantons St. Gallen, Switzerland, 5 December 1995] (citing art. 14 (1), court concludes that buyer's unsigned fax to seller clearly indicated an intent to purchase the equipment and that seller thought buyer rather than sister company was the purchaser); CLOUT case No. 276 [Oberlandesgericht Frankfurt a.M., Germany, 5 July 1995] (circumstances establish defendant and not unnamed third person was party to contract) (see full text of the decision); Landgericht Memmingen, Germany, 1 December 1993, Unilex (citing art. 11, court applies forum's rule on proof as to which company seller had contracted with); CLOUT case No. 95 [Zivilgericht Basel-Stadt, Switzerland, 21 December 1992] (defendant bound even if she was subject to control of another firm) (see full text of the decision).

[35]CLOUT case No. 239 [Oberster Gerichtshof, Austria, 18 June 1997] (remand to determine whether purported buyer was an agent); CLOUT case No. 416 [Minnesota [State] District Court, United States, 9 March 1999] (finding from documents and circumstances that

defendant was a seller rather than an agent); CLOUT case No. 334 [Obergericht des Kantons Thurgau, Switzerland, 19 December 1995] (citing art. 8, court concludes manufacturer rather than its distributor was party to contract); CLOUT case No. 5 [Landgericht Hamburg, Germany, 26 September 1990] (citing art. 8 (1), court states that seller did not know and could not have been aware of buyer's intent to refer to "AMG GmbH" when buyer referred to "AMG Import Export", a non-existent company; agent bound under applicable law of agency).

[36]See, e.g., CLOUT case No. 345 [Landgericht Heilbronn, Germany, 15 September 1997] (lessee, to whom the buyer/lessor assigned its rights as buyer, avoided contract); CLOUT case No. 334 [Obergericht des Kantons Thurgau, Switzerland, 19 December 1995] (although manufacturer rather than its distributor was original party to contract, distributor could enforce the contract because manufacturer had assigned its claim for breach to distributor); CLOUT case No. 132 [Oberlandesgericht Hamm, Germany, 8 February 1995] (assignee enforces seller's claim).

Article 14

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

(2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

OVERVIEW

1. Article 14 sets out the conditions on which a proposal to conclude a contract constitutes an offer that, if accepted by the addressee, will lead to the conclusion of a contract under the Convention. This article has been applied to determine whether a statement or other conduct rejecting an offer constitutes a counter-offer (see article 19 (1)).[1] The principles set out in this article—i.e., the person making the proposal must intend to be bound, and the proposal must be sufficiently definite—have been applied, together with those in other articles of Part II, notwithstanding that Part II was not applicable by virtue of a declaration under article 92.[2] For discussion of whether Part II of the Convention provides the exclusive way to conclude a contract governed by the Convention, see the Digest for Part II.

2. The identity of the person making a proposal or of the person to which the proposal is made may be uncertain. Decisions have applied article 14 and the rules of interpretation in article 8 to this issue.[3]

ADDRESSEES OF PROPOSAL

3 The first sentence of paragraph (1) focuses on proposals that are addressed to one or more specific persons. Under the applicable law of agency, the maker of an offer addressed to an agent may be bound by the acceptance of the principal.[4] One decision states that article 14 (1) rather than the law of agency governs the issue of identifying whether a manufacturer or its distributor is party to the contract.[5]

4. Paragraph (2) provides for proposals other than ones addressed to one or more specific persons. There are no reported decisions applying paragraph (2)

INDICATION OF INTENT TO BE BOUND BY ACCEPTANCE

5. The first sentence of paragraph (1) provides that, to constitute an offer, a proposal to conclude a contract must indicate the intention of the proponent to be bound if the addressee accepts the proposal. The intent may be shown by interpretation of a statement or act in accordance with paragraphs (1) or (2) of article 8.[6] By virtue of paragraph (3) of article 8, this intent may be established by all the relevant circumstances, including statements or other conduct during negotiations and the conduct of the parties after the alleged conclusion of the contract.[7] A buyer was found to have indicated its intent to be bound when it sent the seller an “order” that stated “we order” and that called for “immediate delivery”.[8] A communication in the English language sent by a French seller to a German buyer was interpreted by the court as expressing the seller’s intent to be bound.[9] Where both parties had signed an order designating a computer programme and its price, the buyer was unable to establish that the order merely indicated an intention to describe details of a contract to be concluded at a later time rather than an intention to conclude the contract by means of the order.[10] Another buyer’s order specifying two sets of cutlery and the time for delivery was likewise interpreted as indicating an intent to be bound in case of acceptance, notwithstanding buyer’s argument that it had merely proposed future purchases.[11]

DEFINITENESS OF PROPOSAL

6. To be deemed an offer, a proposal to conclude a contract not only must indicate an intent to be bound by an acceptance but also must be sufficiently definite.[12] The second sentence of paragraph (1) provides that a proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price. Practices established between the parties may supply the details of quality, quantity and price left unspecified in a proposal to conclude a contract.[13] Decisions have applied the rules of interpretation in article 8 to determine whether a communication or act is sufficiently definite. One court has concluded that, if the intent to be bound by an acceptance is established, a proposal is sufficiently definite notwithstanding the failure to specify the price.[14]

7. Article 14 does not require that the proposal include all the terms of the proposed contract.[15] If, for example, the

parties have not agreed on the place of delivery[16] or the mode of transportation[17] the Convention may fill the gap.

INDICATION OF THE GOODS

8. To be sufficiently definite under the second sentence of paragraph (1) a proposal must indicate the goods. There is no express requirement that the proposal indicate the quality of the goods. One court found that a proposal to buy "chinchilla pelts of middle or better quality" was sufficiently definite because a reasonable person in the same circumstances as the recipient of the proposal could perceive the description to be sufficiently definite.[18] Another court assumed that an offer to purchase monoammonium-phosphate with the specification "P 205 52% +/- 1%, min 51%" was a sufficiently definite indication of the quality of the goods ordered.[19] If, however, the parties are unable to agree on the quality of the goods ordered there is no contract.[20]

FIXING OR DETERMINING THE QUANTITY

9. To be sufficiently definite under the second sentence of paragraph (1) a proposal must expressly or implicitly fix or make provision for determining the quantity. The following quantity designations have been found sufficiently definite: a reference to "700 to 800 tons" of natural gas when usage in the natural gas trade treated the designation as adequate;[21] "a greater number of Chinchilla furs" because the buyer accepted the furs tendered without objection;[22] "three truck loads of eggs" because the other party reasonably understood or ought to have understood that the trucks should be filled to their full capacity;[23] "20 truck loads of tinned tomato concentrate" because the parties understood the meaning of these terms and their understanding was consistent with the understanding in the trade;[24] "10,000 tons +/-5%".[25] A court has found that a buyer's proposal that expressly designated no specific quantity was sufficiently definite because, under an alleged customary usage, the proposal would be construed as an offer to purchase the buyer's needs from the offeree.[26] Another court found that the seller's delivery of 2,700 pairs of shoes in response to the buyer's order of 3,400 pairs was a counter-offer accepted by the buyer when it took delivery; the contract was therefore concluded for only 2,700 pairs.[27]

10. A distribution agreement specifying terms on which the parties would do business and obliging the buyer to order a specified amount was found not sufficiently definite because it did not state a specific quantity.[28]

FIXING OR DETERMINING THE PRICE

11. To be sufficiently definite under the second sentence of paragraph (1) a proposal must expressly or implicitly fix or make provision for determining not only the quantity but also the price. Proposals with the following price designations have been found sufficiently definite: pelts of varying quality to be sold "at a price between 35 and 65 German Marks for furs of medium and superior quality" because the price could be calculated by multiplying the quantity of each type by the relevant price;[29] no specific agreement on price where a course of dealing between the parties established the price;[30] a proposal that prices were to be adjusted to reflect market prices;[31] agreement on a provisional price to be followed by establishment of a definitive price after the buyer resold the goods to its customer, because such an arrangement was regularly observed in the trade.[32]

12. The following proposals were found to be insufficiently definite: a proposal that provided for several alternative configurations of goods but did not indicate a proposed price for some elements of the alternative proposals;[33] an agreement that the parties would agree on the price of additional goods ten days before the new year.[34]

13. One court has concluded that, if the intent to be bound by an acceptance is established, a proposal is sufficiently definite notwithstanding the failure to specify the price.[35]

RELEVANCE OF PRICE FORMULA IN ARTICLE 55

14. Article 14 states that a proposal to conclude a contract is sufficiently definite if it "fixes or makes provision for determining" the price. Article 55 provides a price formula that applies "[w]here a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price". The price supplied by article 55 is "the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned."

15. Most decisions have declined to apply article 55.[36] Several have concluded that article 55 was not applicable because the parties had expressly or implicitly fixed or made provision for determining the price, thereby satisfying the definiteness requirement set out in article 14 (1).[37] One tribunal found that where the parties had agreed to fix the price at a later time but had not done so, the proposal was not sufficiently definite under article 14 (1) and that article 55 was not applicable because of the parties' agreement to fix the price at a later time.[38] In another case where the proposal to conclude a contract failed to fix the price, the court declined to apply article 55 to fix the price because there was no market price for the airplane engines concerning which the parties were negotiating.[39] Another court also found that, to the extent the price formula of article 55 might be applicable, the parties had derogated from that formula by their agreement.[40]

16. When enforcing an agreement notwithstanding the fact that the parties had not fixed the price in their original negotiations, one court has invoked article 55. In that case, the court stated that the price set out in a corrected invoice issued by the seller at the request of the buyer and to which the buyer did not object was to be interpreted as the price charged under comparable circumstances in the trade concerned, as provided in the article 55 formula.[41]

Notes

[1]CLOUT case No. 121 [Oberlandesgericht Frankfurt, Germany, 4 March 1994] (a buyer's purported acceptance that included both screws for which the seller had stated the price and additional screws for which the seller had not stated the price was a counter-proposal that was not sufficiently definite because the price of the latter screws were not fixed or determinable). See also CLOUT case No. 189 [Oberster Gerichtshof, Austria, 20 March 1997] (stating that a counter-offer must satisfy the conditions of article 14).

[2]CLOUT case No. 134 [Oberlandesgericht München, Germany, 8 March 1995] (applying the general principles of Part II rather than the national law applicable by virtue of private international law to transaction between Finnish seller and German buyer).

[3]CLOUT case No. 429 [Oberlandesgericht Frankfurt, Germany, 30 August 2000], also in Unilex; Oberlandesgericht Stuttgart, Germany, 28 February 2000, available on the Internet at http://www.cisg-online.ch/cisg/urteile/583.htm; Hoge Raad, Netherlands, 7 November 1997, Unilex; CLOUT case No. 334 [Obergericht des Kantons Thurgau, Switzerland, 19 December 1995]; CLOUT case No. 330 [Handelsgericht des Kantons St. Gallen, Switzerland, 5 December 1995]; CLOUT case No. 5 [Landgericht Hamburg, Germany, 26 September 1990]. See paragraph 15 of the Digest for Part II.

[4]CLOUT case No. 239 [Oberster Gerichtshof, Austria, 18 June 1997] (if offeror knew that addressee was acting as agent, then offeror should expect proposal to be transmitted to the principal; if offeror did not know or was unaware that addressee was an agent, the offeror was not bound by principal's acceptance; case remanded to determine whether the addressee was agent and whether offeror knew of this).

[5]CLOUT case No. 334 [Obergericht des Kantons Thurgau, Switzerland, 19 December 1995] (interpreting the statements and acts of the parties in accordance with art. 8, manufacturer rather than its dealer was party to contract; manufacturer had, however, assigned its claim for breach to dealer).

[6]CLOUT case No. 215 [Bezirksgericht St. Gallen, Switzerland, 3 July 1997] (see full text of the decision).

[7]CLOUT case No. 215 [Bezirksgericht St. Gallen, Switzerland, 3 July 1997] (stressing the parties' conduct subsequent to conclusion of the contract).

[8]CLOUT case No. 330 [Handelsgericht des Kantons St. Gallen, Switzerland, 5 December 1995] (see full text of the decision).

[9]Oberlandesgericht Hamburg, Germany, 4 July 1997, Unilex ("We can only propose you"; "First truck could be delivered").

[10]CLOUT case No. 131 [Landgericht München, Germany, 8 February 1995].

[11]CLOUT case No. 217 [Handelsgericht des Kantons Aargau Switzerland 26 September 1997].

[12]CLOUT case No. 417 [Federal District Court, Northern District of Illinois, United States, 7 December 1999] (conditions satisfied).

[13]CLOUT case No. 52 [Fovárosi Biróság, Hungary, 24 March 1992] (citing art. 9 (1), court concludes that prior sales transactions between the parties supplied details unstated in telephone order).

[14]CLOUT case No. 330 [Handelsgericht des Kantons St. Gallen, Switzerland, 5 December 1995] (fax "ordering" software devices sufficiently definite notwithstanding failure to mention price).

[15]See also CLOUT case No. 131 [Landgericht München, Germany, 8 February 1995] (contract for purchase of software enforceable even if parties intended further agreement with respect to use of software).

[16]CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000] (art. 31 (a) applies when buyer unable to establish parties agreed on different place).

[17]CLOUT case No. 261[Bezirksgericht der Sanne, Switzerland, 20 February 1997] (seller deemed authorized to arrange transportation under art. 32 (2) when buyer was unable to establish that parties agreed on transport by truck).

[18]CLOUT case No. 106 [Oberster Gerichtshof, Austria, 10 November 1994].

[19]CLOUT case No. 189 [Oberster Gerichtshof, Austria, 20 March 1997] (remanding to lower court, however, to determine whether an apparently contradictory response was sufficiently definite).

[20]CLOUT case No. 135 [Oberlandesgericht Frankfurt a.M., Germany 31 March 1995] (no agreement on quality of test tubes).

[21]CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (see full text of the decision).

[22]CLOUT case No. 106 [Oberster Gerichtshof, Austria, 10 November 1994] (citing art. 8 (2), (3)) (see full text of the decision).

[23]Landgericht Oldenburg, Germany, 28 February 1996, Unilex (citing art. 8 (2)).

[24]Oberlandesgericht Hamburg, Germany, 4 July 1997, Unilex.

[25]CLOUT case No. 189 [Oberster Gerichtshof, Austria, 20 March 1997] (remanding to lower court to determine whether other elements of acceptance were sufficiently definite).

[26]CLOUT case No. 579 [Federal] Southern District Court of New York, United States, 10 May 2002, *Federal Supplement (2nd Series)* 201, 236 ff.

[27]CLOUT case No. 291 [Oberlandesgericht Frankfurt a.M., Germany, 23 May 1995].

[28]CLOUT case No. 187 [Federal District Court, Southern District of New York, United States, 23 July 1997] (see full text of the decision).

[29]CLOUT case No. 106 [Oberster Gerichtshof, Austria, 10 November 1994].

[30]CLOUT case No. 52 [Fovárosi Biróság, Hungary, 24 March 1992] (citing art. 9 (1)).

[31]CLOUT case No. 155 [Cour de Cassation. France, 4 January 1995], *affirming*, CLOUT case No. 158 [Cour d'appel, Paris, France, 22 April 1992] (*"à revoir en function de la baisse du marché"*).

[32]ICC award No. 8324, 1995, Unilex.

[33]CLOUT case No. 53 [Legfelsóbb Biróság, Hungary, 25 September 1992] (see full text of the decision).

[34]CLOUT case No. 139 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, award in case No. 309/1993 of 3 March 1995]; Federation Chamber of Commerce and Industry, Russian Federation, award in case No. 304/1993 of 3 March 1995, published in *Rozenberg, Practika of Mejdunarodnogo Commercheskogo Arbitrajnogo Syda: Haychno-Practicheskiy Commentariy* 1997, No. 21 [46–54] (citing art. 8).

[35]CLOUT case No. 330 [Handelsgericht des Kantons St. Gallen, Switzerland, 5 December 1995] (fax "ordering" software devices sufficiently definite notwithstanding failure to mention price).

[36]See also Oberlandesgericht Frankfurt a.M., Germany, 15 March 1996, available on the Internet at http://www.cisg-online.ch/cisg/urteile/284.htm (citing articles 14 and 55 when expressing doubt parties had undertaken obligations), *affirmed*, CLOUT case No. 236 [Bundesgerichtshof, VIII ZR 134/96, 23 July 1997] (no citation to articles 14 or 55); CLOUT case No. 410 [Landgericht Alsfeld, Germany, 12 May 1995] (court indicates that buyer did not allege circumstances from which a lower price could be established in accordance with article 55) (see full text of the decision).

[37]CLOUT case No. 343 [Landgericht, Darmstadt, Germany 9 May 2000] (parties' agreement as to price enforceable even if price different from that of the market); CLOUT case No. 106 [Oberster Gerichtshof, Austria, 10 November 1994] (transaction between a German seller and an Austrian buyer; parties had fixed the price in a contract concluded by offer and acceptance; the court therefore reversed an intermediate court's application of article 55).

[38]CLOUT case No. 139 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, award in case No. 309/1993 of 3 March 1995] (transaction between a Ukrainian seller and an Austrian buyer; court found that buyer may have separate claim for seller's failure to propose a price during the designated time).

[39]CLOUT case No. 53 [Legfelsóbb Biróság,, Hungary, 25 September 1992] (transaction between a U.S. seller and a Hungarian buyer).

[40]CLOUT case No. 151 [Cour d'appel, Grenoble, France, 26 February 1995] (buyer had accepted invoices with higher than market prices).

[41]CLOUT case No. 215 [Bezirksgericht St. Gallen, Switzerland 3 July 1997] (transaction between a Dutch seller and Swiss buyer; buyer's subsequent conduct interpreted as establishing buyer's intent to conclude a contract).

Article 15

(1) An offer becomes effective when it reaches the offeree.

(2) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.

OVERVIEW–ARTICLE 15 (1)

1. Paragraph (1) of article 15 provides that an offer becomes effective when it reaches the offeree. Article 24 defines when a revocation "reaches" the offeree. Although paragraph (1) has been cited[1], no reported decision has interpreted it.

OVERVIEW–ARTICLE 15 (2)

2. Paragraph (2) provides that an offeror may withdraw its offer if the withdrawal reaches the offeree before or at the same time as the offer. After the offer reaches the offeree, the offeror may no longer withdraw the offer, but may be entitled to revoke the offer in accordance with article 16. There are no reported cases applying paragraph (2).

Notes

[1]CLOUT Case No. 430 [Oberlandesgericht München, Germany, 3 December 1999], see also Unilex (citing arts. 14, 15(1), 18 and 23); CLOUT case No. 308 [Federal Court of Australia, 28 April 1995] (citing arts. 8, 11, 15 (1), 18 (1) and 29 (1) when holding that parties had concluded contract with a retention of title clause). The following decisions cite article 15 in general, but because they do not involve withdrawal of an offer—the issue addressed in article 15(2)—the citations effectively refer to paragraph (1) of article 15: CLOUT case No. 318 [Oberlandesgericht Celle, Germany, 2 September 1998] (citing arts. 14, 15 and 18 when finding that parties had concluded a contract); Landgericht Oldenburg, Germany, 28 February 1996, Unilex (citing arts. 14, 15, 16, 17, 18 and 19); CLOUT case No. 291 [Oberlandesgericht Frankfurt a.M., Germany, 23 May 1995] (citing arts. 14, 15, 18 (3), 19 (1) and (3)) (see full text of the decision); Landgericht Krefeld, Germany, 24 November 1992, Unilex (citing arts. 15 and 18).

Article 16

(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.

(2) However, an offer cannot be revoked:

(*a*) If it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or

(*b*) If it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

OVERVIEW—ARTICLE 16 (1)

1. Paragraph (1) of article 16 sets out rules for the effective revocation of an offer. "Revocation" of an offer under article 16 (1) is distinguished from "withdrawal" of an offer under article 15 (2): withdrawal refers to a retraction of an offer that reaches the offeree before or at the same time as the offer reaches the offeree, whereas revocation refers to a retraction of an offer that reaches the offeree after the offer has reached the offeree.[1] Until a contract is concluded, article 16 (1) empowers an offeror to revoke the offer provided the revocation reaches the offeree before he has dispatched an acceptance, unless the offer cannot be revoked by virtue of article 16 (2). Under articles 18 and 23, a contract is not concluded until the offeree's indication of assent reaches the offeror (except where article 18 (3) applies); thus the rule of article 16 (1) precluding revocation from the time an acceptance is dispatched may block revocation for a period before the contract is concluded. Although there have been citations to article 16,[2],there are no reported cases interpreting paragraph (1).

OVERVIEW—ARTICLE 16 (2)

2. Subparagraph *(a)* of paragraph (2) provides that an offer cannot be revoked if it indicates that it is irrevocable, whether by stating a fixed time for acceptance or otherwise. There are no reported cases applying this subparagraph.

3. Subparagraph *(b)* of paragraph (2) provides that an offer cannot be revoked if the offeree relied on the offer and it was reasonable for him to do so. This subparagraph has been cited as evidence of a general principle of estoppel ("*venire contra factum proprium*").[3] It has also been held that domestic legal rules on promissory estoppel are not pre-empted except when the Sales Convention provides the equivalent of promissory estoppel, as it does in subparagraph *(b)*.[4]

Notes

[1]Article 24 defines when an offer or other expression of intention—presumably including a withdrawal or a revocation of an offer—"reaches" the offeree.

[2]The following decision cites article 16 but because the case did not involve irrevocability of the offer—see para. 2—the citation effectively refers to paragraph (1) of article 16: Landgericht Oldenburg, Germany, 28 February 1996, Unilex (citing arts. 14, 15, 16, 17, 18 and 19).

[3]CLOUT case No. 94 [Arbitration—Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft-Wien, Austria, 15 June 1994] (seller's continued requests for information about complaints induced buyer to believe that seller would not raise defence that notice of nonconformity was not timely).

[4]CLOUT case No. 579 [Federal] Southern District Court of New York, United States, 10 May 2002, Federal Supplement (2nd *Series)* 201, 236 (finding limited to scope of promissory estoppel as claimed by buyer).

Article 17

An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.

OVERVIEW

1. Article 17 states that an offer terminates when a rejection reaches the offeror. This is true whether or not the offer is irrevocable. Article 24 defines when a revocation "reaches" the offeror. Although article 17 has been cited,[1] there are no reported cases interpreting it.

Notes

[1]Landgericht Oldenburg, Germany, 28 February 1996, Unilex (citing arts. 14, 15, 16, 17, 18 and 19).

Article 18

(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.

(2) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph.

OVERVIEW

1. Article 18 is the first of five articles that deal with the acceptance of an offer. Paragraph (1) of article 18 addresses what constitutes the acceptance of an offer, while paragraphs (2) and (3) determine when an acceptance is effective. Article 19 qualifies article 18 by providing rules for when a purported acceptance so modifies an offer that the reply is a counter-offer.

2. Decisions have applied article 18 not only to offers to conclude a contract but also to acceptance of counter-offers,[1] proposals to modify the contract[2] and proposals to terminate the contract.[3] The provisions of article 18 have also been applied to matters not covered by the Sales Convention.[4]

INDICATION OF ASSENT TO AN OFFER

3. Pursuant to article 18 (1), an offeree accepts an offer by a statement or other conduct indicating assent. Whether or not the statement or conduct indicates assent is subject to interpretation in accordance with the rules of paragraphs (1) and (2) of article 8.[5] All the circumstances, including negotiations prior to conclusion of the contract and the course of performance after conclusion, are to be taken into account in accordance with paragraph (3) of article 8.[6] If a statement or conduct indicating assent to an offer cannot be found, there is no contract under Part II of the CISG.[7]

4. Only the offeree of a proposal to conclude a contract is entitled to accept the offer.[8]

5. Whether an offeree's reply indicating assent to an offer but modifying that offer is an acceptance or a counter-offer is determined by article 19.[9] Whether a counter-offer is accepted is then determined by article 18.[10]

6. An indication of assent may be made by an oral or written statement[11] or by conduct.[12] The following conduct has been found to indicate assent: buyer's acceptance of goods;[13] third party's taking delivery of goods;[14] issuance of letter of credit;[15] signing invoices to be sent to a financial institution with a request that it finance the purchase;[16] sending a reference letter to an administrative agency.[17]

SILENCE OR INACTIVITY AS ASSENT TO AN OFFER

7. In the absence of other evidence indicating assent to an offer, an offeree's silence or inactivity on receiving an offer does not amount to an acceptance.[18] By virtue of article 9 (1), however, parties are bound by practices established between themselves and these practices may indicate assent to an offer notwithstanding the silence or inactivity of the addressee.[19] Parties are also bound by usages as provided in paragraphs (1) and (2) of article 9, and these usages may give rise to acceptance of an offer notwithstanding the addressee's silence or inactivity.[20] One court stated that a course of dealing between the parties required an offeree to object promptly to an offer, and that the party's delay in objecting constituted acceptance of the offer.[21] A buyer's failure to exercise any remedy under the Convention in response to the seller's proposal that the buyer examine the delivered goods and resell them was construed as acceptance of an offer to terminate the contract.[22]

EFFECTIVENESS—TIME LIMITS FOR ACCEPTANCE

8. Paragraph (2) of article 18 provides that, except in the circumstances set out in paragraph (3), an acceptance becomes effective at the moment the indication of assent reaches the offeror provided it does so within the time limit

for acceptance. The acceptance “reaches” the offeror when article 24 is satisfied. By virtue of article, 23 a contract is concluded when the acceptance becomes effective.[23]

9. To be effective, however, the acceptance must reach the offeror within the time limits set by paragraph (2) of article 18 as modified by article 21 on late acceptance. Article 20 provides rules of interpretation for determining the time limits for acceptance. As provided in article 21, an offer cannot be accepted after the time limit expires unless the offeror informs the offeree without delay that the acceptance is effective.[24]

EFFECTIVENESS BY PERFORMANCE OF ACT

10. An acceptance is effective at the moment the offeree performs an act indicating assent to the offer, provided the offeree is authorized, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, to indicate its acceptance of the offer by an act without notice to the offeror. Several decisions have cited paragraph (3) rather than paragraph (1) for the proposition that a contract may be concluded by the performance of an act by the offeree.[25]

Notes

[1]CLOUT case No. 291 [Oberlandesgericht Frankfurt a.M., Germany, 23 May 1995] (delivery of 2,700 pairs of shoes in response to order of 3,400 pairs was a counter-offer accepted by buyer when it took delivery).

[2]CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998] (no acceptance in communications regarding modification) (see full text of the decision); CLOUT case No. 347 [Oberlandesgericht Dresden, Germany, 9 July 1998] (proposal to modify in commercial letter of confirmation not accepted) (see full text of the decision); CLOUT case No. 193 [Handelsgericht des Kantons Zürich, Switzerland, 10 July 1996] (proposal to modify not accepted by silence of addressee); CLOUT case No. 133 [Oberlandesgericht München, Germany, 8 February 1995] (proposal to modify time of delivery not accepted) (see full text of the decision); CLOUT case No. 203 [Cour d’appel, Paris, France, 13 December 1995] (proposal to modify in letter of confirmation not accepted).

[3]CLOUT case No. 120 [Oberlandesgericht Köln, Germany, 22 February 1994] (acceptance of proposal to terminate contract); CIETAC award No. 75, China, 1 April 1993, Unilex (acceptance of proposal to terminate), also available on the INTERNET at http://www.cisg.law.pace.edu/cgi-bin/isearch.

[4]CLOUT case No. 308 [Federal Court of Australia, 28 April 1995] (applying art. 18 to determine whether retention of title clause accepted).

[5]CLOUT case No. 429 [Oberlandesgericht Frankfurt a.M., Germany, 30 August 2000], also in Unilex (sending of promissory note interpreted as not an acceptance).

[6]See, e.g., Comisión para la Protección del Comercio Exterior de México, Mexico, 29 April 1996, Unilex (alleged seller’s letter in reply to offer, letter of credit naming it as payee, and subsequent conduct of the parties evidenced conclusion of contract); CLOUT case No. 23 [Federal District Court, Southern District of New York, United States, 14 April 1992] (course of dealing created duty to respond to offer).

[7]CLOUT case No. 173 [Fovárosi Biróság, Hungary, 17 June 1997] (no clear agreement to extend distribution contract); CLOUT case No. 135 [Oberlandesgericht Frankfurt a.M., Germany, 31 March 1995] (correspondence did not reach agreement on quality of glass ordered).

[8]CLOUT case No. 239 [Oberster Gerichtshof, Austria, 18 June 1997] (remand to determine whether the offer was made to a mercantile agent).

[9]CLOUT case No. 242 [Cour de Cassation, France, 16 July 1998] (reply with different jurisdiction clause was a material modification under art. 19 and therefore a counter-offer); CLOUT case No. 227 [Oberlandesgericht Hamm, Germany, 22 September 1992] (reply with reference to “unwrapped” bacon a counter-offer under art. 19 and not acceptance under art. 18).

[10]CLOUT case No. 232 [Oberlandesgericht München, Germany, 11 March 1998] (buyer, by performing contract, accepted seller’s standard terms that modified buyer’s offer) (see full text of the decision); CLOUT case No. 227 [Oberlandesgericht Hamm, Germany, 22 September 1992] (buyer accepted counter-offer when its reply did not object to counter-offer).

[11]CLOUT case No. 395 [Tribunal Supremo, Spain, 28 January 2000] (faxed unconditional acceptance); CLOUT case No. 308 [Federal Court of Australia, 28 April 1995] (statement in offeree’s letter interpreted as an acceptance) (see full text of the decision).

[12]CLOUT case No. 429 [Oberlandesgericht Frankfurt a.M., Germany, 30 August 2000], see also Unilex (sending fax and promissory note could be acts indicating acceptance, but interpretation of documents showed no such acceptance): CLOUT case No. 291 [Oberlandesgericht Frankfurt a.M., Germany, 23 May 1995] (seller’s delivery of fewer pairs of shoes than ordered was a counter-offer accepted by buyer taking delivery).

[13]CLOUT case No. 292 [Oberlandesgericht Saarbrücken, Germany, 13 January 1993] (buyer’s acceptance of goods indicated assent to offer, including standard terms in letter of confirmation) (see full text of the decision).

[14]CLOUT case No. 193 [Handelsgericht des Kantons Zürich, Switzerland, 10 July 1996] (third party taking delivery for third party was act accepting increased quantity of goods sent by seller) (see full text of the decision).

[15]CLOUT case No. 417 [Federal District Court, Northern District of Illinois, United States, 7 December 1999] (pleading stated cause of action by alleging facts showing parties concluded contract of sale).

[16]Cámara Nacional de Apelaciones en lo Comercial, Argentina, 14 October 1993, Unilex.

[17]CLOUT case No. 579 [Federal] Southern District Court of New York, United States, 10 May 2002, *Federal Supplement (2nd Series)* 201, 236 ff.

[18]CLOUT case No. 309 [Østre Landsret Denmark, 23 April 1998] (parties had no prior dealings); CLOUT case No. 224 [Cour de Cassation, France, 27 January 1998] (without citation of the Sales Convention, court of cassation finds that court of appeal did not ignore rule that silence does not amount to an acceptance); CLOUT case No. 193 [Handelsgericht des Kantons Zürich, Switzerland, 10 July 1996] (no acceptance where addressee was silent and there was no other evidence of assent).

[19]CLOUT case No. 313 [Cour d'appel, Grenoble, France, 21 October 1999] (in prior transactions seller had filled buyer's without notifying the buyer); CLOUT case No. 23 [Federal District Court, Southern District of New York United States 14 April 1992] (course of dealing created duty to respond to offer).

[20]Gerechtshof 's-Hertogenbosch, Netherlands, 24 April 1996, Unilex; CLOUT case No. 347 [Oberlandesgericht Dresden, Germany 9 July 1998] (buyer who sent commercial letter of confirmation did not establish existence of international usage by which silence constitutes assent). See also Opinion of Advocate General Tesauro, *EC Reports*, 1997, I-911 ff. (commercial letter of confirmation enforceable notwithstanding recipient's silence if international usage established).

[21]CLOUT case No. 23 [Federal District Court, Southern District of New York, United States, 14 April 1992]. See also CLOUT case No. 313 [Cour d'appel, Grenoble, France 21 October 1999] (seller with manufacturing samples and original material in its possession should have questioned buyer about absence of order from buyer).

[22]CLOUT case No. 120 [Oberlandesgericht Köln, Germany, 22 February 1994].

[23]CLOUT case No. 203 [Cour d'appel, Paris, France, 13 December 1995] (contract concluded before receipt of letter of confirmation so no acceptance of the standard terms referred to in letter).

[24]ICC award No. 7844/1994, *The ICC International Court of Arbitration Bulletin* (Nov. 1995) 72-73.

[25]CLOUT case No. 416 [Minnesota [State] District Court, United States 9 March 1999] (if Convention applicable, party accepted by performance under art. 18 (3)) (see full text of the decision); CLOUT case No. 193 [Handelsgericht des Kantons Zürich, Switzerland, 10 July 1996] (third party taking delivery of greater number of goods than had been contracted for was an acceptance under art. 18 (3), but not acceptance of seller's proposal to modify price); CLOUT case No. 291 [Oberlandesgericht Frankfurt a.M., Germany, 23 May 1995] (delivery of goods could constitute an acceptance of an order under art. 18 (3), but because the delivered quantity differed materially from the order the acceptance was a counter-offer under art. 19).

Article 19

(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

(3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

OVERVIEW

1. Article 19 qualifies article 18 by providing that a purported acceptance which modifies the offer is a rejection of the offer and is considered instead to be a counter-offer.[1] Paragraph (1) of article 19 states this basic proposition, while paragraph (2) makes an exception for immaterial modifications to which the offeror does not object. Paragraph (3) lists matters which are considered material.

MATERIAL MODIFICATIONS

2. Paragraph (1) provides that a reply to an offer that adds to, limits or otherwise modifies the offer is a rejection of the offer. Several decisions have reviewed the parties' exchange of multiple communications and have concluded, without specifying the modifications, that at no point was there an acceptance of an offer.[2]

3. Paragraph (3) lists matters that, if they are the subject of a modification in a reply to an offer, render the modification material. Modifications relating to the following listed matters have been found to be material: price;[3] payment;[4] quality and quantity of the goods;[5] place and time of delivery;[6] settlement of disputes.[7] One decision has stated, however, that modifications of matters listed in paragraph (3) are not material if the modifications are not considered material by the parties or in the light of usages.[8]

IMMATERIAL MODIFICATIONS

4. Paragraph (2) provides that a reply with immaterial modifications of the offer constitutes an acceptance (and that the resulting contract includes the modified terms of the reply) unless the offeror notifies the offeree without undue delay that the offeror objects to the modifications.[9] One court has stated that modifications that favour the addressee are not material and do not have to be accepted expressly by the other party.[10]

5. The following modifications have been found to be immaterial: language stating that the price would be modified by increases as well as decreases in the market price, and deferring delivery of one item;[11] seller's standard term reserving the right to change the date of delivery;[12] a request that buyer draft a formal termination agreement;[13] a request to treat the contract confidential until the parties make a joint public announcement;[14] a provision requiring that buyer reject delivered goods within a stated period.[15]

CONFLICTING STANDARD TERMS

6. The Convention does not have special rules to address the issues raised when a potential seller and buyer both use standard contract terms prepared in advance for general and repeated use (the so-called "battle of the forms"). Several decisions conclude that the parties' performance notwithstanding partial contradiction between their standard terms established an enforceable contract.[16] As for the terms of these contracts, several decisions would include those terms on which the parties substantially agreed, and replace those standard terms that (after appraisal of all the terms) conflict[17] with the default rules of the Convention; several other decisions give effect to the standard terms of the last person to make an offer or counteroffer that is then deemed accepted by subsequent performance by the other party.[18] Another decision refused to give effect to the standard terms of either party: the seller was not bound by the buyer's terms on the back of the order form in the absence of a reference to them on the front of the form, while the seller's terms–included in a confirmation letter sent after the contract was concluded—were not accepted by the buyer's silence.[19]

Notes

[1]But see CLOUT case No. 189 [Oberster Gerichtshof, Austria, 20 March 1997] (the reply must satisfy the definiteness requirements of art. 14 (1) in order to be a counter-offer). For discussion of the article 14 (1) definiteness requirement, see paragraphs 6 and 7 of the Digest for article 14.

[2]See, e.g., CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998] (no agreement on termination of contract) (see full text of the decision); CLOUT case No. 173 [Fovárosi Biróság, Hungary, 17 June 1997] (no clear agreement to extend distribution contract).

[3]Oberster Gerichtshof, Austria, 9 March 2000, Unilex; CLOUT case No. 417 [Federal District Court, Northern District of Illinois. United States, 7 December 1999] (see full text of the decision); CLOUT case No. 193 [Handelsgericht des Kantons Zürich, Switzerland, 10 July 1996] (see full text of the decision).

[4]CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (time of payment) (see full text of the decision).

[5]CLOUT case No. 291 [Oberlandesgericht Frankfurt a.M., Germany, 23 May 1995] (delivery of fewer pairs of shoes than ordered); CLOUT case No. 135 [Oberlandesgericht Frankfurt a.M., Germany, 31 March 1995] (difference in quality of glass test tubes); CLOUT case No. 121 [Oberlandesgericht Frankfurt a.M., Germany. 4 March 1994] (acceptance ordering additional kinds of screws); CLOUT case No. 227 [Oberlandesgericht Hamm, Germany 22 September 1992] (acceptance offering to sell "unwrapped" rather than wrapped bacon).

[6]CLOUT case No. 413 [Federal District Court, Southern District of New York, United States, 6 April 1998] (delivery terms) (see full text of the decision); CLOUT case No. 133 [Oberlandesgericht München, Germany, 8 February 1995] (time of delivery) (see full text of the decision).

[7]CLOUT case No. 242 [Cour de Cassation, France, 16 July 1998] (differing choice-of-forum clause); CLOUT case No. 23 [Federal District Court, Southern District of New York, United States, 14 April 1992] (inclusion of arbitration clause) (see full text of the decision).

[8]CLOUT case No. 189 [Oberster Gerichtshof, Austria, 20 March 1997].

[9]Tribunal Commercial de Nivelles, Belgium, 19 September 1995, Unilex.

[10]CLOUT case No. 189 [Oberster Gerichtshof, Austria, 20 March 1997].

[11]CLOUT case No. 158 [Cour d'appel, Paris, France 22 April 1992], *affirmed*, CLOUT case No. 155 [Cour de Cassation, France, 4 January 1995] (affirming with no specific reference to the Convention) (see full text of the decision).

[12]CLOUT case No. 362 [Oberlandesgericht Naumburg, Germany, 27 April 1999] (delivery clause interpreted in accordance with art. 33 (c)).

[13]CIETAC award No. 75, China, 1 April 1993, Unilex, also available on the Internet at http://www.cisg.law.pace.edu/cgi-bin/ isearch.

[14]Fováosi Biróság (Metropolitan Court), Budapest, Hungary, 10 January 1992, English-language trans. available on the Internet at http://cisgw3.law.pace.edu/cases/920110hl.html, *reversed on other grounds*, CLOUT case No. 53 [Legfelsóbb Biróság, Hungary, 25 September 1992].

[15]CLOUT case No. 50 [Landgericht Baden-Baden, Germany, 14 August 1991] (see full text of the decision).

[16]Bundesgerichtshof, Germany, 9 January 2002, available on the Internet at http://www.rws-verlag.de/bgh-free/volltex5/vo82717.htm; Landgericht Kehl, Germany, 6 October 1995, Unilex (parties' performance established that parties either derogated from art. 19 or waived enforcement of conflicting standard terms); CLOUT case No. 232 [Oberlandesgericht München, Germany, 11 March 1998] (buyer accepted standard terms that differed from its offer by performing contract) (see full text of the decision).

[17]Bundesgerichtshof, Germany, 9 January 2002, available on the Internet at http://www.rws-verlag.de/bgh-free/volltex5/vo82717.htm; Landgericht Kehl, Germany, 6 October 1995, Unilex (enforcing only standard terms that the parties had in common).

[18]CLOUT case No. 232 [Oberlandesgericht München, Germany, 11 March 1998] (by performing buyer accepted standard terms that differed from its offer); ICC award No. 8611, 1997, Unilex (if standard terms were considered a counter-offer, recipient accepted those terms by taking delivery of goods along with an invoice to which the standard terms were attached). See also Hof 's-Hertogenbosch, Netherlands, 19 November 1996 (seller's acceptance stated that its standard terms applied only to the extent they did not conflict with buyer's standard terms).

[19]CLOUT case No. 203 [Cour d'appel, Paris, France, 13 December 1995].

Article 20

(1) A period of time for acceptance fixed by the offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by the offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.

(2) Official holidays or non-business days occurring during the period for acceptance are included in calculating the period. However, if a notice of acceptance cannot be delivered at the address of the offeror on the last day of the period because that day falls on an official holiday or a non-business day at the place of business of the offeror, the period is extended until the first business day which follows.

OVERVIEW

1. Article 20 sets out rules for calculating the time in which an offeree must accept an offer.

2. Paragraph (1) defines when a time period for acceptance begins to run. The paragraph distinguishes between communications that involve a delay between dispatch and receipt (sentence 1) and instantaneous communications (sentence 2). There are no reported cases applying this paragraph.

3. Paragraph (2) addresses the effect of official holidays and non-business days on the calculation of the time period. There are no reported cases applying this paragraph.

Article 21

(1) A late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or dispatches a notice to that effect.

(2) If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror orally informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect.

OVERVIEW

1. Article 21 provides that a late acceptance is nevertheless effective if the conditions set out in paragraphs (1) or (2) are satisfied. Other provisions of Part II of the Convention defined when an acceptance is late. Thus article 18 (2) requires a timely acceptance to reach the offeror within the time period specified in that paragraph and calculated as provided in article 20; article 24 defines when a revocation "reaches" the offeree. Article 18(3), however, identifies circumstances in which an acceptance is effective when the offeree performs "an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror […]".

2. Paragraph (1) provides that a late acceptance is effective if the offeror notifies the offeree without delay that the acceptance is effective.[1]

3. Paragraph (2) provides that a "letter or other writing containing a late acceptance" is nevertheless effective as an acceptance if the writing shows that it would normally have reached the offeror within the time period for acceptance, unless the offeror notifies the offeree without delay that he considers the offer to have lapsed. There are no reported cases applying paragraph (2).

Notes

[1]ICC Court of Arbitration award No. 7844/1994, *The ICC International Court of Arbitration Bulletin* (Nov. 1995) 72-73 (reference to Austrian law and Convention for proposition that a late acceptance would not be effective unless the offeror notified offeree without delay that the acceptance is effective).

Article 22

An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.

OVERVIEW

1. Article 22 provides that an offeree may withdraw its acceptance if the withdrawal reaches the offeror before or at the same time as the acceptance becomes effective. An acceptance is generally effective at the moment it reaches the offeror in accordance with article 18 (2) (although in certain circumstances an acceptance by an act is effective when the act is performed, as provided in article 18 (3)). Article 24 defines when an acceptance and a withdrawal of an acceptance "reaches" the offeror. There are no reported cases applying this article.

Article 23

A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention.

INTRODUCTION

1. Article 23 provides that a contract is concluded when an acceptance of an offer becomes effective. Except as provided in article 18 (3), an acceptance is effective at the moment it reaches the offeror in accordance with article 18 (2). The exception in article 18 (3) provides that an acceptance is effective at the moment the offeree performs an act if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree is authorized to indicate its acceptance of the offer by an act without notice to the offeror.

INTERPRETATION AND THE TIME OF CONCLUSION OF A CONTRACT

2. A contract is concluded when the communications between and actions of the parties, as provided in article 18 and as interpreted in accordance with article 8, establish that there has been an effective acceptance of an offer.[1] One decision concluded that an offer that conditioned the contract on the approval of the parties' respective Governments, when properly interpreted, did not postpone conclusion of the contract under the Convention.[2] Another decision found that a supplier and a potential subcontractor had agreed to condition the conclusion of the sales contract on the future award of a sub-contract by the main contractor.[3]

3. Once a contract is concluded, subsequent communications may be construed as proposals to modify the contract. Several courts subject these proposals to the Convention's rules on offer and acceptance.[4]

PLACE OF CONCLUSION OF A CONTRACT

4. Article 23 does not address where a contract is concluded. One court deduced from article 23 that the contract was concluded at the place of business where the acceptance reached the offeror.[5]

Notes

[1]Comisión para la Protección del Comercio Exterior de México, Mexico, 29 April 1996, Unilex (contract concluded when acceptance reached buyer-offeror); CLOUT case No. 134 [Oberlandesgericht München, Germany, 8 March 1995] (although Part II not applicable because of art. 92 declaration, court finds contract concluded by intention of the parties); CLOUT case No. 158 [Cour d'appel, Paris, France, 22 April 1992] (contract concluded when acceptance reached offeror); CLOUT case No. 5 [Landgericht Hamburg, Germany, 26 September 1990] (exchange of communications, interpreted in accordance with art. 8, established parties' intent to conclude contract) (see full text of the decision).

[2]Fovárosi Biróság (Metropolitan Court), Budapest, Hungary, 10 January 1992, English-language trans. available on the Internet at http://cisgw3.law.pace.edu/cases/920110hl.html, *reversed on other grounds*, CLOUT case No. 53 [Legfelsóbb Biróság, Hungary 25 September 1992] (see full text of the decision).

[3]ICC award No. 7844/1994, *The ICC International Court of Arbitration Bulletin* (Nov. 1995) 72-73.

[4]CLOUT case No. 395 [Tribunal Supremo, Spain, 28 January 2000] (proposal to modify price not accepted); CLOUT case No. 193 [Handelsgericht des Kantons Zürich, Switzerland, 10 July 1996] (proposal to modify price not accepted by silence, citing art. 18 (1)); CLOUT case No. 203 [Cour d'appel, Paris, France 13 December 1995] (confirmation letter sent after contract concluded not accepted).

[5]CLOUT case No. 308 [Federal Court of Australia, 28 April 1995] (German law applied because acceptance reached offeror at its place of business in Germany) (see full text of the decision).

Article 24

For the purposes of the Part of the Convention, an offer, declaration of acceptance or any other indication of intention "reaches" the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.

OVERVIEW

1. Article 24 defines, for the purposes of Part II (governing formation of the contract), when a communication reaches the other party. Part II of the Convention refers to the time when a communication "reaches" the other party in articles 15 (1) (time when an offer becomes effective), 15 (2) (withdrawal of offer), 16 (1) (revocation of acceptance), 17 (rejection of an offer), 18 (2) (time when an acceptance becomes effective), 20 (1) (commencement of time period for acceptance if an offer is made via instantaneous means of communication), 21 (2) (late acceptance that normally would have arrived in time), and 23 (time of conclusion of contract).

SCOPE OF ARTICLE 24

2. Article 24 applies only to communications made before or at the time the contract is concluded. For communications after the contract is concluded, article 27 provides that the addressee bears the risk of non-receipt or of delay or error.[1]

ORAL COMMUNICATIONS

3. An oral communication reaches the addressee when it is made to him. There are no reported cases applying this provision.

OTHER COMMUNICATIONS

4. Any other communication reaches the addressee when it is delivered to the addressee personally or to his business or mailing address. If the addressee does not have a place of business or mailing address, a communication reaches the addressee when it is delivered to his habitual residence. A communication delivered to the relevant address is effective even if the addressee has changed its address.[2]

LANGUAGE OF COMMUNICATION

5. Article 24 does not expressly address whether a communication in a language that the addressee is unable to understand "reaches" the addressee. Under paragraphs (1) and (2) of article 8, a party's communication is to be interpreted in accordance with the common understanding of the parties or, absent such a common understanding, in accordance with the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances. One court has stated that, pursuant to article 8, a communication does not "reach" the addressee unless the language of the communication was agreed to by the parties, used by the parties in their prior dealings, or customary in the trade.[3] Several other courts have given no effect to standard terms when they were not translated into the language of the other party.[4]

Notes

[1]But see Arrondissementsrechtbank, Amsterdam, Netherlands, 5 October 1994, Unilex (applying art. 24 to seller's letter responding to buyer's explanation for partial rejection of the goods).

[2]Arrondissementsrechtbank, Amsterdam, Netherlands, 5 October 1994, Unilex (seller's letter in response to buyer's explanation for partial rejection of the goods "reached" the buyer even though buyer did not actually receive it because of change of address).

[3]CLOUT case No. 132 [Oberlandesgericht Hamm, Germany, 8 February 1995] (discussion of "language risk" in light of art. 8).

[4]CLOUT case No. 345 [Landgericht Heilbronn, Germany, 15 September 1997] (standard terms stated exclusively in German language sent by a German seller to an Italian buyer); Amtsgericht Kehl, Germany, 6 October 1995, Unilex (standard terms stated exclusively in German language sent by a German buyer to an Italian seller).

Part three

SALE OF GOODS

OVERVIEW

1. If an international sales contract has been formed, Part III of the Sales Convention contains rules stating the substantive obligations of the parties created by the contract. Timing requirements for the application of these rules are set out in article 100 (b). Part III of the Convention is comprised of Chapter I, "General Provisions" (articles 25-29); Chapter II, "Obligations of the Seller" (articles 30-52); Chapter III, "Obligations of the Buyer" (articles 53-65); Chapter IV, "Passing of Risk" (articles 66-70); and Chapter V, "Provisions Common to the Obligations of the Seller and of the Buyer" (articles 71-88).

PERMITTED RESERVATIONS BY CONTRACTING STATES

2. Under article 92 of the Sales Convention, a Contracting State may declare that it is not bound by Part III of the Convention, in which case the Convention rules binding on that State would primarily be those in Part II on formation of the contract. No Contracting State has made such a declaration. Two or more Contracting States that have the same or closely-related legal rules on sales matters may declare that the Convention is not to apply to sales contracts (or to their formation) where the parties have their places of business in these States. CISG article 94 (1). A Contracting State may also make such a declaration if it has the same or closely-related legal rules on matters governed by the Convention as those of a non-Contracting State. CISG article 94 (2). Such a non-Contracting State may, when it becomes a Contracting State, declare that the Convention shall continue to be inapplicable to sales contracts (of the formation thereof) with persons in the earlier-declaring Contracting State. CISG article 94 (3). Denmark, Finland, Norway and Sweden made declarations that the Convention—including Part III thereof—is inapplicable with respect to contracts between parties located in those states or in Iceland. When Iceland became a Contracting State it declared that it would continue this arrangement.

Part III, Chapter I

General provisions (articles 25-29)

OVERVIEW

1. Chapter I of Part III of the Convention, entitled "General Provisions," encompasses four articles—articles 25-29. The first two of those articles deal with matters relating to avoidance of contract: article 25 defines a "fundamental breach," which is a prerequisite for avoidance of contract under articles 49 (1) *(a)*, 51 (2), 64 (1) *(a)*, 72 (1), and 73 (1) and (2) (as well as a prerequisite for a buyer to require delivery of substitute goods under article 46 (2)); article 26 states that effective avoidance of contract requires notice to the other party. The remaining provisions of Chapter I cover a variety of matters. Article 27 addresses whether a notice under Part III is effective despite a delay or error in transmission or its failure to arrive. Article 28 permits a court to refuse to order specific performance in circumstances in which it would not do so under its own domestic law. Finally, article 29 governs modifications of contracts to which the Convention applies.

Article 25

A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

INTRODUCTION

1. Article 25 defines the term "fundamental breach," which is used in various provisions of the Convention. A fundamental breach as here defined is a prerequisite for certain remedies under the Convention, including a party's right to avoid the contract under articles 49 (1) *(a)* and 64 (1) *(a)*, and a buyer's right to require delivery of replacements for goods that failed to conform to the contract (article 46 (2)). The phrase is also used in other provisions of the Convention in connection with avoidance of contract (see articles 51 (2), 72 (1), 73 (1) and (2)). A fundamental breach also impacts the operation of the passage-of-risk provisions of the Convention—see article 70 and paragraph 13 of the Digest for Part III, Section III, Chapter IV. In general article 25 defines the border between situations giving rise to "regular" remedies for breach of contract—like damages and price reduction—and those calling for more drastic remedies, such as avoidance of contract.

DEFINITION OF FUNDAMENTAL BREACH IN GENERAL

2. A fundamental breach requires, first, that one party has committed a breach of contract. Breach of any obligation under the contract can suffice—provided the other requirements for a fundamental breach are present—irrespective of whether the duty was specifically contracted for between the parties or if, instead, it followed from the provisions of the Convention. Even the breach of a collateral duty can give rise to a fundamental breach. For example, where a manufacturer had a duty to reserve goods with a particular trademark exclusively for the buyer, and the manufacturer displayed the trademarked goods at a fair for sale (continuing to do so even after a warning by the buyer), the manufacturer was found to have committed a fundamental breach.[1]

3. In order to rank as fundamental, a breach must be of a certain nature and weight. The aggrieved party must have suffered such detriment as to substantially deprive it of what it was entitled to expect under the contract. The breach must therefore nullify or essentially depreciate the aggrieved party's justified contract expectations. What expectations are justified depends on the specific contract and the risk allocation envisaged by the contract provisions, on customary usages, and on the provisions of the Convention. For example, buyers cannot normally expect that delivered goods will comply with regulations and official standards in the buyer's country.[2] Therefore, e.g., the delivery of mussels with a cadmium content exceeding recommended levels in the buyer's country has not been regarded as a fundamental breach (or, indeed, as a breach at all) since the buyer could not have expected that the seller would meet those standards and since the consumption of the mussels in small portions as such did not endanger a consumer's health.[3]

4. Article 25 provides further that a breach is fundamental only if the substantial deprivation of expectations caused by the breach was reasonably foreseeable to the breaching party. However, the provision does not mention the time at which the consequences of the breach must have been foreseeable. One court has decided that the time of conclusion of contract is the relevant time.[4]

SPECIFIC FUNDAMENTAL BREACH SITUATIONS

5. Courts have decided whether certain typical fact patterns constitute fundamental breaches. It has been determined on various occasions that complete failure to perform a basic contractual duty constitutes a fundamental breach of contract unless the party has a justifying reason to withhold its performance. This has been decided in the case of final non-delivery[5] as well as in the case of final non-payment.[6] However, if only a minor part of the contract is finally not performed (e.g., one delivery out of several deliveries is not made), the failure to perform is a simple, non-fundamental breach of contract.[7] On the other hand a final and unjustified announcement of the intention not to fulfil one's own contractual obligations has been found to constitute a fundamental breach.[8] Likewise, the buyer's insolvency and placement under administration has been held to constitute a fundamental breach under article 64 since it deprives the unpaid seller of what it was entitled to expect under the contract, namely payment of the full price.[9] Similarly, a buyer's refusal to open a letter of credit as required by the contract has been held to constitute a fundamental breach.[10] It has also been determined that non-delivery of the first instalment in an instalment sale gives the buyer reason to believe that further instalments will not be delivered, and therefore a fundamental breach of contract was to be expected (article 73 (2)).[11]

6. As a rule late performance—whether late delivery of the goods or late payment of the price—does not in itself constitute a fundamental breach of contract.[12] Only when the time for performance is of essential importance either because it is so contracted[13] or due to evident circumstances (e.g., seasonal goods)[14] does delay as such amount to a fundamental breach.[15] But even if a delay is not fundamental breach, the Convention allows the aggrieved party to fix an additional period of time for performance; if the party in breach fails to perform during that period, the aggrieved party may then declare the contract avoided (articles 49 (1) *(b)* and 64 (1) *(b)*).[16] Therefore in such a case, but only in that case, the lapse of the additional period turns a non-fundamental delay in performance into a sufficient reason for avoidance.

7. If defective goods are delivered, the buyer can avoid the contract when the non-conformity of the goods is properly regarded as a fundamental breach of contract (article 49 (1) (*a*)). It therefore is essential to know under what conditions delivery of non-conforming goods constitutes a fundamental breach. Court decisions on this point have found that a non-conformity concerning quality remains a mere non-fundamental breach of contract as long as the buyer—without unreasonable inconvenience—can use the goods or resell them even at a discount.[17] For example, the delivery of frozen meat that was too fat and too moist, and that consequently was worth 25.5 per cent less than meat of the contracted quality (according to an expert opinion), was not regarded as a fundamental breach of contract since the buyer had the opportunity to resell the meat at a lower price or to otherwise process it.[18] On the other hand, if the non-conforming goods cannot be used or resold with reasonable effort this constitutes a fundamental breach and entitles the buyer to declare the contract avoided.[19] This has been held to be the case as well where the goods suffered from a serious and irreparable defect although they were still useable to some extent (e.g., flowers which were supposed to flourish the whole summer but did so only for part of it).[20] Courts have considered a breach to be fundamental without reference to possible alternative uses or resale by the buyer when the goods had major defects and conforming goods were needed for manufacturing other products.[21] The same conclusion has been reached where the non-conformity of the goods resulted from added substances the addition of which was illegal both in the country of the seller and the buyer.[22]

8. Special problems arise when the goods are defective but repairable. Some courts have held that easy repairability precludes finding a fundamental breach.[23] Courts are reluctant to consider a breach fundamental when the seller offers and effects speedy repair without any inconvenience to the buyer.[24]

9. The violation of other contractual obligations can also amount to a fundamental breach. It is, however, necessary that the breach deprive the aggrieved party of the main benefit of the contract and that this result could have been foreseen by the other party. Thus, a court stated that there is no fundamental breach in case of delivery of incorrect certificates pertaining to the goods if either the goods were nevertheless merchantable or if the buyer itself could—at the seller's expense—easily acquire the correct certificates.[25] The unjustified denial of contract rights of the other party—e.g., a refusal to recognize the validity of a retention of title clause and the seller's right to possession of the goods,[26] or the unjustified denial of a valid contract after having taken possession of samples of the goods[27]—can amount to a fundamental breach of contract. The same is true when resale restrictions have been substantially violated.[28]

10. A delay in accepting the goods will generally not constitute a fundamental breach, particularly when the delay is only for a few days.[29]

11. The cumulation of violations of several contractual obligations makes a fundamental breach more probable, but does not automatically constitute a fundamental breach.[30] In such cases, the existence of a fundamental breach depends on the circumstances of the case as well as on whether the breach resulted in the aggrieved party losing the main benefit of, and its interest in, the contract.[31]

BURDEN OF PROOF

12. Article 25 regulates to some extent the burden of proving its elements. The burden with regard to the foreseeabiity element of article 25 lies with the party in breach:[32] this party must prove that it did not foresee the substantial detrimental effect of its breach, and that a reasonable person of the same kind in the same circumstances would not have foreseen such an effect. On the other hand, the aggrieved party has to prove that the breach substantially deprived it of what it was entitled to expect under the contract.[33]

Notes

[1]CLOUT case No. 2 [Oberlandesgericht Frankfurt a.M., Germany, 17 September 1991]; see also CLOUT case No. 217 [Handelsgericht des Kantons Aargau, Switzerland, 26 September 1997].

[2]CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995]; see CLOUT case No. 418 [Federal District Court, Eastern District of Louisiana, United States 17 May 1999] (in the same sense and relying on CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995]); CLOUT case No. 426 [Oberster Gerichtshof, Austria, 13 April 2000], also in *Internationales Handelsrecht* 2001, 117.

[3]CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995].

[4]CLOUT case No. 275 [Oberlandesgericht Düsseldorf, Germany, 24 April 1997] (see full text of the decision).

[5]CLOUT case No. 90 [Pretura circondariale di Parma, Italy, 24 November 1989] (only partial and very late delivery); CLOUT case No. 136 [Oberlandesgericht Celle, Germany, 24 May 1995] (see full text of the decision).

[6]CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994].

[7]CLOUT case No. 275 [Oberlandesgericht Düsseldorf, Germany, 24 April 1997].

[8]See CLOUT case No. 136 [Oberlandesgericht Celle, Germany, 24 May 1995]. In that case the seller gave notice that he had sold the specified good to another buyer. See also CLOUT case No. 595 [Oberlandesgericht München, Germany, 15 September 2004] (seller's refusal to deliver on the assumption that the contract had been cancelled was a fundamental breach) (see full text of the decision); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russia, awadr in case No.387/1995 of 4 April 1997, Unilex (final refusal to pay the price).

[9]CLOUT case No. 308 [Federal Court of Australia, 28 April 1995].

[10]CLOUT case No. 631 [Supreme Court of Queensland, Australia, 17 November 2000], citing CLOUT case No. 187 [Federal District Court, Southern District of New York, United States, 23 July 1997] (see full text of the decision).

[11]CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997].

[12]Corte di Appello di Milano, Italy, 20 March 1998, Unilex (late delivery); CLOUT case No. 275 [Oberlandesgericht Düsseldorf, Germany, 24 April 1997] (late delivery); CLOUT case No. 301 [Arbitration—International Chamber of Commerce No. 7585 1992] (late payment).

[13]CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997] (the late delivery under a CIF sale was held to be a fundamental breach of contract).

[14]Corte di Appello di Milano, Italy, 20 March 1998, Unilex (the buyer had ordered seasonal knitted goods and pointed to the essential importance of delivery at the fixed date, although only after conclusion of the contract); ICC International Court of Arbitration, France, award No. 8786, January 1997, *ICC International Court of Arbitration Bulletin* 2000, 70.

[15]CLOUT case No. 275 [Oberlandesgericht Düsseldorf, Germany, 24 April 1997] (late delivery constitutes a fundamental breach when the buyer would prefer non-delivery instead and the seller could have been aware of this).

[16]See, e.g. CLOUT case No. 301 [Arbitration—International Chamber of Commerce No. 7585 1992].

[17]CLOUT case No. 171 [Bundesgerichtshof, Germany, 3 April 1996]; CLOUT case No. 248 [Schweizerisches Bundesgericht, Switzerland, 28 October 1998].

[18]CLOUT case No. 248 [Schweizerisches Bundesgericht, Switzerland, 28 October 1998].

[19]CLOUT case No. 150 [Cour de Cassation, France, 23 January 1996] (artificially sugared wine); CLOUT case No. 79 [Oberlandesgericht Frankfurt a.M., Germany, 18 January 1994] (shoes with splits in the leather) (see full text of the decision); Landgericht Landshut, Germany, 5 April 1995, Unilex (T-shirts which shrink by two sizes after first washing).

[20]CLOUT case No. 107 [Oberlandesgericht Innsbruck, Austria, 1 July 1994].

[21]See CLOUT case No. 138 [Federal Court of Appeals for the Second Circuit, United States, 6 December 1993, 3 March 1995] (compressors with lower cooling capacity and higher power consumption than the goods contracted-for, which were required for the manufacture of air conditioners by the buyer); CLOUT case No. 150 [Cour de Cassation, France, 23 January 1996] (artificially sugared wine) (see full text of the decision); CLOUT case No. 315 [Cour de Cassation, France, 26 May 1999] (metal sheets absolutely unfit for the foreseen kind of manufacture by the buyer's customer) (see full text of the decision); see also Tribunale di Busto Arsizio, Italy, 13 December 2001, published in *Rivista di Diritto Internazionale Privato e Processuale, 2003*, 150–155, also available on Unilex (delivery of a machine totally unfit for the particular use made known to the seller and that was incapable of reaching the promised production level represented a "serious and fundamental" breach of the contract, since the promised production level was an essential condition for the conclusion of the contract; the lack of conformity therefore was a basis for avoidance).

[22]Compare CLOUT case No. 150 [Cour de Cassation, France, 23 January 1996] (artificially sugared wine which is forbidden under EU-law and national laws) (see full text of the decision); CLOUT case No. 170 [Landgericht Trier, Germany, 12 October 1995] (watered wine) (see full text of the decision).

[23]Handelsgericht des Kantons Zürich, Switzerland, 26 April 1995, *Schweizerische Zeitschrift für Internationales und Europäisches Recht* 1996, 51.

[24]CLOUT case No. 152 [Cour d'appel, Grenoble, France, 26 April 1995]; CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997].

[25]CLOUT case No. 171 [Bundesgerichtshof, Germany, 3 April 1996].

[26]CLOUT case No. 308 [Federal Court of Australia, 28 April 1995].

[27]CLOUT case No. 313 [Cour d'appel, Grenoble, France, 21 October 1999] (see full text of the decision).

[28]CLOUT case No. 2 [Oberlandesgericht Frankfurt a.M., Germany, 17 September 1991]; CLOUT case No. 154 [Cour d'appel, Grenoble, France, 22 February 1995]; CLOUT case No. 82 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994], (see full text of the decision); CLOUT case No. 217 [Handelsgericht des Kantons Aargau, Switzerland, 26 September 1997].

[29]CLOUT case No. 243 [Cour d'appel, Grenoble, France, 4 February 1999].

[30]CLOUT case No. 171 [Bundesgerichtshof, Germany, 3 April 1996] (see full text of the decision).

[31]*Id.* (see full text of the decision).

[32]*Id.* (see full text of the decision).

[33]*Id.* (see full text of the decision).

Article 26

A declaration of avoidance of the contract is effective only if made by notice to the other party.

OVERVIEW

1. Article 26 provides that avoidance of contract must be declared by the party who intends to terminate the contract, and that the declaration must be effected by notice to the other party. The Convention does not provide for an automatic (*ipso facto*) avoidance of contract.[1] It has nevertheless been held that notice of avoidance is unnecessary where a seller has "unambiguously and definitely" declared that it will not perform its obligations, since notice in such a situation would be a "mere formality," the date of avoidance can be determined from the obligor's declaration of the intention not to perform, and requiring notice of avoidance would be contrary to the mandate in article 7(1) to interpret the Convention in a fashion that promotes the observance of goods faith in international trade.[2]

2. The purpose of the notice requirement is to ensure that the other party becomes aware of the status of the contract.

FORM OF NOTICE

3. The notice need not be given in a particular form (see also article 11). It therefore can be made in writing or even orally.[3] Also, a notice in a statement of claim filed with a court suffices.[4]

4. Article 26 does not mention the possibility of implicit notice, but several courts have dealt with this issue. One court found that the buyer's mere purchase of substitute goods did not constitute a valid (implicit) notice of declaration of avoidance;[5] another court decided that the buyer did not give valid notice of avoidance by sending back the delivered goods without further explanation.[6]

CONTENTS OF NOTICE

5. The notice must express with sufficient clarity that the party will not be bound by the contract any longer and considers the contract terminated.[7] Therefore, an announcement that the contract will be avoided in the future if the other party does not react,[8] or a letter demanding either price reduction or taking the delivered goods back,[9] or the mere sending back of the goods[10] does not constitute a valid notice because it does not state in unequivocal terms that the originating party believes that the contract is avoided. The same is true if a party merely requests damages,[11] or if it declares avoidance with respect to a different contract.[12] It appears, however, that the phrase "declaration of avoidance" or even the term "avoidance" need not be used, nor need the relevant provision of the Convention be cited, provided that a party communicates the idea that the contract is presently terminated because of the other side's breach. Thus, one court found that the buyer effectively gave notice by declaring that it could not use the defective goods and that it placed them at the disposal of the seller.[13] The same was ruled with respect to a letter in which the buyer stated that no further business with the seller would be conducted.[14] A buyer's written refusal to perform combined with a demand for repayment has also been deemed sufficient notice of avoidance.[15] Notice of non-conformity of the goods and notice of avoidance can be combined and expressed in one declaration.[16]

ADDRESSEE OF THE NOTICE

6. The notice must be directed to the other party, which is normally the other party to the original contract, or its authorized agent. If the contractual rights have been assigned to a third party the declaration must be addressed to this new party.[17]

TIME FOR COMMUNICATION OF NOTICE

7. In certain circumstances, articles 49 (2) and 64 (2) require that notice of avoidance be communicated within a reasonable time. It has been held that notice after several months is clearly not reasonable under article 49 (2).[18] To meet any applicable time limit, dispatch of the notice within the period is sufficient (see article 27).

Notes

[1]See CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (see full text of the decision); CLOUT case No. 294 [Oberlandesgericht Bamberg, Germany, 13 January 1999]; ICC Court of Arbitration, France, award No. 9887, *ICC International Court of Arbitration Bulletin* 2000, 109.

[2]CLOUT case No. 595 [Oberlandesgericht München, Germany, 15 September 2004].

[3]CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996].

[4]CLOUT case No. 308 [Federal Court of Australia, 28 April 1995].

[5]CLOUT case No. 294 [Oberlandesgericht Bamberg, Germany, 13 January 1999].

[6]CLOUT case No. 6 [Landgericht Frankfurt a.M., Germany, 16 September 1991].

[7]Id.

[8]Landgericht Zweibrücken, Germany, 14 October 1992, Unilex.

[9]Oberlandesgericht München, Germany, 2 March 1994, *Recht der Internationalen Wirtschaft* 1994, 515.

[10]CLOUT case No. 6 [Landgericht Frankfurt a.M., Germany, 16 September 1991].

[11]CLOUT case No. 176 [Oberlandesgericht München, Germany, 8 February 1995].

[12]CLOUT case No. 6 [Landgericht Frankfurt a.M., Germany, 16 September 1991] (see full text of the decision).

[13]CLOUT case No. 235 [Bundesgerichtshof, Germany 25 June 1997].

[14]CLOUT case No. 293 [Arbitration—Schiedsgericht der Hamburger freundschatlichen Arbitrage 29 December 1998].

[15]CLOUT case No. 594 [Oberlandesgericht Karlsruhe, Germany 19 December 2002].

[16]CLOUT case No. 235 [Bundesgerichtshof, Germany, 25 June 1997].

[17]CLOUT case No. 6 [Landgericht Frankfurt a.M., Germany, 16 September 1991] (see full text of the decision).

[18]See CLOUT case No. 124 [Bundesgerichtshof, Germany, 15 February 1995] (notice after 5 months: too late); CLOUT case No. 84 [Oberlandesgericht Frankfurt a.M., Germany, 20 April 1994] (2 months: too late); CLOUT case No. 83 [Oberlandesgericht München, Germany, 2 March 1994] (4 months: too late); CLOUT case No. 6 [Landgericht Frankfurt a.M., Germany, 16 September 1991] (1 day: in time) (see full text of the decision).

Article 27

Unless otherwise expressly provided in this Part of the Convention, if any notice, request or other communication is given or made by a party in accordance with this Part and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.

OVERVIEW

1. Article 27 states that, in general, the dispatch principle applies to all kinds of communications provided for in Part III of the Convention (articles 25-89). Under this principle the declaring party has only to dispatch its communication by using an appropriate means of communication; the addressee then bears the risk of correct and complete transmission of the communication.[1]

THE DISPATCH PRINCIPLE

2. The dispatch principle is the general principle of the Convention applicable to communications after the parties have concluded their contract. According to the principle, a notice, request or other communication becomes effective as soon as the declaring party releases it from its own sphere by an appropriate means of communication. This rule applies to notice of non-conformity or of third-party claims (articles 39, 43); to requests for specific performance (article 46), price reduction (article 50), damages (article 45 (1) *(b)*) or interest (article 78); to a declaration of avoidance (articles 49, 64, 72, 73); to the fixing of an additional period for performance (articles 47, 63); and to other notices, as provided for in articles 32 (1), 67 (2) and 88. As a general principle for Part III of the Convention, the dispatch principle applies as well to any other communication the parties may provide for in their contract unless they have agreed that the communication has to be received to be effective.[2]

3. Some provisions of Part III of the Convention, however, expressly provide that a communication becomes effective only when the addressee "receives" it (see articles 47 (2), 48 (4), 63 (2), 65, 79 (4)).

APPROPRIATE MEANS OF COMMUNICATION

4. The declaring party must use appropriate means of communication in order for a notice to benefit from the rule of article 27. In one case a court stated that giving notice to a self-employed broker who did not act as a commercial agent for the seller was not an appropriate means of communication with the seller: the notice would only be deemed given by appropriate means if the buyer assured itself about the reliability of the self-employed broker; the buyer also had to indicate to the broker its function as a messenger, as well as the importance of the notice, and had to control the performance of the commission.[3]

5. Article 27 does not explicitly deal with how the language of a communication impacts its appropriateness. In order to be effective, however, the communication must be in the language the parties have explicitly chosen, or that has previously been used among them, or that the receiving party understands or has communicated that it understands.[4]

6. It has been held that article 27 does not govern oral communications.[5] One court stated that such communications are effective if the other party can hear and—with respect to language—understand them.[6]

EFFECT OF APPROPRIATE AND INAPPROPRIATE COMMUNICATIONS

7. Where the declaring party uses an inappropriate means of transmission the communication is generally considered ineffective. Therefore, e.g., the buyer loses its remedies for non-conformity in the delivered goods if the buyer transmits the notice of non-conformity to the wrong person.[7]

BURDEN OF PROOF

8. It has been held that the declaring party must prove actual dispatch of the communication as well as the time and method of dispatch.[8] If the parties have agreed on a specific form of communication the declaring party must also prove that it used the agreed form.[9] However the declaring party does not need to prove that the communication reached the addressee.[10]

Notes

[1]CLOUT case No. 540 [Oberlandesgericht Graz, Austria, 16 September 2002]; CLOUT case No. 305 [Oberster Gerichtshof, Austria, 30 June 1998].

[2]Landgericht Stuttgart, Germany, 13 August 1991, Unilex (according to the contract, notice of non-conformity had to be by registered letter; as a result, the court held, the notice had to be received by the other party and the declaring party had the burden of proving that the notice had been received by the other party). See also CLOUT case No. 305 [Oberster Gerichtshof, Austria, 30 June 1998].

[3]CLOUT case No. 409 [Landgericht Kassel, Germany, 15 February 1996].

[4]CLOUT case No. 132 [Oberlandesgericht Hamm, Germany, 8 February 1995]; Amtsgericht Kehl, Germany, 6 October 1995, Unilex; CLOUT case No. 409 [Landgericht Kassel, Germany, 15 February 1996] (see full text of the decision).

[5]CLOUT case No. 305 [Oberster Gerichtshof, Austria, 30 June 1998] (see full text of the decision).

[6]*Id.*

[7]See CLOUT case No. 409 [Landgericht Kassel, Germany, 15 February 1996] (see full text of the decision).

[8]CLOUT case No. 305 [Oberster Gerichtshof, Austria, 30 June 1998]; Landgericht Stuttgart, Germany, 13 August 1991, Unilex; CLOUT case No. 362 [Oberlandesgericht Naumburg, Germany, 27 April 1999] (see full text of the decision).

[9]Landgericht Stuttgart, Germany, 13 August 1991, Unilex.

[10]CLOUT case No. 362 [Oberlandesgericht Naumburg, Germany, 27 April 1999] (see full text of the decision).

Article 28

If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.

OVERVIEW: MEANING AND PURPOSE OF THE PROVISION

1. The article constitutes a compromise between legal systems that deal differently with the right of a party to claim specific performance of the contract. According to article 28, a court is not obliged to grant specific performance under the Convention if it would not do so for similar sales contracts under its domestic law.

2. "Specific performance" means requiring the other party to perform its obligations under the contract through court action. For example, the buyer may obtain a court order requiring the seller to deliver the quantity and quality of steel contracted for.[1]

3. There is little case law on this provision; only one case has been reported thus far.[2] In that case, a court stated that that where the Convention entitles a party to claim specific performance, article 28 allows the seized court to look to the availability of such relief under its own substantive law in a like case.[3] If the national law would also grant specific performance in the case, no conflict with the Convention and no problem arises.[4] If the national law would, however, disallow specific performance, alternative relief—in most cases, damages—could be granted instead. Article 28, however, merely provides that the court "is not bound" to adopt the solution of its national law regarding specific performance in the context of an international sale of goods governed by the Convention.

Notes

[1]CLOUT case No. 417 [Federal District Court, Northern District of Illinois, United States, 7 December 1999].

[2]CLOUT case No. 417 [Federal District Court, Northern District of Illinois, United States, 7 December 1999] is apparently the only CISG case to consider this issue.

[3]CLOUT case No. 417 [Federal District Court, Northern District of Illinois, United States, 7 December 1999]: "Simply put, [CISG Article 28] looks to the availability of such relief under the UCC."

[4]That was the outcome in CLOUT case No. 417 [Federal District Court, Northern District of Illinois, United States, 7 December 1999].

Article 29

(1) A contract may be modified or terminated by the mere agreement of the parties.

(2) A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

OVERVIEW: MEANING AND PURPOSE OF THE PROVISION

1. Article 29 addresses modification (which includes an addition to)[1] and termination of an already concluded contract by agreement of the parties. According to article 29 (1), the mere consent of the parties is sufficient to effect such a modification or termination. If, however, the parties have agreed in writing that a modification or termination of their contract must be done in writing, paragraph 2 provides that the contract cannot be otherwise modified or terminated—although a party's conduct may preclude it from asserting such a provision to the extent that the other party has relied on that conduct.

2. Article 29 (1) is intended to abolish the common law doctrine of "consideration" as a requirement for modification or termination of contracts governed by the Convention.[2]

MODIFICATION OR TERMINATION BY MERE AGREEMENT

3. In order to modify a contract provision or terminate their contract, the parties must reach agreement. The existence of such an agreement is determined on the basis of the provisions in Part II (articles 14-24) of the Convention.[3] Article 29 provides that a contract can be modified or terminated "by the mere agreement of the parties". In line with article 18 (1), it has been stated that silence of one party in response to a proposal by the other to modify a contract does not in itself constitute acceptance of such proposal;[4] it has also been stated, however, that there was agreement to terminate a contract where a buyer refused to pay due to alleged non-conformities in the goods, the seller subsequently offered to market the goods itself, and the buyer failed to reply to the offer.[5] One court stated that, although article 29 provides that a contract can be modified purely by agreement of the parties, modification of the purchase price did not result merely from the general mood of a meeting.[6] The acceptance without comment of a bill of exchange as payment has, however, been regarded as implied consent to postponement of the date for payment until the maturity of the bill.[7]

4. Interpretation of the parties' agreement to modify or terminate a contract is governed by the Convention's rules on construction—in particular article 8.

5. The agreement of both parties is all that is required in order to modify or terminate their contract.[8] No form requirements need be met[9] unless the reservation concerning form applies (arts. 11, 12, 96)[10] or the parties have agreed otherwise. According to one decision, when a State's article 96 reservation comes into play, modifications agreed upon only orally are invalid.[11] In all other cases it follows from article 11, which evidences a general principle of informality in the Convention, that the parties are free to modify or terminate their contract in any form, whether in writing, orally, or in any other form. Even an implied termination of the contract has been held possible;[12] it has also been held that a written contract may be orally changed.[13]

FORM AGREEMENTS

6. According to article 29 (2), if a written contract contains a provision requiring modification or termination of the contract to be in writing (a "no oral modification"-clause or "written modification"-clause), then the parties cannot modify or terminate the contract in a different manner.[14] An oral amendment is ineffective in such a case unless the second sentence of article 29(2) were to apply.[15]

7. A so-called merger clause, according to which all prior negotiations have been merged into the contract document, has been treated like a "no oral modification"-clause, so that no evidence of oral agreements prior to the written contract could be adduced in order to modify or terminate that contract.[16]

ABUSE OF "NO ORAL MODIFICATION" CLAUSE

8. Article 29 (2) (2) provides that a party may be precluded by its conduct from invoking a "no oral modification" clause "to the extent that the other party has relied on that conduct". It has been stated that the provision is an expression of the general good faith principle that governs the Convention (art. 7 (1)).[17]

Notes

[1]See CLOUT case No. 86 [Federal District Court, Southern District of New York, United States, 22 September 1994] (see full text of the decision).

[2]See Secretariat Commentary to (then) article 27 ('overcoming the common law rule that "consideration" is required') Commentary on the draft Convention on Contracts for the International Sale of Goods, A/CONF.97/5, reproduced in United Nations Conference on Contracts for the International Sale of Goods: Official Records, at p. 28, paras. 2-3.

[3]CLOUT case No. 120 [Oberlandesgericht Köln, Germany, 22 February 1994]; to the same effect see CLOUT case No. 153 [Cour d'appel, Grenoble, France, 29 March 1995], and CLOUT case No. 332 [Obergericht des Kantons, Basel-Landschaft Switzerland 11 June 1999].

[4]CLOUT case No. 120 [Oberlandesgericht Köln Germany 22 February 1994]; CLOUT case No. 332 [Obergericht des Kantons Basel-Landschaft, Switzerland, 11 June 1999].

[5]CLOUT case No. 120 [Oberlandesgericht Köln, Germany, 22 February 1994].

[6]CLOUT case No. 153 [Cour d'appel, Grenoble, France, 29 March 1995].

[7]CLOUT case No. 5 [Landgericht Hamburg, Germany, 26 September 1990] (see full text of the decision).

[8]CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996].

[9]CLOUT case No. 413 [Federal District Court, Southern District of New York, United States, 6 April 1998] (see full text of the decision); CLOUT case No. 422 [Oberster Gerichtshof, Austria, 29 June 1999], *Zeitschrift für Rechtsvergleichung* 2000, 33.

[10]For a similar case see Rechtbank van Koophandel, Hasselt, Belgium, 2 May 1995, available on the Internet at http://www.law.kuleuven.be/ipr/eng/cases/1995-05-02.html.

[11]Information Letter No. 29 of the High Arbitration Court of the Russian Federation, Russian Federation, 16 February 1998, Unilex (abstract).

[12] CLOUT case No. 422 [Oberster Gerichtshof, Austria, 29 June 1999], *Zeitschrift für Rechtsvergleichung* 2000, 33.

[13]CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (see full text of the decision).

[14]ICC Court of Arbitration, Switzerland, March 1998, *ICC International Court of Arbitration Bulletin,* 2000, 83.

[15]CLOUT case No. 86 [Federal District Court, Southern District of New York, United States, 22 September 1994].

[16]ICC Court of Arbitration, Switzerland, March 1998, *ICC International Court of Arbitration Bulletin,* 2000, 83.

[17]CLOUT case No. 94 [Arbitration-Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft–Wien, 15 June 1994].

Part III, Chapter II

Obligations of the seller (articles 30-52)

OVERVIEW

1. The provisions in Chapter II of Part III of the Convention, entitled “Obligations of the seller,” contain a comprehensive treatment of the Convention’s rules on the seller’s duties under an international sales contract governed by the CISG. The chapter begins with a single provision describing in broad strokes the seller’s obligations (article 30), followed by three sections that elaborate on the constituent elements of those obligations: Section I, “Delivery of the goods and handing over of documents” (articles 31-34); Section II, “Conformity of the goods and third party claims” (articles 35-44); and Section III, “Remedies for breach of contract by the seller” (articles 45-52). Chapter II of Part III generally parallels Chapter III (“Obligations of the buyer”, articles 53-65) of Part III in both structure and focus.

Article 30

The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention.

OVERVIEW: MEANING AND PURPOSE OF THE PROVISION

1. Article 30 identifies and summarizes the main duties that the seller is obliged to fulfil. The seller is also bound to perform any additional obligations provided for in the contract, as well as duties mandated by a usage or practice between the parties as provided in article 9. Such additional obligations could include, for example, a contractual duty to deliver exclusively to the buyer.[1]

OBLIGATION TO DELIVER

2. Article 30 provides that the seller is obliged to deliver the goods. In several instances parties to a contract governed by the Convention have specified the duty to deliver by using a price-delivery term (such as one defined in the Incoterms), which then prevails over the rules of the Convention.[2]

OBLIGATION TO HAND OVER DOCUMENTS

3. Article 30 obliges the seller to hand over documents relating to the goods, but does not itself impose a duty on the seller to arrange for the issuance of such documents.[3]

OBLIGATION TO TRANSFER PROPERTY

4. Although the Convention "is not concerned with the effect which the contract may have on the property in the goods sold" (article 4 *(b)*), the seller's principal obligation under article 30 is to transfer the property in the goods to the buyer. Whether the property in the goods has in fact been transferred to the buyer is not a question governed by the Convention; it must be determined by reference to the law designated by the rules of private international law of the forum. In addition, the effect of a retention of title clause on the property in the goods is not governed by the Convention,[4] but rather by the law designated by the rules of private international law of the forum. One court has stated, however, that whether a retention of title clause has been validly agreed upon, and whether an alleged retention of title constitutes a breach of contract, must be determined by reference to the rules of the Convention.[5]

OTHER OBLIGATIONS

5. The Convention itself provides for seller obligations not mentioned in article 30. These include the duties described in Chapter V (articles 71-88, on obligations common to the buyer and the seller), and obligations derived from usages or practices between the parties as provided in article 9.

Notes

[1]See, e.g., CLOUT Case No. 2 [Oberlandesgericht Frankfurt, Germany, 17 September 1991], *Neue Juristische Wochenschrift* 1992, 633.

[2]Compare, e.g., CLOUT case No. 244 [Cour d'appel, Paris, France, 4 March 1998] (Incoterm EXW used) (see full text of the decision); CLOUT case No. 340 [Oberlandesgericht Oldenburg, Germany, 22 September 1998] (Incoterm DDP used). See also paragraphs 3, 5 and 11 of the Digest for article 31.

[3]The seller's obligation to hand over documents relating to the goods is further particularized in article 34

[4]CLOUT case No. 226 [Oberlandesgericht Koblenz, Germany, 16 January 1992].

[5]CLOUT case No. 308 [Federal Court of Australia, 28 April 1995].

Section I of Part III, Chapter II

Delivery of the goods and handing over of documents (articles 31-34)

OVERVIEW

1. Section I of Chapter II ("Obligations of the seller") in Part III ("Sale of goods") of the Convention contains provisions elaborating on two of the seller's primary obligations described in article 30 of the CISG: the obligation to deliver the goods, and the obligation to hand over documents relating to the goods. Of the four articles within Section I, the first three (articles 31-33) focus on the seller's obligation to deliver the goods and the final article (article 34) deals with the seller's obligation to hand over documents. The provisions dealing with delivery of the goods contain rules governing the place of delivery (article 31),[1] the seller's supplementary delivery obligations where carriage of the goods is involved (article 32),[2] and the time for delivery (article 33). Several of the rules within these articles are addressed specifically to delivery by carrier.[3] The Section I provision dealing with handing over of documents (article 34) addresses the time and place of such handing over, the form of the documents, and curing lack of conformity in the documents. Provisions dealing with conformity of delivered goods (as well as with the effect of third party claims to delivered goods) are contained in a different division—Section II (articles 35-44)—of Part III Chapter II.

RELATION TO OTHER PARTS OF THE CONVENTION

2. The provisions of Section I interrelate with the Convention's rules on passing of risk (articles 66-70).[4] They may also apply to obligations beyond the seller's obligation to deliver goods and hand over documents, such as a buyer's obligation to return goods[5] or a seller's non-delivery duties linked to the time of delivery.[6] The Section I rules may also be relevant to legal rules outside the Convention, including jurisdictional laws keyed to the place of delivery of goods.[7]

3. Under CISG article 6, party autonomy generally prevails over the rules of the Convention, and that is true of the rules in Section I.[8]

Notes

[1]Article 31 and decisions applying it also shed light on what constitutes delivery. See the Digest for art. 31, paras. 1, 7, 9 and 10.

[2]The matters covered in article 32 are the seller's obligation to give notice of shipment (art. 32 (1)), to arrange for appropriate means of delivery using "usual" terms (art. 32 (2)), and to provide information the buyer needs to effect insurance if the seller itself is not obligated to insure the shipment (art. 32 (3)).

[3]See arts. 31 *(a)*, 32,

[4]See the Digest for Chapter IV of Part III, para. 2.

[5]See the Digest for art. 31, para. 4.

[6]See the Digest for art. 33, para. 2.

[7]See the Digest for art. 31, para. 2.

[8]See the Digest for art. 30, para. 2; the Digest for article 31, para. 3; the Digest for article 33, para. 1.

Article 31

If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:

(a) If the contract of sale involves carriage of the goods—in handing the goods over to the first carrier for transmission to the buyer;

(b) If, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place—in placing the goods at the buyer's disposal at that place;

(c) In other cases—in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract.

OVERVIEW

1. The article specifies the place of performance of the seller's duty of delivery. The provision fixes where the seller has to deliver the goods and what the seller has to do for that purpose. Article 31 addresses three different cases for which different rules apply. The general rule, however, appears to be that the seller's place of business is the presumed place of delivery.[1]

GENERAL REMARKS

2. Under some procedural rules, such as the ones based upon article 5 (1) of the 1968 Brussels and 1988 Lugano Conventions,[2] article 31 can be the basis for jurisdiction.[3] Such jurisdiction extends to claims concerning breach of the duty to deliver, as well as claims relating to the delivery of non-conforming goods.[4]

3. The rules formulated in article 31 apply only when the parties have not agreed otherwise, as party autonomy prevails over article 31.[5] Many court decisions applying article 31 deal with the construction of contract terms in order to decide whether those terms fix a place of performance or merely allocate the costs of transportation. If a price-delivery term (such as a term defined in the Incoterms) is included in the contract, it defines the place of performance and excludes the Convention's rule.[6]

4. Article 31 has also been used to determine the place of delivery when the buyer must return goods after the contract has been avoided (article 81 (2)).[7] This has led to the result that, if not otherwise provided for in the contract, the buyer must re-deliver the goods at the buyer's place of business.[8]

SALES INVOLVING CARRIAGE (Article 31 *(a)*)

5. The first alternative of article 31 applies only if the contract involves carriage of the goods. For sales at a distance it has been held that article 31 *(a)* ordinarily is applicable.[9] Carriage of the goods is presumed to be involved if the parties have envisaged (or if it is clear from the circumstances)[10] that the goods will be transported by independent carrier(s) from the seller to the buyer. Therefore, shipment contracts (e.g., contracts that include price-delivery terms such as FOB, CIF or other F- or C-terms as defined in the Incoterms) as well as destination contracts (e.g., contracts that include DES or other D-terms as defined in the Incoterms) involve carriage of the goods.[11]

6. Article 31 *(a)* only applies if it is neither the seller's nor the buyer's own obligation under the contract to transport the goods from the seller's place of business (or from where they are located) to the buyer's place of business (or wherever specified by the buyer).[12] When applicable, article 31 *(a)* does not imply that the seller itself must deliver the goods to the destination. On the contrary, the seller has duly performed its duty of delivery under article 31 *(a)* when the goods are handed over to the carrier.[13] If several carriers are involved in delivering the goods, handing over to the first carrier constitutes delivery under article 31 *(a)*.[14]

7. "Handing over," as the phrase is used in article 31 *(a)*, means that the carrier is given possession of the goods.[15] The handing over of documents relating to the goods does not appear to constitute handing over the goods themselves, and does not constitute delivery of the goods unless otherwise agreed by the parties.[16]

SALE OF GOODS LOCATED AT A PARTICULAR PLACE (Article 31 *(b)*)

8. The second alternative of article 31 applies when three requirements are met: first, delivery as per the contract must not involve carriage of the goods in the sense of article 31 (a)—so that it is the buyer's task to get possession of the goods; second, the goods sold must be specific goods, goods of a specific stock, or goods to be manufactured or produced; third, both parties must have known when the contract was concluded that the goods were located at (or were to be manufactured or produced at) a particular place. If those conditions are met, article 31 *(b)* requires the seller to place the goods at the buyer's disposal at that particular place.[17]

9. Placing the goods at the buyer's disposal means that "the seller has done that which is necessary for the buyer to be able to take possession."[18] The seller must therefore arrange everything necessary for delivery in the circumstances, so that the buyer need do nothing other than take over the goods at the place of delivery.[19]

OTHER CASES (Article 31 *(c)*)

10. Article 31 *(c)* is a "residuary rule".[20] The provision covers those cases which do not fall under paragraph *(a)* or *(b)* and for which the contract does not provide a particular place of performance. Where article 31 *(c)* applies, the seller must put the goods at the buyer's disposal at the place where the seller had its place of business when the contract was concluded.

CONTRACTUAL PROVISIONS FOR THE PLACE OF PERFORMANCE

11. Many decisions involve the construction of contract clauses that may or may not modify the place of performance as provided in article 31. In interpreting such clauses, the courts generally look at all the circumstances of the case. The meaning of certain formulations can therefore vary with the circumstances. With respect to the term EXW ("ex works"), it has been stated that it does not vary the place of performance provided for in article 31 *(a)* or *(c)*.[21] Under the term DDP ("delivered, duty paid"), it has been held that the place of delivery is the buyer's place of business.[22] However, the parties can agree upon a different place of delivery at any time. If the buyer requests that the goods be delivered to another firm that will process them for the buyer, the place of business of that other firm is then the place to which the goods must be delivered.[23] The clause "free delivery (buyer's place of business)" has been interpreted in different ways. Two courts considered that clause to be a mere allocation of costs that did not address the place of performance.[24] Other courts have stated the contrary.[25]

A contract clause "pricing ex work Rimini/Italy" has been held not to change the place of performance provided for in article 31 where an Italian seller was to deliver a facility to manufacture windows to a German buyer.[26] An additional contract provision requiring the seller to erect and run the plant for a certain period at the buyer's place of business, however, led to the conclusion that the place of delivery was that place.[27] If the seller is obliged to install the delivered goods at a particular place or to erect at a particular place a facility that it sold, that place has been regarded as the place of delivery.[28]

CONSEQUENCES OF DELIVERY

12. When the seller has delivered the goods it has fulfilled its duty of delivery and is no longer responsible for the goods. Courts regularly conclude that the risk of subsequent damage to or loss of the goods passes to the buyer, unless such damage or loss is intentionally or negligently caused by the seller.[29] Therefore if the seller has handed over the goods to the first carrier, any delay in the transmission of the goods is at the risk of the buyer, who may or may not have a claim against the carrier.[30] Similarly, if goods are loaded on board a vessel in the designated port the seller has performed its duty of delivery.[31]

BURDEN OF PROOF

13. A party asserting that the contract provides for a place of delivery other than the place provided for in article 31 must prove such agreement.[32]

Notes

[1]In Italy the constitutionality of the corresponding domestic rule has been attacked, but has been upheld, based—among other reasons—on its correspondence to the rule of CISG article 31 *(a)*. CLOUT case No. 91 [Corte Constituzionale, Italy, 19 November 1992].

[2]Under that article, jurisdiction exists at the place at which the obligation has actually been performed or should have been performed. The place where the obligation should have been performed must be determined according to the applicable law, whether that law is domestic or uniform international law. See CLOUT case No. 298 [European Court of Justice, C-288/92, 29 June 1994].

[3]E.g., CLOUT case No. 268 [Bundesgerichtshof, Germany, 11 December 1996]; Hoge Raad, the Netherlands, 26 September 1997, Unilex; CLOUT case No. 207 [Cour de Cassation, France, 2 December 1997]; CLOUT case No. 242 [Cour de Cassation, France, 16 July 1998]; Oberster Gerichtshof, Austria, 10 September 1998, Unilex.

[4]CLOUT case No. 268 [Bundesgerichtshof, Germany, 11 December 1996] (see full text of the decision); Gerechtshof 's-Hertogenbosch, the Netherlands, 9 October 1995, Unilex; CLOUT case No. 244 [Cour d'appel, Paris, France, 4 March 1998]; CLOUT case No. 245 [Cour d'appel, Paris, France, 18 March 1998].

[5]CLOUT case No. 430 [Oberlandesgericht München, Germany, 3 December 1999], also in *Recht der Internationalen Wirtschaft* 2000, 712.

[6]CLOUT case No. 244 [Cour d'appel, Paris, France, 4 March 1998] (see full text of the decision); CLOUT case No. 245 [Cour d'appel, Paris, France, 18 March 1998].

[7]Oberster Gerichtshof, Austria, 29 June 1999, *Transportrecht—Internationales Handelsrecht* 1999, 48. See also CLOUT case No. 594 [Oberlandesgericht Karlsruhe, Germany 19 December 2002] (principle of article 31 (c) applied to determine when buyer fulfilled its obligations under agreement to return nonconforming goods to the seller; because seller was responsible for carriaqge of the goods, damage to goods that occurred during transport back to the seller was seller's responsibility).

[8]Id.

[9]See CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000].

[10]Hoge Raad, the Netherlands, 26 September 1997, Unilex.

[11]See the Secretariat Commentary to (then) article 29; Commentary on the draft Convention on Contracts for the International Sale of Goods, A/CONF.97/5, reproduced in United Nations Conference on Contracts for the International Sale of Goods: Official Records, at p. 29, para. 5.

[12]See also the Secretariat Commentary to (then) article 29, at p. 29, paras. 5 and 8.

[13]CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999]. This is consistent with the Convention's rules on passing of risk in this situation. See article 67 (1).

[14]Id. The Convention's rules on passsing of risk confirm this point. See article 67 (1).

[15]CLOUT case No. 247 [Audiencia Provincial de Córdoba, Spain, 31 October 1997] (loading on board).

[16]Secretariat Commentary to (then) article 29, at p. 29, para. 9. Specifics of the seller's obligation to hand over documents are provided by Article 34.

[17]See, e.g., CLOUT case No. 47 [Landgericht Aachen, Germany, 14 May 1993] (place of manufacture of ear devices corresponds to the place of delivery under article 31 (b)).

[18]Secretariat Commentary to (then) article 29, at p. 30, para. 16.

[19]CLOUT case no. 338 [Oberlandesgericht Hamm, Germany, 23 June 1998].

[20]Secretariat Commentary to (then) article 29, at p. 30, para. 15.

[21]CLOUT case No. 244 [Cour d'appel, Paris, France, 4 March 1998] (see full text of the decision); CLOUT case No. 245 [Cour d'appel, Paris, France, 18 March 1998]. For the same result in contracts that included the German clause "ex works", see CLOUT case No. 311 [Oberlandesgericht Köln, Germany, 8 January 1997], and Oberster Gerichtshof, Austria, 29 June 1999, *Transportrecht—Internationales Handelsrecht* 1999, 48.

[22]CLOUT case No. 340 [Oberlandesgericht Oldenburg, Germany, 22 September 1998].

[23]Id.

[24]CLOUT case No. 268 [Bundesgerichtshof, Germany, 11 December 1996]; Oberster Gerichtshof, Austria, 10 September 1998, Unilex.

[25]CLOUT case No. 317 [Oberlandesgericht Karlsruhe, Germany, 20 November 1992]; CLOUT case No. 311 [Oberlandesgericht Köln, Germany, 8 January 1997], also in Unilex.

[26]CLOUT case No. 430 [Oberlandesgericht München, Germany, 3 December 1999], also in *Recht der Internationalen Wirtschaft* 2000, 712.

[27]Id.

[28]CLOUT case No. 646 [Corte di Cassazione, Italy, 10 March 2000], see also *Recht der Internationalen Wirtschaft* 2001, 308.

[29]See the Convention's rules on passing of risk (Part III, Chapter IV, Articles 66-70).

[30]CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999]; similarly CLOUT case No. 377 [Landgericht Flensburg, Germany, 24 March 1999].

[31]CLOUT case No. 247 [Audiencia Provincial de Córdoba, Spain, 31 October 1997].

[32]CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000].

Article 32

(1) If the seller, in accordance with the contract or this Convention, hands the goods over to a carrier and if the goods are not clearly identified to the contract by markings on the goods, by shipping documents or otherwise, the seller must give the buyer notice of the consignment specifying the goods.

(2) If the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessary for carriage to the place fixed by means of transportation appropriate in the circumstances and according to the usual terms for such transportation.

(3) If the seller is not bound to effect insurance in respect of the carriage of the goods, he must, at the buyer's request, provide him with all available information necessary to enable him to effect such insurance.

OVERVIEW: MEANING AND PURPOSE OF THE PROVISION

1. When the contract involves carriage of the goods (i.e., transporting the goods via a third party), Article 32 sets forth obligations of the seller beyond those specified in article 31.

2. The article states three rules: If goods are not clearly identified (by markings on the goods, shipping documents, or other means) as the goods covered by the contract when they are handed over to a carrier, the seller must specify the goods in a notice to the buyer of the consignment (paragraph 1).[1] When the seller is bound to arrange for carriage of the goods, he must make reasonable arrangments (paragraph 2); if the seller is not bound to arrange for insurance covering the carriage of goods, he must nevertheless, at the buyer's requrest, provide the buyer "all available information" needed for the buyer to procure such insurance (paragraph 3).

3. One decision has applied article 32 (2).[2] This provision requires a seller who is under a duty to arrange for carriage of the goods to choose "means of transportation appropriate in the circumstances and according to the usual terms for such transportation", but the provision does not otherwise oblige the seller to employ a particular mode of transport. Under article 6 of the Convention, of course, the parties could agree to a specific type of carrier. According to the decision, the buyer in the case had failed to meet the burden of proving an agreement to transport the goods by a particular means (truck), so that the choice of the mode of transportation was left to the seller.[3]

BURDEN OF PROOF

4. The party asserting an alleged agreement that would modify or go beyond the rules of article 32 has the burden of proving that such an agreement was concluded. Failing sufficient proof, article 32 applies.[4]

Notes

[1]The rules of article 32 (1) also relate to the Covnention's rules on the passing of risk where carriage of the goods is involved. See article 67 (2).

[2]See CLOUT case No. 261 [Bezirksgericht der Sanne, Switzerland, 20 February 1997].

[3]*Id.*

[4]*Id.* (the buyer failed to prove an agreement that the goods would be transported to Moscow by truck).

Article 33

The seller must deliver the goods:

(a) If a date is fixed by or determinable from the contract, on that date;

(b) If a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or

(c) In any other case, within a reasonable time after the conclusion of the contract.

OVERVIEW

1. Article 33 specifies the time at or within which the seller must deliver the goods. Under articles 33 *(a)* and *(b)*, the time of delivery is governed first by the provisions of the contract, consistently with the general principle of party autonomy adopted in the Convention.[1] If no delivery date or delivery period can be inferred from the contract, article 33 *(c)* states a default rule requiring delivery "within a reasonable time after the conclusion of the contract."

2. Although article 33 addresses only the duty to deliver, its approach is applicable to other duties of the seller, which also must be performed at the time provided in the contract or, absent such a provision, within a reasonable time.

DELIVERY DATE FIXED OR DETERMINABLE FROM THE CONTRACT

3. Article 33 *(a)* presupposes that the parties have fixed a date for delivery,[2] or that such a date can be inferred from the contract (e.g., "15 days after Easter") or determined by reference to a usage or practice as provided in article 9. In that case the seller must deliver on that fixed date.[3] Delivery at a later time constitutes a breach of contract.

4. According to one court, article 33 *(a)* also applies where the parties did not at the time of contract conclusion fix a specific date of delivery, but instead agreed that the seller should deliver at the request of the buyer.[4] If the buyer does not request delivery, however, the seller is not in breach.[5]

FIXED PERIOD FOR DELIVERY

5. Article 33 *(b)* applies where either the parties have fixed a period of time during which the seller can deliver the goods, or such a period can be inferred from the contract. In such cases, article 33 *(b)* provides that the seller may deliver at any date during that period.

6. For purposes of article 33 *(b)*, a period for delivery is fixed, e.g., by a contract clause providing for delivery "until: end December".[6] Under this clause, delivery at some point between the conclusion of the contract and the end of December would conform to the contract, whereas delivery after 31 December would constitute a breach of contract. Similarly, if delivery is to be "effected in 1993-1994",[7] delivery any time between 1 January 1993 and 31 December 1994 constitutes timely performance.[8] Where the contract provides for a delivery period the right to choose the specific date of delivery generally rests with the seller.[9] For the buyer to have the right to specify a delivery date within the period, an agreement to that effect is necessary,[10] as the last clause of article 33 *(b)* suggests. In one case, a court assumed *arguendo* that a contract provision calling for for delivery in "July, August, September + -" might require delivery of one third of the contracted-for quantity during each of the specified months.[11]

DELIVERY WITHIN A REASONABLE TIME AFTER CONCLUSION OF THE CONTRACT

7. Article 33 *(c)* applies where a specific time or period for delivery cannot be derived from the contract or from usages or practices between the parties. In that case, article 33 *(c)* requires the seller to deliver "within a reasonable time after the conclusion of the contract". "Reasonable" means a time adequate in the circumstances. Delivery of a bulldozer two weeks after the seller received the first instalment on the price has been held reasonable.[12] Where a contract concluded in January contained the delivery term "April, delivery date remains reserved",[13] the court held that article 33 *(c)* applied and delivery was due within a reasonable time after the contract was concluded because a concrete delivery date or period could not be determined from the contract: because the buyer had made it clear that he needed delivery by 15 March, the reasonable time was held to have expired before 11 April.[14]

WHAT CONSTITUTES DELIVERY

8. To timely fulfil the obligation to deliver, the seller must perform, in compliance with the deadlines established

under article 33, all delivery obligations required by the contract or under articles 31, 32 or 34. Unless otherwise agreed, article 33 does not require that the buyer be able to take possession of the goods on the date of delivery.[15]

CONSEQUENCES OF LATE DELIVERY

9. Delivery after the date or period for delivery is a breach of contract to which the Convention's rules on remedies apply. If timely delivery was of the essence of the contract, late delivery amounts to a fundamental breach, and the contract can be avoided as provided in Article 49.[16] According to one decision, a one day delay in the delivery of a small portion of the goods does not constitute a fundamental breach even where the parties had agreed upon a fixed date for delivery.[17] The parties, however, can provide in their contract that any delay in delivery is to be treated as a fundamental breach.[18]

10. A seller's declaration that it would not be able to deliver the goods on time, it has been held, constituted an anticipatory breach of contract in the sense of article 71.[19]

BURDEN OF PROOF

11. A party asserting that a date or a period for delivery has been agreed upon must prove such agreement.[20] A buyer who asserts that it has the right to choose a specific delivery date within an agreed period for delivery must prove an agreement or circumstances supporting the assertion.[21]

Notes

[1]CLOUT case No. 338 [Oberlandesgericht Hamm, Germany, 23 June 1998].

[2]See the example in Corte di Appello di Milano, Italy, 20 March 1998, Unilex ("Delivery: 3rd December, 1990").

[3]See the Secretariat Commentary to (then) article 31, p. 31, para. 3.

[4]CLOUT case No. 338 [Oberlandesgericht Hamm, Germany, 23 June 1998] (see full text of the decision).

[5]Id. (contract provided that the seller would deliver according to delivery schedules drawn up by the buyer, but the buyer apparently never provided the schedules) (see full text of the decision).

[6]See the case in ICC Court of Arbitration, January 1997, award No. 8786, *ICC International Court of Arbitration Bulletin* 2000, 70.

[7]See ICC Court of Arbitration, France, March 1998, award No. 9117, *ICC International Court of Arbitration Bulletin* 2000, 83.

[8]Id.

[9]Id.

[10]Id.; impliedly also CLOUT case No. 338 [Oberlandesgericht Hamm, Germany, 23 June 1998].

[11]CLOUT case No. 7 [Amtsgericht Oldenburg in Holstein, Germany, 24 April 1990].

[12]CLOUT case No. 219 [Tribunal Cantonal Valais, Switzerland, 28 October 1997]. Another decision found that the seller delivered within a reasonable time despite the seasonal (Christmas-related) character of the goods: CLOUT case No. 210 [Audienca Provincial, Barcelona, Spain, 20 June 1997].

[13]CLOUT case No. 362 [Oberlandesgericht Naumburg, Germany, 27 April 1999].

[14]CLOUT case No. 362 [Oberlandesgericht Naumburg, Germany, 27 April 1999] (the court found that the the buyer's offer, which required delivery by "March 15", was not materially altered by the seller's acceptance stating a delivery term of "April, delivery date reserved".; since the offeror did not object to the terms of the acceptance, a contract had been formed under article 19 (2) and the varying term in the acceptance became part of the contract).

[15]See the Secretariat Commentary to (then) article 31, p. 31, para. 2; also Landgericht Oldenburg, Germany, 27 March 1996, Unilex.

[16]ICC Court of Arbitration, January 1997, award No. 8786, *ICC International Court of Arbitration Bulletin* 2000, 70.

[17]Landgericht Oldenburg, Germany, 27 March 1996, Unilex.

[18]ICC Court of Arbitration, January 1997 award No. 8786, *ICC International Court of Arbitration Bulletin* 2000, 70 (the general conditions of the buyer, to which the parties had agreed, provided that any delay in delivery constituted a fundamental breach of contract).

[19]ICC Court of Arbitration, January 1997, award No. 8786, *ICC International Court of Arbitration Bulletin* 2000, 72.

[20]CLOUT case No. 362 [Oberlandesgericht Naumburg, Germany, 27 April 1999] (see full text of the decision).

[21]ICC Court of Arbitration, France, March 1998, award No. 9117, *ICC International Court of Arbitration Bulletin* 2000, 90.

Article 34

If the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract. If the seller has handed over documents before that time, he may, up to that time, cure any lack of conformity in the documents, if the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.

OVERVIEW: MEANING AND PURPOSE OF THE PROVISION

1. Article 34 addresses the seller's duty to deliver documents relating to the goods being sold, where such an obligation exists.

2. According to the first sentence of article 34, the documents must be tendered at the time and place, and in the form, required by the contract. The second sentence provides that, if the seller has delivered non-conforming documents before the agreed time, he has the right to cure the defects if this would not cause the buyer unreasonable inconvenience or expense. Under the final sentence of the provision, however, the buyer can claim any damages suffered despite the seller's cure.

DOCUMENTS RELATING TO THE GOODS: DEFINITION AND OBLIGATION TO DELIVER

3. Article 34 applies when "the seller is bound to hand over documents relating to the goods," but the provision does not specify when the seller has that obligation nor does it further define the documents to which it refers. The contract generally provides for what documents must be handed over, which it can do, e.g., by incorporating particular price-delivery terms, including price-delivery terms defined in the Incoterms. In one case the court concluded that, under an FOB term the seller is obliged to provide the buyer with an invoice stating the quantity and value of the goods.[1] Trade usages and practices between the parties may also dictate which documents must be provided.

4. "Documents relating to the goods" in the sense of article 34 include, in the main, documents that give their holders control over the goods, such as bills of lading, dock receipts and warehouse receipts,[2] but they also include insurance policies, commercial invoices, certificates (e.g., of origin, weight, contents or quality), and other similar documents.[3]

5. It has been found that the seller is usually not obliged to procure customs documents for the export of the goods, unless the parties agree otherwise.[4]

HANDING OVER OF DOCUMENTS

6. Article 34 requires that the place, time and manner of handing over the documents comply with the contract.[5] Where price-delivery terms (such as Incoterms) are agreed upon, they will often fix these modalities. With regard to the Incoterm CFR ("cost, freight"), one arbitral tribunal has held that that clause does not render the time for handing over documents of the essence of the contract.[6] If neither the contract nor trade usages nor practices between the parties provide specific modalities for handing over the documents, the seller must tender the documents "in such time and in such form as will allow the buyer to take possession of the goods from the carrier when the goods arrive at their destination, bring them through customs into the country of destination and exercise claims against the carrier or insurance company."[7]

NON-CONFORMING DOCUMENTS

7. The handing over of non-conforming documents constitutes a breach of contract to which the normal remedies apply.[8] Provided the breach is of sufficient gravity it can amount to a fundamental breach, thus permitting the buyer to declare the contract avoided.[9] However, delivery of non-conforming documents (a false certificate of origin and a faulty certificate of chemical analysis) has been found not to constitute fundamental breach if the buyer itself can easily cure the defect by requesting accurate documents from the producer.[10]

EARLY TENDER OF DOCUMENTS

8. If the seller has handed over non-conforming documents before the time the documents are due, article 34 permits the seller to cure the lack of conformity provided the cure is accomplished by the due date and the buyer is not caused unreasonable inconvenience or expense. The cure may be effected by delivery of conforming documents.[11]

Notes

[1]COMPROMEX Arbitration, Mexico, 29 April 1996, Unilex.

[2]Secretariat Commentary to (then) article 32, p. 31, para. 2; see also CLOUT case No. 216 [Kantonsgericht St. Gallen, Switzerland, 12 August 1997] (see full text of the decision).

[3]CLOUT case No. 171 [Bundesgerichtshof, Germany, 3 April 1996] (certificate of origin and certificate of analysis); see also Secretariat Commentary to (then) article 32, p. 31, para. 2.

[4]CLOUT case No. 216 [Kantonsgericht St. Gallen, Switzerland, 12 August 1997].

[5]See also ICC Court of Arbitration, France, March 1995, award No. 7645, *ICC International Court of Arbitration Bulletin* 2000, 34.

[6]Id.

[7]Secretariat Commentary to (then) article 32, p. 31, para. 3.

[8]CLOUT case No. 171 [Bundesgerichtshof, Germany, 3 April 1996].

[9]Id.

[10]Id.

[11]ICC Court of Arbitration, France, March 1998, award No. 9117, *ICC International Court of Arbitration Bulletin* 2000, 90.

Section II of Part III, Chapter II

Conformity of the goods and third party claims (articles 35-44)

OVERVIEW

1. The second section of Chapter II of Part III of the Convention contains provisions addressing some of the most important seller obligations under a contract for sale—in particular, the obligation to deliver goods that conform to the requirements of the contract and of the Convention in terms of quantity, quality, description and packaging (article 35), as well as the duty to ensure that the goods are free from third party claims to ownership rights (article 41) and to intellectual property rights (article 42). Other provisions connected to the question of conformity are included in the section, including an article governing the relation between the timing of a defect's occurrence and the division of responsibility therefor between the seller and the buyer (article 36), and a provision addressing the seller's right to cure a lack of conformity if goods are delivered before the date required for delivery.

2. The section also includes provisions regulating the procedure that a buyer must follow in order to preserve claims that the seller has violated the obligation to deliver conforming goods or to deliver goods free from third party claims. These include a provision governing the buyer's duty to examine the goods following delivery (article 38) and provisions requiring the buyer to give notice of alleged violations of the seller's obligations (articles 39 and 43 (1)), as well as provisions excusing or relaxing the consequences of a buyer's failure to give the required notice (articles 40, 43 (2), and 44). Articles 38 and 39 have proven to be among the most frequently-invoked (and most controversial) provisions in litigation under the Convention.

RELATION TO OTHER PARTS OF THE CONVENTION

3. In general, the provisions in Section II of Part III, Chapter II work in tandem with, and frequently are invoked together with, the articles governing an aggrieved buyer's remedies, found in the next section (Section III, articles 45-52). Several individual provisions of Section II have a special relation to articles or groups of articles elsewhere in the Convention. Thus article 36, addressing the seller's liability for a lack of conformity in terms of when the non-conformity occurs, is closely connected to Chapter IV of Part III on passing of risk (articles 66-70); article 37 (seller's right to cure a lack of conformity before the date for delivery required under the contract) functions as a companion to article 48 (seller's right to cure a lack of conformity after the required delivery date), and also is connected to article 52 (1) (buyer's option to accept or refuse early delivery). The section II provisions on notice (articles 39 and 43), of course, are subject to the rule in article 27 that notice in accordance with Part III of the Convention and dispatched by means appropriate in the circumstances is effective despite "a delay or error in the transmission … or its failure to arrive …."

Article 35

(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.

(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

(a) Are fit for the purposes for which goods of the same description would ordinarily be used;

(b) Are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;

(c) Possess the qualities of goods which the seller has held out to the buyer as a sample or model;

(d) Are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods

(3) The seller is not liable under subparagraphs *(a)* or *(d)* of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

INTRODUCTION

1. Article 35 of the CISG states standards for determining whether goods delivered by the seller conform to the contract in terms of type, quantity, quality, and packaging, thereby defining the seller's obligations with respect to these crucial aspects of contractual performance. Two courts have stated that the unitary notion of conformity defined in article 35 displaces the concepts of "warranty" found in some domestic laws.[1]

2. In general, a failure by the seller to deliver goods that meet the applicable requirements of article 35 constitutes a breach of the seller's obligations,[2] although it has been stated that a failure of goods to conform to the contract is not a breach if the non-conforming goods are equal in value and utility to conforming goods.[3] A seller's breach of its obligations under article 35, furthermore, can in proper circumstances rise to the level of a fundamental breach of contract as defined in article 25 of the Convention, thus justifying the buyer in avoiding the contract under article 49 (1) of the Convention.[4]

ARTICLE 35 (1)

3. Article 35 (1) requires a seller to deliver goods that meet the specifications of the contract in terms of description, quality, quantity and packaging. Thus it has been found that a shipment of raw plastic that contained a lower percentage of a particular substance than that specified in the contract, and which as a result produced window blinds that did not effectively shade sunlight, did not conform to the contract, and the seller had therefore breached its obligations.[5] It has also been found that a shipment of goods containing less than the quantity specified in the contract lacks conformity under article 35 (1); the court noted that a lack of "conformity" encompasses both a lack of quality in the goods delivered and a lack of quantity.[6] A used car that had been licensed two years earlier than indicated in the car's documents and whose odometer did not state the full mileage on the car was found to be non-conforming under article 35 (1).[7] On the other hand, one court has concluded that there was no violation of article 35 (1) when the seller delivered shellfish containing a high level of cadmium because the parties did not specify a maximum cadmium level in their agreement.[8]

4. In ascertaining, for purposes of article 35 (1), whether the contract requires goods of a particular quantity, quality or description, or requires that the goods be contained or packaged in a particular manner, one must refer to general rules for determining the content of the parties' agreement.[9] In this connection, one court, on appeal of the decision concerning shellfish with high cadmium levels mentioned in the previous paragraph, found that the seller had not

impliedly agreed to comply with recommended (but not legally mandatory) domestic standards for cadmium in the buyer's country.[10] As the court reasoned, the mere fact the seller was to deliver the shellfish to a storage facility located in the buyer's country did not constitute an implied agreement under article 35 (1) to meet that country's standards for resaleability, or to comply with its public law provisions governing resaleability.[11]

ARTICLE 35 (2): OVERVIEW

5. Article 35 (2) states standards relating to the goods' quality, function and packaging that, while not mandatory, are presumed to be a part of sales contracts. In other words, these standards are implied terms that bind the seller even without affirmative agreement thereto. If the parties do not wish these standards to apply to their contract, they can (in the words of article 35) "agree[...] otherwise."[12] Unless the parties exercise their autonomous power to contract out the standards of article 35 (2), they are bound by them.[13] An arbitral tribunal has found that an agreement as to the general quality of goods did not derogate from article 35 (2) if the agreement contained only positive terms concerning the qualities that the goods would possess, and not negative terms relieving the seller of responsibilities.[14] One court applied domestic law to invalidate a particular contract clause that attempted to exclude the seller's liability for a lack of conformity in the goods: the court held that the question of the validity of such a clause is an issue beyond the scope of the CISG, and is governed by the domestic law applicable under private international law rules.[15]

6. Article 35 (2) is comprised of four subparts. Two of the subparts (article 35 (2) *(a)* and article 35 (2) *(d)*) apply to all contracts unless the parties have agreed otherwise. The other two subparts (article 35 (2) *(b)* and article 35 (2) *(c)*) are triggered only if certain factual predicates are present. The standards stated in these subparts are cumulative—that is, the goods do not conform to the contract unless they meet the standards of all applicable subparts.

ARTICLE 35 (2) *(a)*

7. Article 35 (2) *(a)* requires the seller to deliver goods "fit for the purposes for which goods of the same description would ordinarily be used." It has been held that this standard was violated when the seller delivered a refrigeration unit that broke down soon after it was first put into operation.[16] The standard was also found violated when the seller delivered wine that had been diluted with 9 per cent water, causing domestic authorities to seize and destroy the wine,[17] and when the seller delivered chaptalized wine.[18] It was also found violated where the seller substituted a different component in a machine without notifying the buyer and without giving the buyer proper instructions for installation; as a result, the machine failed after three years of use, thus disappointing the buyer's expectation for "long, continuous operation of the [machine] without failure."[19]

8. The standard of article 35 (2) *(a)*, however, requires only that the goods be fit for the purposes for which they are ordinarily used. It does not require that the goods be perfect or flawless, unless perfection is required for the goods to fulfil their ordinary purposes.[20] One court has raised but not resolved the issue of whether article 35 (2) *(a)* requires goods of average quality, or goods of merely "marketable" quality.[21]

9. Several decisions have discussed whether conformity with article 35 (2) *(a)* is determined by reference to the quality standards prevailing in the buyer's jurisdiction. According to one decision, the fact that the seller is to deliver goods to a particular jurisdiction and can infer that they will be marketed there is not sufficient to impose the standards of the importing jurisdiction in determining suitability for ordinary purposes under article 35 (2) *(a)*.[22] Thus the fact that mussels delivered to the buyer's country contained cadmium levels exceeding the recommendations of the health regulations of the buyer's country did not establish that the mussels failed to conform to the contract under article 35 (2) *(a)*.[23] The court indicated that the standards in the importing jurisdiction would have applied if the same standards existed in the seller's jurisdiction, or if the buyer had pointed out the standards to the seller and relied on the seller's expertise.[24] The court raised but did not determine the question whether the seller would be responsible for complying with public law provisions of the importing country if the seller knew or should have known of those provisions because of "special circumstances"—e.g., if the seller maintained a branch in the importing country, had a long-standing business connection with the buyer, often exported into the buyer's country, or promoted its products in the importing country.[25] A court from a different country, citing the aforementioned decision, refused to overturn an arbitral award that found a seller in violation of article 35 (2) *(a)* because it delivered medical devices that failed to meet safety regulations of the buyer's jurisdiction:[26] the court concluded that the arbitration panel acted properly in finding that the seller should have been aware of and was bound by the buyer's country's regulations because of "special circumstances" within the meaning of the opinion of the court that rendered the aforementioned decision. A different court has found that a seller of cheese was required to comply with the buyer's country's standards because it had had dealings with the buyer for several months, and therefore must have known that the cheese was destined for the market in the buyer's country;[27] the seller, therefore, violated its obligations under CISG article 35 when it delivered cheese that did not have its composition marked on the packaging, as required by the buyer's country's marketing regulations.

ARTICLE 35 (2) *(b)*

10. Article 35 (2) *(b)* requires that goods be fit for "any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract." The article 35 (2) *(b)* obligation arises only if one or more particular purposes were revealed to the seller by the time the contract was concluded. In addition, the requirements of article 35 (2) *(b)* do not apply if "the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement." With regard to the latter reliance element, one court has stated

that in the usual case, a buyer cannot reasonably rely on the seller's knowledge of the importing country's public law requirements or administrative practices relating to the goods, unless the buyer pointed such requirements out to the seller.[28] The court therefore found that mussels with cadmium levels exceeding the recommendations of German health regulations did not violate the requirements of article 35 (2) *(b)* where there was no evidence that the buyer had mentioned the regulations to the seller. By so holding, the court affirmed the decision of a lower court that the seller had not violated article 35 (2) *(b)* because there was no evidence that the parties implicitly agreed to comply with the buyer's country's health recommendations.[29] On the other hand, one court has found that a seller violated article 35 (2) *(b)* when it delivered skin care products that did not maintain specified levels of vitamin A throughout their shelf life.[30] The court found that the buyer intended to purchase products with the specified vitamin levels, that "the special purpose . . . was known by the [seller] with sufficient clarity," and that "the buyer counted on the seller's expertise in terms of how the seller reaches the required vitamin A content and how the required preservation is carried out."

ARTICLE 35 (2) *(c)*

11. Article 35 (2) *(c)* requires that, in order to conform to the contract, goods must "possess the qualities of goods which the seller has held out to the buyer as a sample or model." Several courts have found that delivered goods violated this provision.[31] Article 35 (2) *(c)*, by its terms, applies if the seller has held out a sample or model to the buyer, unless the parties "have agreed otherwise." One court has nevertheless indicated that the goods must conform to a model only if there is an express agreement in the contract that the goods will do so.[32] On the other hand, it has been held that the provision applies even if it is the buyer rather than the seller that has provided the model, provided that the parties agreed that the goods should conform to the model.[33]

ARTICLE 35 (2) *(d)*

12. Article 35 (2) *(d)* supplements the last clause of article 35 (1), which requires that the goods be "contained or packaged in the manner required by the contract." Several cases have found that improperly packaged goods failed to conform to the contract under article 35 (2) *(d)*. Where a seller sold cheese that it knew would be resold in the buyer's country, and the cheese was delivered in packaging that did not comply with that country's food labelling regulations, the goods were deemed non-conforming under article 35 (2) *(d)*.[34] In another case, a seller of canned fruit was found to have violated article 35 where the containers were not adequate to prevent the contents from deteriorating after shipment.[35]

ARTICLE 35 (3)

13. Article 35 (3) relieves the seller of responsibility for a lack of conformity under article 35 (2) to the extent that the buyer "knew or could not have been unaware" of the non-conformity at the time the contract was concluded.[36] Under this provision, a buyer has been held to have assumed the risk of defects in a used bulldozer that the buyer inspected and tested before purchasing.[37] One court has stated that, under article 35 (3), a buyer who elects to purchase goods despite an obvious lack of conformity must accept the goods "as is."[38] The rule of article 35 (3), however, is not without limits. Where a seller knew that a used car had been licensed two years earlier than indicated in the car's documents and knew that the odometer understated the car's actual mileage but did not disclose these facts to the buyer, the seller was liable for the lack of conformity even if the buyer (itself a used car dealer) should have detected the problems.[39] Citing articles 40 and 7 (1), the court found that the Convention contains a general principle favouring even a very negligent buyer over a fraudulent seller.

BURDEN OF PROOF

14. A number of decisions have discussed who bears the burden of proving that goods fail to conform to the contract under article 35. One court has twice indicated that the seller bears that burden.[40] On the other hand, several tribunals have concluded that the buyer bears the burden of proving lack of conformity, although the decisions adopt different theories to reach that result. For example, after noting that the CISG does not expressly address the burden of proof issue, one arbitral tribunal applied domestic law to allocate the burden to the buyer as the party alleging a lack of conformity.[41] Other courts have concluded that the Convention itself, although it does not expressly answer the burden of proof question, contains a general principle that the party who is asserting or affirming a fact bears the burden of proving it, resulting in an allocation of the burden to a buyer who asserts that goods did not conform to the contract.[42] Some decisions suggest that the burden of proof varies with the context. Thus, one court has stated that the buyer bears the burden of proving a lack of conformity if it has taken delivery of the goods without giving immediate notice of non-conformity.[43] Similarly, another court has indicated that the seller bears the burden of proving that goods were conforming at the time risk of loss passed, but the buyer bears the burden of proving a lack of conformity after the risk shifted if it has accepted the goods without immediately notifying the seller of defects.[44]

EVIDENCE OF LACK OF CONFORMITY

15. Several decisions address evidentiary issues relating to a lack of conformity under article 35. Direct evidence that the standards of article 35 were violated has been adduced and accepted by courts in several instances. Thus a showing that delivered wine had been seized and destroyed by authorities in the buyer's country because it had been diluted with water was accepted by the court as establishing that the wine did not conform with the contract for sale.[45] Similarly, one court has found that, once the buyer established that a refrigeration unit had broken down shortly after it was first put into operation, the seller was presumed to have violated article 35 (2) *(a)* and thus bore the burden

of showing it was not responsible for the defects.[46] Expert opinion has also been accepted as establishing a lack of conformity,[47] although the results of an investigation into the quality of the goods have been held insufficient to establish a lack of conformity where the buyer ignored a trade usage requiring that the seller be permitted to be present at such investigations.[48] On the other hand, it has been found that the early failure of a substituted part in a machine did not by itself establish that the machine was not in conformity with the contract, since the failure might have been due to improper installation.[49] Furthermore, a buyer's failure to complain of obvious defects at the time the goods were received has been taken as affirmative evidence that the goods conformed to the contract.[50] In another case, deliveries of allegedly non-conforming chemicals had been mixed with earlier deliveries of chemicals; thus, even though the buyer showed that glass produced with the chemicals was defective, it could not differentiate which deliveries were the source of the defective chemicals; and since the time to give notice of non-conformity for the earlier deliveries had expired, the buyer failed to prove a lack of conformity.[51] Another court has held, as an alternative ground for dismissing the buyer's claim, that the evidence did not establish whether the goods' non-conformities arose before or after risk of loss passed to the buyer.[52] Finally, it has been found that a seller's offer to remedy any defects in the goods did not constitute an admission that the goods lacked conformity.[53]

JURISDICTIONAL ISSUES

16. For purposes of determining jurisdiction under article 5 (1) of the Brussels Convention, several courts have concluded that the conformity obligation imposed on the seller by CISG article 35 is not independent of the obligation to deliver the goods, and both obligations are performed at the same place.[54]

Notes

[1]CLOUT case No. 256 [Tribunal Cantonal du Valais, Switzerland, 29 June 1998] (see full text of the decision); CLOUT case No. 219 [Tribunal Cantonal Valais, Switzerland, 28 October 1997] (see full text of the decision).

[2]See, e.g., CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995] (see full text of the decision), (stating that a fundamental breach of contract "can be caused by a delivery of goods that do not conform with the contract"); Landgericht Paderborn, Germany, 25 June 1996, Unilex (stating that the seller had breached its obligations by delivering goods that failed to conform to the technical specifications of the contract).

[3]CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998].

[4]CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995] (see full text of the decision); CLOUT case No. 79 [Oberlandesgericht Frankfurt a.M., Germany, 18 January 1994]. See also Tribunale di Busto Arsizio, Italy, 13 December 2001, published in *Rivista di Diritto Internazionale Privato e Processuale*, 2003, 150–155, also available on Unilex (delivery of a machine totally unfit for the particular use made known to the seller and which was incapable of reaching the promised production level represented a "serious and fundamental" breach of the contract, because the promised production level had been an essential condition for the conclusion of the contract; the breach was therefore a basis for avoiding the contract).

[5]Landgericht Paderborn, Germany, 25 June 1996, Unilex.

[6]CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997].

[7]CLOUT case No. 168 [Oberlandesgericht Köln, Germany, 21 March 1996].

[8]CLOUT case No. 84 [Oberlandesgericht Frankfurt a.M., Germany, 20 April 1994].

[9]Such general rules include the CISG provisions pertaining to the meaning and content of a contract for sale, including article 8 (standards for determining a party's intent) and article 9 (usages and practices to which the parties are bound).

[10]CLOUT case no. 123 [Bundesgerichtshof, Germany, 8 March 1995] (see full text of the decision).

[11]*Id.* (see full text of the decision).

[12]The parties' power to contract out of the implied standards of article 35 (2) (i.e., to agree otherwise) is a specific application of the parties' power under article 6 to "derogate from or vary the effect of any of [the Convention's] provisions." See CLOUT case No. 229 [Bundesgerichtshof, Germany, 4 December 1996]. ("If the [buyer] has warranty claims against the seller—and of what kind—primarily depends upon the warranty terms and conditions of [seller], which became part of the contract. They have priority over the CISG provisions (CISG Art. 6).") (see full text of the decision).

[13]One court of first instance has held that machinery was sold "as is"—in effect, without the protections of article 35 (2) *(a)*—because it was second-hand, but the court of appeal chose not to rely on this approach and instead affirmed this portion of the lower court decision on other grounds. See Oberlandesgericht Köln, Germany, 8 January 1997, Unilex, affirming in relevant part Landgericht Aachen, Germany, 19 April 1996.

[14]CLOUT case No. 237 [Arbitration—Arbitration Institute of the Stockholm Chamber of Commerce 5 June 1998] (see full text of the decision).

[15]CLOUT case No. 168 [Oberlandesgericht Köln, Germany, 21 March 1996]. See also *Supermicro Computer, Inc. v. Digitechnic, S.A.*, 145 F. Supp. 2d 1147 (N.D. Cal. 2001), wherein a United States District Court declined to hear a dispute that was already subject to litigation in France because resolving the matter would require the court to determine the validity of a warranty disclaimer clause under the CISG (145 F. Supp. 2d at 1151).

[16]CLOUT case No. 204 [Cour d'appel, Grenoble, France, 15 May 1996].

[17]CLOUT case No. 170 [Landgericht Trier, Germany, 12 October 1995].

[18]Cour de Cassation, France, 23 January 1996, Unilex.

[19]CLOUT case No. 237 [Arbitration—Arbitration Institute of the Stockholm Chamber of Commerce, 5 June 1998] (see full text of the decision).

[20]ICC Arbitration Case No. 8247, June 1996, *International Court of Arbitration Bulletin*, vol. 11, p. 53 (2000) (microcrystalline chemicals that had solidified but could easily be re-transformed into crystals did not fail to conform to the contract); CLOUT case No. 252 [Handelsgericht des Kantons Zürich, Switzerland, 21 September 1998] (one misplaced line of text, which did not interfere with the comprehensability of the text, did not render an art exhibition catalogue non-conforming); CLOUT case No. 341 [Ontario Superior Court of Justice, Canada, 31 August 1999] (shipments containing a small percentage of defective picture frame mouldings did not fail to conform to the contract when the evidence indicated that shipments from any supplier would include some defective mouldings) (see full text of the decision).

[21]CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995] (see full text of the decision). One court has stated that, to comply with article 35 (2) (a), goods must be of average quality, and not merely marketable; see Landgericht Berlin, Germany, 15 September 1994, Unilex. Compare Netherlands Arbitration Institute, Arbitral Award, No. 2319, 15 October 2002, Unilex (rejecting both average quality and merchantability tests, and applying a "reasonable quality" standard).

[22]CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995] ("a foreign seller can simply not be required to know the not easily determinable public law provisions and/or administrative practices of the country to which he exports, and . . . the purchaser, therefore, cannot rationally rely upon such knowledge of the seller, but rather, the buyer can be expected to have such expert knowledge of the conditions in his own country or in the place of destination, as determined by him, and, therefore, he can be expected to inform the seller accordingly"). The court raised but did not resolve the issue of whether goods must meet the standards of the seller's own jurisdiction in order to comply with article 35 (2) *(a)* (see full text of the decision).

[23]*Id*. Compare CLOUT case No. 343 [Landgericht Darmstadt, Germany, 9 May 2000], where a Swiss purchaser of video recorders complained that the German seller had only supplied instruction booklets in German and not in the other languages spoken in Switzerland. The court rejected the argument because the recorders had not been produced specially for the Swiss market and the buyer had failed to stipulate for instruction booklets in other languages.

[24]In a later decision involving vine wax that failed to protect vines grafted using the wax, the German Supreme Court found that the wax did not meet the requirements of article 35 (2) *(a)* because it "did not meet the industry standards—of which both parties were aware and which both parties applied...". CLOUT case No. 272 [Oberlandesgericht Zweibrücken, Germany, 31 March 1998] (see full text of the decision).

[25]One court has concluded that, in the following circumstances, a Spanish seller of pepper agreed that the goods would comply with German food safety laws: the seller had a long-standing business relationship with the German buyer; the seller regularly exported into Germany; and in a previous contract with the buyer the seller had agreed to special procedures for ensuring compliance with German food safety laws; Landgericht Ellwangen, Germany, 21 August 1995, Unilex. The court, citing article 35 (1), found that pepper products containing ethylene oxide at levels exceeding that permitted by German food safety laws did not conform to the contract; it therefore ruled in favour of the buyer, who had argued (presumably on the basis of article 35 (2) *(a)*) that the pepper products "were not fit for the purposes for which the goods would ordinarily be used and not fit to be sold in Germany."

[26]CLOUT case No. 418 [Federal District Court, Eastern District of Louisiana, United States, 17 May 1999].

[27]CLOUT case No. 202 [Cour d'appel, Grenoble, France 13 September 1995].

[28]CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995].

[29]CLOUT case No. 84 [Oberlandesgericht Frankfurt a.M., Germany, 20 April 1994], opinion described in CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995].

[30]Helsinki Court of First Instance, Finland, 11 June 1995, affirmed by Helsinki Court of Appeal, Finland, 30 June 1998, English translation available on the Internet at (http://www.cisg.law.pace.edu/cisg/wais/db/cases2/980630f5.html); see also Tribunale di Busto Arsizio, Italy, 13 December 2001, published in *Rivista di Diritto Internazionale Privato e Processuale*, 2003, 150–155, also available on Unilex.

[31]CLOUT case No. 79 [Oberlandesgericht Frankfurt a.M., Germany, 18 January 1994] (holding that the goods (shoes) failed to conform to a sample supplied by the seller, but that the lack of conformity was not shown to be a fundamental breach) (see full text of the decision); CLOUT case No. 138 [Federal Court of Appeals for the Second Circuit, United States, 6 December 1993, 3 March 1995] (finding that air conditioner compressors delivered by the seller did not conform to the contract, and that such lack of conformity constituted a fundamental breach: "The agreement between Delchi and Rotorex was based upon a sample compressor supplied by Rotorex and upon written specifications regarding cooling capacity and power consumption . . . The president of Rotorex . . . conceded in a May 17, 1988 letter to Delchi that the compressors supplied were less efficient than the sample . . . .") (see full text of the decision).

[32]Landgericht Berlin, Germany, 15 September 1994, Unilex.

[33]CLOUT case No. 175 [Oberlandesgericht Graz, Austria, 9 November 1995] (see full text of the decision).

[34]CLOUT case No. 202 [Cour d'appel, Grenoble, France, 13 September 1995] (see full text of the decision).

[35]Conservas La Costella S.A. de C.V. v. Lanín San Luis S.A. & Agroindustrial Santa Adela S.A., Arbitration Proceeding before Compromex (Comisión pare la Protección del Comercio Exterior de Mexico), Mexico, 29 April 1996, Unilex. The Compromex decision did not specifically cite CISG article 35 (2) *(d)*.

[36]Article 35(3) only relieves the seller of responsibility for non-conformity under article 35 (2) *(a)–(d)*. A lack of conformity under article 35 (1) (which requires the goods to be of "the quantity, quality and description required by the contract") is not subject to the rule of article 35 (3). Nevertheless, a buyer's awareness of defects at the time the contract is concluded should presumably be taken into account in determining what the parties' agreement requires as to the quality of the goods. Secretariat Commentary to (then) Article 33 of the Convention, p. 32, para. 14.

[37]CLOUT case No. 219 [Tribunal Cantonal Valais, Switzerland, 28 October 1997]. After the buyer inspected the bulldozer, the parties agreed that the seller would replace three specific defective parts. The seller replaced the parts before delivering the machine, but the buyer then complained of other defects (see full text of the decision).

[38]CLOUT case No. 256 [Tribunal Cantonal du Valais, Switzerland, 29 June 1998] (see full text of the decision).

[39]CLOUT case No. 168 [Oberlandesgericht Köln, Germany, 21 March 1996].

[40]Rechtbank van koophandel Kortrijk, Belgium, 6 October 1997, Unilex; Rechtbank van koophandel Kortrijk, Belgium, 16 December 1996, available on the Internet at (http://www.law.kuleuven.ac.be/int/tradelaw/WK/1996-12-16.htm).

[41]CLOUT case No. 103 [Arbitration—International Chamber of Commerce No. 6653 1993]. A Swiss court has acknowledged the view that the burden of proving a lack of conformity should be allocated by applying domestic law, but it neither adopted nor rejected this approach because the contrary view led to the same result (buyer bore the burden). CLOUT case No. 253 [Cantone del Ticino Tribunale d'appello, Switzerland, 15 January 1998].

[42]CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (containing an extended discussion of the issue). To the same general effect, see CLOUT case No. 97 [Handelsgericht des Kantons Zürich, Switzerland, 9 September 1993]. One court has noted the view that the Convention contains a general principle allocating the burden to the buyer, but it neither adopted nor rejected this approach because the contrary view led to the same result (buyer bore the burden). CLOUT case No. 253 [Cantone del Ticino Tribunale d'appello, Switzerland, 15 January 1998]; see also Netherlands Arbitration Institute, Arbitral Award, No. 2319, 15 October 2002, Unilex. Without expressly discussing the issue, several decisions appear to have impliedly adopted the view that the CISG allocated the burden of proving lack of conformity to the buyer. See CLOUT case No. 107 [Oberlandesgericht Innsbruck, Austria, 1 July 1994] (buyer failed to prove that the goods did not conform to the contract); Landgericht Düsseldorf, Germany, 25 August 1994, Unilex (buyer failed to prove lack of conformity).

[43]CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995] (see full text of the decision). One court has found that, because it was shown that a refrigeration unit had broken down soon after it was first put into operation, the seller bore the burden of proving that it was not responsible for the defect. CLOUT case No. 204 [Cour d'appel, Grenoble, France, 15 May 1996].

[44]CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998]. See also CLOUT case No. 486 [Audiencia Provincial de La Coruña, Spain, 21 June 2002] (stating that buyer has burden of proving lack of conformity in delivered goods, but not explaining the grounds for the statement).

[45]CLOUT case No. 170 [Landgericht Trier, Germany, 12 October 1995] (see full text of the decision).

[46]CLOUT case No. 204 [Cour d'appel, Grenoble, France 15 May 1996].

[47]CLOUT case No. 50 [Landgericht Baden-Baden, Germany, 14 August 1991] (see full text of the decision). But see CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] where the court rejected expert opinion evidence offered by the seller because under Italian civil procedure law only an expert appointed by the court can offer such an opinion (see full text of the decision). For cases in which courts appointed experts to evaluate the conformity of the goods, see CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995] (reporting that the trial court had obtained an expert opinion of public health authorities on the cadmium level in mussels) (see full text of the decision); CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999] (expert opinion that damage to vines was caused by defective vine wax) (see full text of the decision); Rechtbank van Koophandel, Kortrijk, Belgium, 6 October 1997, Unilex (appointing judicial expert to determine the conformity of yarn); Rechtbank van Koophandel, Kortrijk, Belgium, 16 December 1996, available on the Internet at (http://www.law.kuleuven.ac.be/int/tradelaw/WK/1996-12-16.htm).

[48]Helsinki Court of Appeal, Finland, 29 January 1998, available on the Internet at (http://www.utu.fi/oik/tdk/xcisg/tap4.html#engl).

[49]CLOUT case No. 237 [Arbitration—Arbitration Institute of the Stockholm Chamber of Commerce, 5 June 1998] (see full text of the decision).

[50]CLOUT case No. 341 [Ontario Superior Court of Justice, Canada, 31 August 1999] (see full text of the decision).

[51]CLOUT case No. 50 [Landgericht Baden-Baden, Germany, 14 August 1991] (see full text of the decision).

[52]CLOUT case No. 481 [Court d' Appel Paris, France, 14 June 2001], affirmed on appeal in CLOUT case No. 494 [Court de Cassation, France, 24 September 2003]. Compare CLOUT case No. 486 [Audiencia Provincial de La Coruña, Spain, 21 June 2002] (stating that buyer had not sufficiently proved that the seller delivered nonconforming goods where a pre-shipment inspection reported that they were conforming).

[53]CLOUT case No. 97 [Handelsgericht des Kantons Zürich, Switzerland, 9 September 1993] (see full text of the decision).

[54]CLOUT case No. 245 [Cour d'appel, Paris, France, 18 March 1998]; CLOUT case No. 244 [Cour d'appel, Paris, France, 4 March 1998]; CLOUT case No. 203 [Cour d'appel, Paris, France, 13 December 1995].

Article 36

(1) The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.

(2) The seller is also liable for any lack of conformity which occurs after the time indicated in the preceding paragraph and which is due to a breach of any of his obligations, including a breach of any guarantee that for a period of time the goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics.

OVERVIEW

1. Article 36 deals with the time at which a lack of conformity in the goods must have arisen in order for the seller to be liable for it. Article 36 (1) states a general rule that the seller is liable for a lack of conformity that exists at the time risk of loss for the goods passes to the buyer.[1] Article 36 (2) extends the seller's responsibility in certain circumstances by providing that the seller is liable for a lack of conformity occurring even after risk has passed if the non-conformity is caused by a breach by the seller of its obligations, including a breach of a guarantee of the future performance or qualities of the goods.[2] Several decisions illustrate the operation of the two paragraphs of article 36. A flower shop that purchased daisy plants refused to pay the price when the buyer's own customers complained that the plants did not bloom throughout the summer as expected: a court of appeals affirmed the seller's right to the price because (1) the buyer failed to prove, pursuant to article 36 (1), that the plants were defective when the risk passed to the buyer, and (2) the buyer failed to prove that the seller had guaranteed the future fitness of the goods under article 36 (2).[3] Another court concluded that the seller was not liable under article 36 (1) for damage to pizza boxes that occurred while the boxes were being shipped by carrier because risk of loss had passed to the buyer when the goods were handed over to the first carrier; the result was not changed by article 36 (2) because the damage was not due to any breach by the seller.[4]

ARTICLE 36 (1) OVERVIEW

2. Article 36 (1) provides that the seller is liable "in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer." The principle of seller responsibility for defects existing before risk passes is reinforced by the final clause of article 36 (1), which confirms the seller's liability "even though the lack of conformity becomes apparent only after [the time risk passes to the buyer]." Thus it is the time that the lack of conformity comes into existence, not the time it is discovered (or should have been discovered), that is critical for the rule in article 36 (1).[5] One court decision involving the sale of cocoa beans from Ghana illustrates the general operation of article 36 (1).[6] The contract provided that risk would shift to the buyer when the goods were handed over to the first carrier. It also required the seller to supply, before the goods were shipped, a certificate from an independent testing agency confirming that the beans met certain quality specifications. The independent agency tested the goods some three weeks before they were packed for shipment, and issued the required certificate. When the goods arrived, however, the buyer's own testing revealed that the cocoa beans were below contract-quality. The court stated that the seller would be liable for the lack of conformity in three situations: (1) if the pre-shipment certificate of quality from the independent agency were simply mistaken and the goods thus lacked conformity at the time they were inspected; (2) if the deterioration in the quality of the goods occurred in the three week gap between inspection and shipment; or (3) if the defects otherwise existed when the goods were shipped but the defects would only become apparent after they were delivered to the buyer.

SELLER'S LIABILITY FOR DEFECTS EXISTING WHEN RISK PASSED

3. The basic principle of article 36 (1), that the seller is liable for a lack of conformity that exists at the time risk passes to the buyer, has been affirmed in several decisions.[7] Conversely, the principle that the seller is not normally liable for a lack of conformity arising after risk has passed has also been invoked in several decisions. For example, where a contract for the sale of dried mushrooms included a "C & F" clause, and the mushrooms deteriorated during shipment, one court found that the lack of conformity arose after risk of loss had passed and the seller was therefore not responsible for it under article 36 (1).[8]

DEFECTS NOT APPARENT UNTIL AFTER RISK PASSED

4. Article 36 (1) states that a seller is liable for a lack of conformity existing when risk passed to the buyer "even

though the lack of conformity becomes apparent only after that time." This principle has been applied in several cases. Thus where a refrigeration unit that had been sold installed on a truck trailer failed within 15 days of delivery, the court found that a lack of conformity had existed at the time risk passed even though the non-conformity did not become apparent until the unit had been put into use.[9] On the other hand, a buyer of a painting said to be by a specific artist sued the seller when the party to whom the buyer resold the painting determined that it could not be attributed to that artist.[10] The court stated that the seller was not liable because, under article 36 (1), the seller was only responsible for non-conformities existing at the time risk of loss passed to the buyer, and there was no indication at that time that the artist indicated was not the painter.[11]

BURDEN OF PROOF REGARDING THE TIME A DEFECT AROSE

5. Under article 36 (1), the parties' rights often hinge on whether a lack of conformity existed at the time the risk of loss passed to the buyer. For this reason, the question of which party bears the burden of proof on this issue is a critical one.[12] A court has noted that some CISG scholars suggest the question should be settled by reference to domestic law applicable under the rules of private international law, whereas other scholars argue that the CISG itself contains a general principle (controlling under CISG article 7 (2)) that the party asserting the non-conformity (i.e., the buyer) bears the burden; in the particular case the court did not have to resolve this disagreement because both approaches placed the burden on the buyer.[13] In another case, a lower court had dismissed a buyer's claim because it was not clear whether the goods' lack of conformity arose before or after risk passed to the buyer; the buyer appealed, arguing that article 36, in conjunction with article 7 (2), allocates to the seller the burden of proving that the goods were conforming when risk passed; the appeals court, however, held that the lower court decision had not reversed the burden of proof and dismissed the appeal.[14] Other courts appear to have taken a factual approach to the question. Thus, one court has concluded that a buyer who accepts goods upon delivery without promptly objecting to their quality bears the burden of proving that they did not conform to the contract.[15] On the other hand, a court from a different country found that where a refrigeration unit broke down shortly after it was delivered, the defect was presumed to have existed when the goods were shipped, and the seller bore the burden of proving it was not responsible for the lack of conformity.[16]

ARTICLE 36 (2)

6. Article 36 (2) provides that a seller is liable for a lack of conformity arising after the time that risk passed to the buyer, but only if the lack of conformity is due to a breach by the seller. An arbitral tribunal has invoked this provision in finding a seller liable for the lack of conformity of canned fruit that deteriorated during shipment because of inadequate packaging, even though the buyer bore transit risk under the FOB term in the contract.[17] On the other hand, a court has found that the seller was not responsible for damage to pizza boxes occurring after risk of loss passed to the buyer because the buyer did not demonstrate that the damage was due to any breach by the seller.[18] Article 36 (2) specifically mentions that the seller will be responsible for post-risk non-conformities if they result from "breach of any guarantee that for a period of time the goods will remain fit for their ordinary purpose[19] or for some particular purpose[20] or will retain specified qualities or characteristics." Another court has placed the burden of proving the existence of an express guarantee of future performance on the buyer, and concluded that a seller of plants was not liable under article 36 (2) for the failure of the plants to bloom throughout the summer because the buyer did not prove that the seller had guaranteed future performance of the plants.[21]

Notes

[1]Rules on risk of loss, including rules on when risk shifts from the seller to the buyer, are given in articles 66-70 of the Convention.

[2]The substance of the two paragraphs of article 36 constitutes a mirror image of article 66, which provides: "Loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller."

[3]CLOUT case No. 107 [Oberlandesgericht Innsbruck, Austria, 1 July 1994].

[4]CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000] (see full text of the decision).

[5]Under article 39 (1), in contrast, the time of discovery of a lack of conformity is critical: that article provides that a buyer loses its right to rely on a lack of conformity if it fails to "give notice to the seller specifying the nature of the of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it."

[6]CLOUT case No. 253, Switzerland, 1998 (see full text of the decision).

[7]CLOUT case No. 204 [Cour d'appel, Grenoble, France, 15 May 1996], reversed on other grounds by CLOUT case No. 241 [Cour de Cassation, France, 5 January 1999]; CLOUT case No. 253 [Cantone del Ticino Tribunale d'appello, Switzerland, 15 January 1998] (see full text of the decision).

[8]CLOUT case No. 191 [Cámara Nacional de Apelaciones en lo Comercial, Argentina, 31 October 1995]. To similar effect, see CLOUT case No. 107 [Oberlandesgericht Innsbruck, Austria, 1 July 1994] (see full text of the decision); CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000].

[9]CLOUT case No. 204 [Cour d'appel, Grenoble, France 15 May 1996], reversed on other grounds by CLOUT case No. 241 [Cour de Cassation, France, 5 January 1999]. See also CLOUT case No. 253 [Cantone del Ticino Tribunale d'appello, Switzerland, 15 January 1998] (see full text of the decision); Conservas L Costeña S.A. de C.V. v. Lanín San Lui S.A. & Agroindustrial Santa Adela S.A., Compromex Arbitration, Mexico, 29 April 1996, Unilex.

[10]Arrondissementsrechtbank Arnhem, the Netherlands, 17 July 1997, Unilex. On appeal, the court found that the CISG was inapplicable but affirmed the result on the basis of domestic law. Gerechtshof Arnhem, the Netherlands, 9 February 1999, Unilex.

[11]This statement was an alternative holding. The court also reasoned that the seller was not liable because any claim against the buyer by its own buyer was time-barred.

[12]This question is closely related to the general question of which party bears the burden of proof when the buyer claims the goods do not conform to the contract under article 35. See the Digest for article 35, para. 15.

[13]CLOUT case No. 253 [Cantone del Ticino Tribunale d'appello, Switzerland, 15 January 1998].

[14]CLOUT case No. 494 [Cour de Cassation, France, 24 September 2003], on appeal from CLOUT case No. 481 [Court d' Appel Paris, France, 14 June 2001].

[15]CLOUT case No. 377 [Landgericht Flensburg, Germany, 24 March 1999].

[16]CLOUT case No. 204 [Cour d'appel, Grenoble, France, 15 May 1996], reversed on other grounds by CLOUT case No. 241 [Cour de Cassation, France, 5 January 1999].

[17]Conservas L Costeña S.A. de C.V. v. Lanín San Lui S.A. & Agroindustrial Santa Adela S.A., Compromex Arbitration, Mexico, 29 April 1996, Unilex.

[18]CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000].

[19]Article 35 (2) *(a)* of the CISG provides that, unless otherwise agreed, goods do not conform to the contract unless they "are fit for the purposes for which goods of the same description would ordinarily be used." This provision does not, however, expressly require that goods be fit for ordinary purposes for any specified "period of time."

[20]Article 35 (2) *(b)* of the Convention provides that, unless otherwise agreed, goods do not conform to the contract unless they "are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement." This provision does not, however, expressly require that goods be fit for particular purposes for any specified "period of time".

[21]CLOUT case No. 107 [Oberlandesgericht Innsbruck, Austria, 1 July 1994].

Article 37

If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.

OVERVIEW

1. Article 37 of the CISG deals with non-conforming deliveries made by the seller before the date specified in the contract. The first sentence of article 37 specifies that, in the case of a delivery of insufficient quantity, the seller can cure by "deliver[ing] any missing part" or by "mak[ing] up any deficiency in the quantity of the goods delivered." In the case of a delivery of goods deficient in quality, the seller can cure by delivering replacement goods[1] or by "remedy[ing] any lack of conformity in the goods delivered."[2] The second sentence of article 37 specifies that the buyer retains any right to damages provided by the Convention, although the amount of such damages presumably must reflect any cure accomplished by the seller under the first sentence of the provision. The second sentence of article 37 was invoked by an arbitral tribunal where a seller had made a delivery of confectionary products before the buyer had furnished a banker's guarantee required by the contract.[3] Although the buyer accepted the delivery, it failed to pay for the goods, arguing that the seller had breached the contract by delivering before the guarantee was in place and that this default should be considered a fundamental breach of contract justifying the buyer's non-payment. The arbitral tribunal, however, ruled that the breach by the seller did not permit the buyer to refuse to pay, noting that under the last sentence of article 37 the buyer could claim damages for any losses caused by the early delivery.

Notes

[1]A seller's right under article 37 to deliver goods to replace non-conforming goods should be compared to a buyer's right under article 46 (2) of the CISG to require the seller to deliver goods in substitution for non-conforming goods.

[2]A seller's right under article 37 to "remedy" non-conforming goods should be compared to a buyer's right under article 46 (3) of the CISG to require the seller to repair non-conforming goods.

[3]CLOUT case No. 141 [Arbitration-Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, award in case No. 200/1994 of 25 April 1995].

Article 38

(1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.

(2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.

(3) If the goods are redirected in transit or redispatched by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispatch, examination may be deferred until after the goods have arrived at the new destination.

OVERVIEW

1. Article 38 directs a buyer to whom goods have been delivered to examine them or cause them to be examined. Much of the text of article 38 focuses on the time when this examination should take place. Thus article 38 (1) specifies the general rule that the examination must occur "within as short a period as is practicable in the circumstances." Article 38 (2) provides a special rule for cases involving carriage of goods, permitting the examination to be deferred until the goods arrive at their destination. With respect to the relationship between articles 38 (1) and 38 (2), one court has explained that normally the place of examination is the place where the seller's delivery obligation is performed under article 31 of the Convention, but if the contract involves carriage of the goods the examination may be deferred until the goods reach their destination.[1] Article 38 (3) contains another special rule, applicable if the buyer redirects goods while they are in transit or redispatches goods before having a reasonable opportunity to examine them: in such cases, examination may be deferred until after the goods arrive at their "new destination," provided the seller was on notice of the possibility of such redirection or redispatch when the contract was concluded.

2. As the Secretariat Commentary relating to article 38[2] and numerous cases[3] aver, the time when a buyer is required to conduct an examination of the goods under article 38 is intimately connected to the time when the buyer "ought to have discovered" a lack of conformity under article 39—an occurrence that starts the clock running on the buyer's obligation to give notice of the non-conformity under the latter provision. The examination obligation imposed by article 38, therefore, can have very serious consequences: if a buyer fails to detect a lack of conformity because it did not conduct a proper and timely examination, and as a result fails to give the notice required by article 39, the buyer will lose remedies—quite possibly all remedies—for the lack of conformity.[4]

3. The obligation to examine under article 38 (and to give notice of lack of conformity under article 39) applies not just to non-conformities under CISG article 35, but also to non-conformities under contractual provisions that derogate from article 35.[5] The examination mandated by article 38, furthermore, should ascertain not only that the quality, quantity, capabilities and features of the goods conform to the seller's obligations, but also that the goods are accompanied by documentation required by the contract.[6]

4. According to several opinions, the purpose of the article 38 examination obligation, in conjunction with the notice requirement imposed by article 39, is to make it clear, in an expeditious fashion, whether the seller has properly performed the contract.[7] In this regard, article 38 is similar to rules commonly found in domestic sales law; indeed, article 38 has been applied as a matter of "international trade usage" even though the States of neither the buyer nor the seller had, at the time of the transaction, ratified the Convention[8] Article 38, however, is a provision of international uniform law distinct from similar domestic rules,[9] and is to be interpreted (pursuant to article 7 (1)) from an international perspective and with a view to promoting uniformity in its application.[10] It has been asserted that the requirements of article 38 are to be strictly applied.[11]

ARTICLE 38 (1) IN GENERAL

5. Article 38 (1) mandates that the buyer "examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances." The meaning of the phrase specifying the time within which the examination must be conducted—"as short a period as is practicable in the circumstances"—has been addressed in many decisions.[12] The text of article 38 (1) does not expressly specify the type or method of examination required, and this issue has also generated substantial comment in the cases.[13]

6. Under article 6 of the Convention, the parties can derogate from or vary the effect of any provision of the CISG. This principle has been applied to article 38, and an agreement concerning the time and/or manner of the examination

of goods has been found to supersede the usual rules of article 38.[14] On the other hand, it has been found that contractual provisions addressing the terms and duration of warranties, the buyer's obligation to give notice of defects occurring after delivery, and the buyer's rights if the seller did not cure defects, did not displace the provisions of article 38.[15] Derogation from article 38 can also occur by trade usage,[16] although the express terms of the agreement may negate the applicability of a usage.[17]

7. After the goods have been delivered, the seller may waive its right to object to the propriety of the buyer's examination of the goods,[18] or it may be estopped from asserting such right.[19] On the other side, it has been asserted that a buyer may lose its rights to object to a lack of conformity if the buyer takes actions indicating acceptance of the goods without complaining of defects that it had discovered or should have discovered in its examination.[20]

8. Evidentiary questions can play a crucial role in determining whether a buyer has met its obligations under article 38 (1). Several decisions have asserted that the buyer bears the burden of proving that it conducted a proper examination.[21] In determining whether an adequate examination was conducted, furthermore, it has been asserted that a tribunal should consider both "objective" and "subjective" factors, including the buyer's "personal and business situation."[22] Some decisions appear in fact to take into account the buyer's subjective circumstances in judging the adequacy of an examination, at least where such considerations suggest a high standard for the examination.[23] Other decisions, however, have refused to consider the buyer's particular situation when it was invoked to argue for a low standard for the examination.[24]

METHOD OF EXAMINATION

9. By stating that the buyer must either examine the goods or "cause them to be examined," article 38 (1) implies that the buyer need not personally carry out the examination. In a number of cases, examinations were (or should have been) conducted by a person or entity other than the buyer, including the buyer's customer,[25] subcontractor,[26] or an expert appointed by the buyer.[27] It has also been held, however, that the buyer bears ultimate responsibility under article 38 for examinations carried out by others.[28]

10. Except for implying that the examination need not be carried out by the buyer personally, article 38 (1) is silent about the method the buyer should employ in examining the goods. In general, it has been asserted, the manner of inspection will depend on the parties' agreement, trade usages and practices;[29] in the absence of such indicators, a "reasonable" examination, "thorough and professional", is required, although "costly and expensive examinations are unreasonable."[30] It has also been asserted that the extent and intensity of the examination are determined by the type of goods, packaging and the capabilities of the typical buyer.[31] The issues relating to the method or manner of examination that have been addressed in decisions include: the impact of the buyer's expertise on the level of examination required;[32] whether spot testing or "sampling" is required[33] or adequate[34] the effect of the packaging or shipping condition of the goods on the type of examination the buyer should conduct;[35] whether an outside expert can or must be utilized;[36] and whether the presence or absence of defects in earlier deliveries or transactions should affect the manner of examination.[37]

TIME PERIOD FOR EXAMINATION

11. Article 38 (1) states that the buyer must examine the goods "within as short a period as is practicable in the circumstances." It has been asserted that the purpose of the article 38 (1) deadline for examination is to allow the buyer an opportunity to discover defects before the buyer resells,[38] and to permit prompt clarification of whether the buyer accepts the goods as conforming;[39] the period for examination, however, has been interpreted in a fashion that serves other purposes—for example, to mandate examination before the condition of the goods so changes that the opportunity to determine if the seller is responsible for a lack of conformity is lost.[40]

12. Except where the contract involves carriage of the goods (a situation governed by article 38 (2), discussed below) or where the goods are redirected in transit or redispatched (circumstances addressed in article 38 (3), discussed below), the time for the buyer's examination as a rule begins to run upon delivery of the goods[41]—which in general corresponds to the time risk of loss passes to the buyer.[42] Requiring the buyer to conduct an examination after delivery, therefore, is consistent with article 36 (1) of the Convention, which establishes the seller's liability for any lack of conformity existing when the risk passes. Where the lack of conformity is a hidden or latent one not reasonably discoverable in the initial examination, however, decisions have indicated that the period for conducting an examination to ascertain the defect does not begin to run until the defects reveal (or should reveal) themselves. Thus where a buyer alleged a lack of conformity in a grinding device that suffered a complete failure approximately two weeks after being put into service (approximately three weeks after delivery), one court indicated that the period for examining the goods with respect to this defect began to run at the time of the failure.[43]

13. The mandate in article 38 (1) to examine the goods "within as short a period as is practicable" has indeed been applied in a strict fashion in several cases.[44] It has also been asserted that the phrase is to be strictly interpreted.[45] In light of the requirement in article 38 (1) that the time period for examination must be "practicable in the circumstances," however, decisions have also recognized that the standard is a flexible one, and that the period for examination will vary with the facts of each case.[46] According to one court, the short period for the examination depends on the size of the buyer's company, the type of the goods to be examined, their complexity or perishability or their character as seasonal goods, the amount in question, the efforts necessary for an examination, etc. Furthermore, the objective and subjective circumstances of the concrete case must be considered—in particular the buyer's personal and business situation, the features of the goods, the quantity of goods delivered, and the chosen legal remedy.[47]

14. As the aforementioned statement indicates, the perishable nature of goods is a factor that tribunals have considered in determining the period for examination.[48] Other factors that the decisions recognize as relevant include the professionalism and/or expertise of the buyer,[49] the timing and nature of the buyer's expected use or resale of the goods,[50] the buyer's knowledge of the seller's need for speedy notice of lack of conformity,[51] whether the goods had passed a pre-delivery inspection,[52] whether there were non-business days during the period for examination,[53] the complexity of the goods,[54] the difficulty of conducting an examination,[55] whether there were defects in prior deliveries,[56] the fact that the buyer had requested expedited delivery of the goods,[57] and the obviousness (or non-obviousness) of the lack of conformity.[58]

15. Although the flexibility and variability of the period within which the buyer must examine the goods is widely recognized, several decisions have attempted to establish presumptive time periods for the buyer's examination. Thus some opinions have asserted that the general base-line period for examination (which might be lengthened or shortened by particular circumstances) is one week after delivery.[59] Other decisions have set presumptive examination periods ranging from three or four days[60] to a month.[61] Based on the facts of the particular case, examinations have been found timely when they were conducted within approximately two weeks of the first delivery under the contract,[62] within a few days after delivery at the port of destination,[63] and on the day of delivery.[64] An examination by an expert was also deemed timely when it was conducted and completed at an unspecified time following delivery, but where arrangements to have the expert examine the goods were initiated before the goods arrived at their destination.[65] Examinations in the following periods have been found to be untimely in the particular circumstances: four months after the delivery of the second of two engines (20 months after the delivery of the first engine);[66] over two months after delivery, which was almost two months after the buyer had a particular opportunity to examine the goods;[67] seven weeks after delivery;[68] more than 10 days following delivery;[69] beyond one week to 10 days after delivery;[70] beyond one week following delivery;[71] more than a few days after delivery;[72] after three or four days following delivery;[73] beyond three days after delivery;[74] after the day of arrival at the port of destination;[75] any time later than immediately following delivery.[76]

LATENT LACK OF CONFORMITY

16. The issue of the buyer's obligation to examine the goods for a hidden or latent lack of conformity not discernible during an initial inspection[77] is an important one: article 39 (1) of the Convention requires the buyer to give notice of a lack of conformity "within a reasonable time after [the buyer] discovered *or ought to have discovered it*" (emphasis added). Tribunals have adopted different approaches to examination for latent defects, apparently varying with the view taken of the nature of the examination required by article 38. Some decisions appear to conceive of the article 38 examination as an ongoing or repeated process involving a continuous search for all non-conformities, including latent ones. Such decisions seem to treat the question of when the buyer ought to have found any defect, including a latent one not discoverable in an initial examination, as an issue governed by article 38, on the apparent assumption that article 38 requires the buyer to continue examining the goods until all defects are revealed. Thus some decisions indicate that the period for an article 38 examination for latent defects does not begin to run until such defects should reveal themselves,[78] whereas the period for examination of obvious defects begins to run immediately upon delivery.[79] These opinions apparently contemplate multiple or continuous examinations under article 38. Other decisions appear to conceive of the examination required by article 38 as a single discrete event to occur shortly after delivery. For tribunals adopting this approach, the question of when latent defects should be discovered if they are not reasonably discernible in the initial article 38 examination is an issue beyond the scope of article 38.[80]

17. Illustrating this approach, one decision has emphasized that the article 38 examination occurs upon delivery of the goods, and failure to discern a lack of conformity that was not discoverable at the time does not violate article 38.[81]

ARTICLE 38 (2)

18. As was noted previously, under article 38 (1) the period for the buyer to examine the goods as a rule begins to run upon delivery of the goods.[82] Where such delivery is to occur, in turn, is governed by the sales contract or, in the absence of a contractual provision addressing this question, by the default rules stated in article 31.[83] In many transactions in which the goods will be delivered to the buyer by means of a third-party carrier, the place of delivery will be where the seller hands over the goods to the carrier for transportation.[84] In such cases, it will often not be convenient or even possible for the buyer to examine the goods at the point of delivery, and thus in fairness the period for examination should not begin running at that point. For this reason, in transactions involving "carriage of goods" (i.e., transportation by third-party carrier), article 38 (2) permits the buyer to defer the examination "until after the goods have arrived at their destination." This rule has been applied in several cases. In one transaction involving goods to be transported from Tallinn, Estonia to Abu Dhabi in the United Arab Emirates, the court found that the buyer could postpone examination until the goods arrived at Abu Dhabi even though the contract provided for delivery FOB Tallinn.[85] On the other hand, article 38 (2) is subject to the contrary agreement of the parties.[86] Thus where a contract between a seller and a buyer provided that the goods were to be delivered "free on refrigerated truck Turkish loading berth (Torbali)" and from there to be shipped to the buyer's country by carrier, the court found that the parties' agreement had excluded article 38 (2) and the buyer was required to conduct the article 38 examination in Turkey rather than at the place of arrival, because the contract contemplated that a representative of the buyer would inspect the goods at the Turkish loading dock and the buyer was responsible for making arrangements for transporting the goods to its country.[87]

ARTICLE 38 (3)

19. Article 38 (3) permits a buyer in certain circumstances to defer examination of the goods until after the time that the period for examination would otherwise have commenced.[88] Specifically, where the goods are "redirected in transit" or "redispatched by the buyer without a reasonable opportunity for examination by him,"[89] article 38 (3) permits examination to be deferred "until after the goods have arrived at the new destination," provided the seller "knew or ought to have known of the possibility of such redirection or redispatch" when the contract was concluded. Under this provision, an examination of a delivery of rare hard woods that the buyer (with the seller's knowledge) redispatched to the buyer's customer could be deferred until the goods arrived at the customer's facilities.[90] Several decisions, however, have strictly construed the requirements for article 38 (3) to apply. Thus it has been stated that the provision only applies if the goods are delivered directly from the seller to the end customer or if the buyer acts simply as an intermediary between the seller and the end customer, and the provision was held inapplicable where the buyer received and stored the goods in its own warehouse without knowing in advance whether and when they would be resold.[91] It has also been stated that article 38 (3) allows a deferred examination only if all (rather than just a part) of a delivery of goods is redispatched, or redirected in transit, and then only if the buyer does not have a reasonable opportunity to examine the delivery.[92]

Notes

[1]Landgericht Landshut, Germany, 5 April 1995.

[2]Secretariat Commentary to draft counterpart to final Article 38, p. 34, para. 2.

[3]E.g., CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995]; CLOUT case No 378 [Tribunale di Vigevano, Italy, 12 July 2000]; ICC Arbitration Case No. 8247, June 1996, *International Court of Arbitration Bulletin*, vol. 11, p. 53 (2000); CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994]; CLOUT case No. 48 [Oberlandesgericht Düsseldorf, Germany, 8 January 1993].

[4]See, e.g., CLOUT case No. 634 [Landgericht Berlin, Germany 21 March 2003]; CLOUT case No. 4 [Landgericht Stuttgart, Germany, 31 August 1989]; Hoge Raad, the Netherlands, 20 February 1998, Unilex; CLOUT case No. 364 [Landgericht Köln, Germany 30 November 1999]; CLOUT case No. 56 [Canton of Ticino Pretore di Locarno Campagna, Switzerland, 27 April 1992] (see full text of the decision). For further information concerning the effect of failure to give timely notice, see the Digests for arts. 39, 40 and 44.

[5]CLOUT case No. 237 [Arbitration—Arbitration Institute of the Stockholm Chamber of Commerce, 5 June 1998].

[6]Gerechtshof Arnhem, the Netherlands, 17 June 1997, Unilex.

[7]CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999], also available on the Internet at http://www.cisg.at/1_22399x.htm; CLOUT case No. 284 [Oberlandesgericht Köln, Germany, 21 August 1997] (see full text of the decision). The buyer's obligation to examine goods under Article 38 has also been linked to the principle of good faith in the performance of international sales contracts. Arrondissementsrechtbank Zwolle, the Netherlands, 5 March 1997, Unilex.

[8]CLOUT case No. 45 [Arbitration—International Chamber of Commerce No. 5713 1989].

[9]CLOUT case No. 230, Germany, 1997 (see full text of the decision).

[10]CLOUT case No. 284 [Oberlandesgericht Köln, Germany 21 August 1997] (see full text of the decision).

[11]CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994] (see full text of the decision).

[12]See the discussion in paras. 11–14 *infra*. The time frame specified in article 38 (1) is subject to articles 38(2) and 38(3), which state special rules applicable to particular situations. See paras. 16–17 *infra*. See also the discussion of latent defects in para. 15 *infra*.

[13]See the discussion in paras. 9–10 *infra*.

[14]CLOUT case No. 94 [Arbitration—Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft–Wien, 15 June 1994] (agreement as to time and manner of examination); CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999], also available on the Internet at http://www.cisg.at/1_22399x.htm; Arrondissementsrechtbank Zwolle, the Netherlands, 5 March 1997, Unilex (agreement as to time).

[15]CLOUT case No. 229 [Bundesgerichtshof, Germany, 4 December 1996].

[16]Helsinki Court of Appeal, Finland, 29 January 1998, available on the Internet at http://www.utu.fi/oik/tdk/xcisg/tap4.html#engl; CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999], also available on the Internet at http://www.cisg.at/1_22399x.htm; Arrondissementsrechtbank Zwolle, the Netherlands, 5 March 1997, Unilex; CLOUT case No. 170 [Landgericht Trier, Germany, 12 October 1995] (see full text of the decision); CLOUT case No. 290 [Oberlandesgericht Saarbrücken, Germany, 3 June 1998].

[17]CLOUT case No. 292 [Oberlandesgericht Saarbrücken, Germany, 13 January 1993].

[18]CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002] (approving analysis of lower appeals court that held the seller waived its right to object that buyer had not immediately examined the goods when it accepted late notice of lack of conformity and offered a remedy) (see full text of the decision); CLOUT case No. 270 [Bundesgerichtshof, Germany, 25 November 1998] (seller impliedly waived it rights because it had negotiated for a period of 15 months over the amount of damages for non-conforming goods without reserving the right to rely on articles 38 and 39, it had paid for an expert at buyer's request, and it had offered damages amounting to seven times the price of the goods); CLOUT case No. 235 [Bundesgerichtshof, Germany, 25 June 1997], (seller waived rights by agreeing to give a credit for goods that the buyer showed were non-conforming). But see CLOUT case No. 94 [Arbitration—Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft– Wien, 15 June 1994] (seller had not waived its rights under articles 38 and 39 merely by failing to object immediately to the timeliness of buyer's notice; the seller's intention to waive must be

clearly established); CLOUT case No. 251 [Handelsgericht des Kantons. Zürich, Switzerland, 30 November 1998] (the fact that seller, at the buyer's request, examined goods that the buyer claimed were non-conforming did not mean that seller waived its right to claim late notice of the non-conformity).

[19]CLOUT case No. 94 [Arbitration— Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft–Wien, 15 June 1994] (seller was estopped from asserting its rights under arts. 38 and 39 because (1) it engaged in conduct that the buyer could justifiably interpret as indicating the seller accepted the validity of buyer's complaint of lack of conformity, and (2) buyer relied upon the indication that seller would not raise a defence based on arts. 38 or 39).

[20]CLOUT case No. 343 [Landgericht Darmstadt, Germany, 9 May 2000]; CLOUT case No. 337 [Landgericht Saarbrücken, Germany, 26 March 1996]. But see CLOUT case No. 253 [Cantone del Ticino Tribunale d'appello, Switzerland, 15 January 1998] (acceptance of pre-shipment certificate showing proper quality of cocoa beans, for purposes of drawing on letter of credit, did not deprive the buyer of right to examine goods after delivery and to contest their quality) (see full text of the decision).

[21]CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland 30 November 1998]; CLOUT case No. 97 [Handelsgericht des Kantons Zürich, Switzerland 9 September 1993]; CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000]; CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999] also available on the Internet at http://www.cisg.at/1_22399x.htm. See also Landgericht Duisburg, Germany, 17 April 1996, Unilex (holding in favour of seller because buyer had not produced evidence of timely examination of goods and timely notice of defect).

[22]CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999], also available on the Internet at http://www.cisg.at/1_22399x.htm.

[23]CLOUT case No. 232 [Oberlandesgericht München, Germany, 11 March 1998] (because buyer was an experienced merchant, it should have conducted an expert examination and detected defects) (see full text of the decision); CLOUT case No. 4 [Landgericht Stuttgart, Germany, 31 August 1989] (in light of its expertise and the fact that it had found defects in the first delivery, buyer should have conducted a more thorough examination).

[24]Hoge Raad, the Netherlands, 20 February 1998, Unilex (despite buyer's summer vacation, it should not have delayed examining the goods when its customer complained in July); CLOUT case No. 285 [Oberlandesgericht Koblenz, Germany, 11 September 1998] (fact that buyer's manufacturing facilities were still under construction and that buyer was disorganized should not be considered in determining whether the buyer conducted a proper examination).

[25]CLOUT case No. 167 [Oberlandesgericht München, Germany, 8 February 1995] (buyer's customer should have examined goods and discovered defect sooner than it did); CLOUT case No. 120 [Oberlandesgericht Köln, Germany, 22 February 1994] (examination by buyer's customer, to whom the goods had been transhipped, was timely and proper) (see full text of the decision).

[26]CLOUT case No. 359 [Oberlandesgericht Koblenz, Germany, 18 November 999] (third party to whom buyer transferred the goods (fibreglass fabrics) for processing was supposed to conduct the article 38 examination; because buyer unjustifiably delayed transferring the goods to the third party, the examination was late).

[27]CLOUT case No. 319 [Bundesgerichtshof, Germany, 3 November 1999]; CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999], also in Unilex. See also CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002] (approving approach of lower appeals court which stated that use of experts to examine technically complicated goods may be required) (see full text of the decision).

[28]CLOUT case No. 167 [Oberlandesgericht München, Germany, 8 February 1995].

[29]CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999], also available on the Internet at http://www.cisg.at/1_22399x.htm. For discussion of contractual provisions and usages relating to examination, see para. 6 *supra*.

[30]CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999], also available on the Internet at http://www.cisg.at/1_22399x.htm. See also Landgericht Paderborn, Germany, 25 June 1996, Unilex (holding that the buyer did not need to conduct special chemical analyses of plastic compound). See also CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002] (see full text of decision approving approach of lower appeals court).

[31]CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997], reversed on other grounds by CLOUT case No. 270 [Bundesgerichtshof, Germany, 25 November 1998].

[32]CLOUT case No. 232 [Oberlandesgericht München, Germany, 11 March 1998] (see full text of the decision); CLOUT case No. 4 [Landgericht Stuttgart, Germany, 31 August 1989] (see full text of the decision) (in view of his expertise, merchant buyer should have conducted "a more thorough and professional examination").

[33]CLOUT case No. 634 [Landgericht Berlin, Germany 21 March 2003] (see full text of the decision); CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997] (requiring test use of goods for defects that would only become apparent upon use and asserting that random testing is always required), reversed on other grounds by CLOUT case No. 270 [Bundesgerichtshof, Germany, 25 November 1998]; CLOUT case No. 232 [Oberlandesgericht München, Germany, 11 March 1998] (see full text of the decision); CLOUT case No. 98 [Rechtbank Roermond, Netherlands, 19 December 1991] (buyer required to thaw and examine a portion of shipment of frozen cheese) (see full text of the decision); CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999], also available on the Internet at http://www.cisg.at/1_22399x.htm; CLOUT case No. 292 [Oberlandesgericht Saarbrücken, Germany, 13 January 1993]; CLOUT case No. 285 [Oberlandesgericht Koblenz, Germany, 11 September 1998] (buyer should have conducted a test by processing a sample of delivered plastic using its machinery) (see full text of the decision); CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998]; CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994]; CLOUT case No. 4 [Landgericht Stuttgart, Germany, 31 August 1989] (spot checking of delivery of shoes not sufficient where defects had been discovered in an earlier delivery).

[34]CLOUT case No. 170 [Landgericht Trier, Germany, 12 October 1995] (taking samples of wine for examination the day after delivery was adequate; buyer did not have to examine for dilution with water because that is not generally done in the wine trade); CLOUT case No. 280 [Oberlandesgericht Jena, Germany, 26 May 1998] (examination of random samples of live fish after delivery would have been sufficient); CLOUT case No. 192 [Obergericht des Kantons Luzern, Switzerland, 8 January 1997] (spot checking of wrapped medical devices would be adequate) (see full text of the decision). But see Rechtbank Zwolle, the Netherlands, 5 March 1997, Unilex (examination of

delivery of fish by sample would not be sufficient where the buyer had ready opportunity to examine entire shipment when it was processed and buyer had discovered lack of conformity in another shipment by the seller).

[35]CLOUT case No. 98 [Rechtbank Roermond, the Netherlands, 19 December 1991] (fact that delivery consisted of frozen cheese did not excuse buyer from obligation to examine: buyer should have thawed and examined a portion of shipment); CLOUT case No. 292 [Oberlandesgericht Saarbrücken, Germany, 13 January 1993] (fact that doors had been delivered wrapped in plastic sheets on pallets and buyer contemplated sending them on to its customers did not prevent buyer from examining goods: buyer should have unwrapped a sample of the doors); Rechtbank van Koophandel Kortrijk, Belgium, 6 October 1997, Unilex (not reasonable to expect buyer of yarn to unroll the yarn in order to examine it before processing); CLOUT case No. 192 [Obergericht des Kantons Luzern, Switzerland, 8 January 1997] (buyer should have removed a sample of medical devices from shipping boxes and examined them through transparent wrapping) (see full text of the decision).

[36]CLOUT case No. 319 [Bundesgerichtshof, Germany, 3 November 1999]; CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999], also available on the Internet at http://www.cisg.at/1_22399x.htm; Landgericht Ellwangen, Germany, 21 August 1995, Unilex.

[37]Landgericht Ellwangen, Germany, 21 August 1995, Unilex; CLOUT case No. 4 [Landgericht Stuttgart, Germany, 31 August 1989] (spot checking of delivery of shoes not sufficient where defects had been discovered in an earlier delivery).

[38]CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998].

[39]CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997] (see full text of the decision).

[40]CLOUT case No. 284 [Oberlandesgericht Köln, Germany, 21 August 1997] (immediate examination of chemicals required where the chemicals were going to be mixed with other substances soon after delivery); Rechtbank Zwolle, the Netherlands, 5 March 1997, Unilex (examination was due quickly where shipment of fish was to be processed by the buyer, because the processing would make it impossible to ascertain whether the fish were defective when sold); Arrondissementsrechtsbank 's-Hertogenbosch, the Netherlands, 15 December 1997, Unilex (examination of furs not conducted until they had already undergone processing was not timely).

[41]E.g., CLOUT case No. 634 [Landgericht Berlin, Germany 21 March 2003]; CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002] (approving approach of lower appeals court which stated that examination period begins as soon as the goods are made available to the buyer at the place of delivery) (see full text of the opinion); CLOUT case No. 48 [Oberlandesgericht Düsseldorf, Germany, 8 January 1993] (where the contract provided for delivery of cucumbers "free on refrigerated truck Turkish loading berth," the German buyer should have examined the goods when they were loaded in Turkey, instead of waiting until they had been forwarded to Germany); CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994] (asserting that the period for examining the goods under art. 38 and giving notice under art. 39 begins upon delivery to the buyer); CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (buyer's time for examining goods begins to run upon delivery or shortly thereafter, except where the defect can only be discovered when the goods are processed); CLOUT case No. 56 [Canton of Ticino Pretore di Locarno Campagna, Switzerland, 27 April 1992] (buyer must examine goods upon delivery); Rechtbank Zwolle, the Netherlands, 5 March 1997, Unilex (examination due at the time of delivery or shortly after). The German Supreme Court has suggested that an article 38 examination of machinery should be conducted both at the time of delivery and at the time of installation; see CLOUT case No. 319 [Bundesgerichtshof, Germany, 3 November 1999] (see full text of the decision). In a decision involving the sale and installation of sliding gates, one court held that the defects in the gates should have been discovered when installation of the gates was substantially complete, even though some minor work remained unperformed by the seller; see CLOUT case No. 262 [Kanton St. Gallen, Gerichtskommission Oberrheintal, Switzerland, 30 June 1995]. The court did not actually cite article 38—instead, it discussed the article 39 (1) obligation to give notice of a lack of conformity within a reasonable time after the non-conformity was discovered or should have been discovered—but the decision clearly implies that the time for the buyer's examination of the goods commenced even before seller had completed all its duties. Where elevator cables were delivered on incorrectly-sized reels, a court has held that the buyer should have examined the goods for defects at the time he rewound the cables on proper-sized reels (which occurred eight days after delivery); thus the subsequent discovery of obvious defects in the cables by the buyer's customer was, with respect to the buyer obligations under article 38 (1), untimely. CLOUT case No. 482 [Cour d'appel Paris, France, 6 November 2001].

[42]See CISG art. 69.

[43]CLOUT case No. 319 [Bundesgerichtshof, Germany, 3 November 1999] (see full text of the decision). See also CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002] (approving approach of lower appeals court whichheld that defects could not be discovered until the goods were put into provisional operation) (see full text of the decision); CLOUT case No 378 [Tribunale di Vigevano, Italy, 12 July 2000] ("the time when the buyer is required to examine the goods under Art. 38(1) . . . as a rule is upon delivery or shortly thereafter and only exceptionally may be later, for instance when the defect is discoverable only by processing the goods."); Hoge Raad, the Netherlands, 20 February 1998, Unilex (implying that the period for examining for latent defects in floor tiles began to run when buyer's customer complained, some seven months after seller delivered the tiles to buyer); Landgericht Düsseldorf, Germany, 23 June 1994, Unilex (suggesting that period to examine engines for latent defects did not begin until buyer had installed and put goods into operation); Rechtbank van Koophandel Kortrijk, Belgium, 27 June 1997, available on the Internet at http://www.law.kuleuven.ac.be/int/tradelaw/WK/1997-06-27.htm (time for examination of goods and notice of lack of conformity was extended for goods that had to be processed before defects could be discovered). But see CLOUT case No. 634 [Landgericht Berlin, Germany 21 March 2003] (stating that, even if defects in fabrics would not be revealed until they were dyed, buyer should have conducted preliminary spot testing by dyeing samples of the fabric).

[44]ICC Arbitration Case No. 8247, June 1996, *International Court of Arbitration Bulletin*, vol. 11, p. 53 (2000) (buyer should have examined a large shipment of a chemical compound on the day it arrived in the port of destination); Landgericht Landshut, Germany, 5 April 1995, Unilex (asserting that buyer's obligation to examine the goods must be complied with immediately, even if the goods are not perishable); CLOUT case No. 56 [Canton of Ticino Pretore di Locarno Campagna, Switzerland, 27 April 1992] (because both buyer and seller were merchants, buyer should have examined the goods immediately upon delivery) (see full text of the decision); Hof Arnhem, the Netherlands, 17 June 1997, Unilex (buyer, who was a dealer in medical equipment, should have checked immediately after delivery whether documents necessary to satisfy regulations were present); CLOUT case No. 290 [Oberlandesgericht Saarbrücken, Germany, 3 June 1998] (buyer must examine flowers on the day of delivery); CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994] (examination of shirts was required immediately following delivery).

[45]CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994] (see full text of the decision); CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998].

[46]See, e.g., CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002] (see full text of the decision).

[47]CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999], also available on the Internet at http://www.cisg.at/1_22399x.htm. The opinion continues by asserting that "the reasonable periods pursuant to arts. 38 and 39 CISG are not long periods." For other statements on the flexible standard for the time for examination and/or the factors that should be considered in determining whether examination was timely, see CLOUT case No. 192 [Obergericht des Kantons Luzern, Switzerland, 8 January 1997] (indicating that a tribunal should consider "the nature of the goods, the quantity, the kind of wrapping and all other relevant circumstances") (see full text of the decision); Tribunale Civile di Cuneo, Italy, 31 January 1996, Unilex (asserting that scholars discussing Article 38 have indicated that the time frame is "elastic, leaving space to the interpreter and in the end to the judge, in terms of reasonableness, so that the elasticity will be evaluated in accordance with the practicalities of each case"); CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994] (in determining the time for examining the goods "the circumstances of the individual case and the reasonable possibilities of the contracting parties are crucial") (see full text of the decision); CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997] (asserting that, although the "median" time for an examination of durable goods is three to four days, "[t]his figure can be corrected upward or downward as the particular case requires") (see full text of the decision).

[48]CLOUT case No. 290 [Oberlandesgericht Saarbrücken, Germany, 3 June 1998] (flowers); CLOUT case No. 98 [Rechtbank Roermond, the Netherlands, 19 December 1991] (cheese); Rechtbank Zwolle, the Netherlands, 5 March 1997, Unilex (fish).

[49]CLOUT case No. 56 [Canton of Ticino Pretore di Locarno Campagna, Switzerland, 27 April 1992] (see full text of the decision); Hof Arnhem, the Netherlands, 17 June 1997, Unilex.

[50]CLOUT case No. 284 [Oberlandesgericht Köln, Germany, 21 August 1997] (immediate examination of chemicals required where the chemicals were going to be mixed with other substances soon after delivery); Rechtbank Zwolle, the Netherlands, 5 March 1997, Unilex (examination was due quickly where shipment of fish was to be processed by the buyer; processing would make it impossible to ascertain whether the fish were defective when sold); Arrondissementsrechtsbank 's-Hertogenbosch, the Netherlands, 15 December 1997, Unilex (examination of furs not conducted until they had already undergone processing was not timely).

[51]Landgericht Köln, Germany, 11 November 1993, Unilex, reversed on other grounds by CLOUT case No. 122 [Oberlandesgericht Köln, Germany, 26 August 1994] (see full text of the decision).

[52]Compare Helsinki Court of First Instance, 11 June 1995, available on the Internet at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/980630f5.html#proceed (existence of pre-delivery tests showing acceptable vitamin content for skin care products excused buyer from testing for vitamin content immediately after delivery) with CLOUT case No. 280 [Oberlandesgericht Jena, Germany, 26 May 1998] (buyer was not entitled to rely on pre-importation veterinarian's inspection certificate certifying health of live fish: buyer should have examined samples of fish after delivery).

[53]CLOUT case No. 120 [Oberlandesgericht Köln, Germany, 22 February 1994] (buyer's examination was timely, taking into account the fact that two days of the period were weekend days) (see full text of the decision); Amtsgericht Riedlingen, Germany, 21 October 1994, Unilex (3 days for examining delivery of ham was sufficient even though Christmas holidays interfered with examination). But see Hoge Raad, the Netherlands, 20 February 1998, Unilex (despite buyer's summer vacation, it should not have delayed in examining the goods when its customer complained in July).

[54]Landgericht Düsseldorf, Germany, 23 June 1994, Unilex (where the goods consisted of two engines to be used for manufacturing hydraulic presses and welding machines, buyer had more than the usual time for an examination in order to determine conformity with technical specifications; because buyer delayed examining the goods until some four months after delivery of the second engine (16 months after delivery of first engine), however, the examination was untimely).

[55]CLOUT case No. 315 [Cour de Cassation, France, 26 May 1999] (time for examination took into account the difficulty of handling the metal sheets involved in the sale); Rechtbank van Koophandel Kortrijk, Belgium, 27 June 1997, Unilex (period for examination was longer for goods that had to be processed before defects could be discovered (in this case, yarn to be woven)); Rechtbank van Koophandel Kortrijk, Belgium, 6 October 1997, Unilex (buyer of crude yarn did not have to examine goods until they were processed; it would be unreasonable to expect buyer to unroll the yard in order to examine it before processing); Landgericht Düsseldorf, Germany, 23 June 1994, Unilex (buyer had longer than normal period to examine engines to be used in its manufacturing process because buyer had to install and put goods into operation in order to discover defects). Compare CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994] (the time for examination depends on the circumstances of the particular case, in this case, involving a sale of shirts, "it was easily possible to examine the shirts—at least by way of sampling—immediately after their delivery") (see full text of the decision). But see CLOUT case No. 98 [Rechtbank Roermond, the Netherlands, 19 December 1991] (fact that sale involved frozen cheese did not excuse buyer from prompt examination, buyer could thaw and examine a sample of delivery) (see full text of the decision).

[56]Rechtbank Zwolle, the Netherlands, 5 March 1997, Unilex (buyer should have examined fish before processing and selling them to its customers given that buyer had already discovered lack of conformity in a previous shipment by the seller); Rechtbank van Koophandel Kortrijk, Belgium, 27 June 1997, available on the Internet at http://www.law.kuleuven.ac.be/int/tradelaw/WK/1997-06-27.htm ("defects in prior shipments a factor to consider in determining timeliness of examination").

[57]CLOUT case No. 634 [Landgericht Berlin, Germany 21 March 2003].

[58]Amtsgericht Riedlingen, Germany, 21 October 1994, Unilex (defects in under-seasoned ham were easily discernible, and thus buyer should have examined goods and discovered defects quickly); Landgericht Köln, Germany, 11 November 1993, Unilex, reversed on other grounds in CLOUT case No. 122 [Oberlandesgericht Köln, Germany, 26 August 1994] (mistake in business report was easily discoverable, and thus examination was required to be quick) (see full text of the decision); CLOUT case No. 359 [Oberlandesgericht Koblenz, Germany, 18 November 1999] (where defects are easy to discover, the time for examination should not exceed one week); CLOUT case No. 284 [Oberlandesgericht Köln, Germany, 21 August 1997] (where chemicals were to be mixed with other substances and defects were easily discernible, immediate examination of the goods was required). See also Tribunale Civile di Cuneo, Italy, 31 January 1996, Unilex (time period for notice (and, perhaps, examination) is reduced if defects are easily recognizable); CLOUT case No. 482 [Cour d'appel Paris, France, 6 November 2001] (see full text of decision).

[59]CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002] (approving approach of lower appeals court which had asserted: "As a rough assessment for orientation purposes, an inspection period of one week (five work days) can apply") (see full text of the decision); CLOUT case No. 285 [Oberlandesgericht Koblenz, Germany 11 September 1998] ("Generally speaking, examination of the goods by the buyer should occur within a week after delivery"); CLOUT case No. 284 [Oberlandesgericht Köln, Germany, 21 August 1997] (where chemicals were to be mixed with other substances and defects were easily discernible, immediate examination of the goods was required); CLOUT case No. 359 [Oberlandesgericht Koblenz, Germany, 18 November 1999] ("where defects are easy to discover . . the examination period should not exceed a period of one week"); Landgericht Mönchengladbach, Germany, 22 May 1992, Unilex (generally allowing one week for examination of goods). Compare CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999], also available on the Internet at http://www.cisg.at/1_22399x.htm (unless special circumstances suggest otherwise, buyer has a total of approximately 14 days to examine and give notice of defects).

[60]CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997]. Compare Landgericht Düsseldorf, Germany, 23 June 1994 (a few working days).

[61]CLOUT case No. 284 [Oberlandesgericht Köln, Germany, 21 August 1997].

[62]CLOUT case No. 315 [Cour de Cassation, France, 26 May 1999] (see full text of the decision).

[63]China International Economic and Trade Arbitration Commission (CIETAC) Arbitration, China, 23 February 1995, Unilex, see also http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950223c1.html.

[64]CLOUT case No. 46 [Landgericht Aachen, Germany, 3 April 1990] (see full text of the decision).

[65]CLOUT case No. 45 [Arbitration—International Chamber of Commerce, No. 5713 1989] (see full text of the decision).

[66]Landgericht Düsseldorf, Germany, 23 June 1994 Unilex.

[67]CLOUT case No. 482 [Cour d'appel Paris, France, 6 November 2001] (buyer should have examined elevator cables delivered on incorrectly-sized reels at the time he rewound the cables on proper-sized reels (which occurred eight days after delivery); discovery by the buyer's customer of obvious defects in the cables some two months thereafter was, with respect to the buyer obligations under article 38 (1), untimely.

[68]CLOUT case No. 634 [Landgericht Berlin, Germany 21 March 2003].

[69]CLOUT case No. 192 [Obergericht des Kantons Luzern, Switzerland, 8 January 1997] (see full text of the decision).

[70]CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland 30 November 1998].

[71]CLOUT case No. 285 [Oberlandesgericht Koblenz, Germany, 11 September 1998]; Landgericht Mönchengladbach, Germany, 22 May 1992, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/56.htm; CLOUT case No. 359 [Oberlandesgericht Koblenz, Germany, 18 November 1999].

[72]Landgericht, Köln, Germany, 11 November 1993, Unilex.

[73]CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997].

[74]Amtsgericht Riedlingen, Germany, 21 October 1994, Unilex; Landgericht Landshut, Germany, 5 April 1995, Unilex (examination for proper quantity of sports clothing).

[75]ICC Arbitration Case No. 8247, 1996, Unilex.

[76]CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994].

[77]For the distinction between latent and obvious (patent) defects, see CLOUT case No. 4 [Landgericht Stuttgart, Germany, 31 August 1989]; CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000]; CLOUT case No. 284 [Oberlandesgericht Köln, Germany 21 August 1997] (see full text of the decision); CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997].

[78]See footnote 43 *supra* and accompanying text discussing CLOUT case No. 319 [Bundesgerichtshof, Germany, 3 November 1999] (period for examination to discover latent defects in grinding device did not begin until device broke down approximately three weeks after delivery).

[79]See footnote 41 *supra* and accompanying text; footnote 56 *supra* and accompanying text.

[80]Under this approach, the question of the timely discovery of such latent defects is an issue governed not by article 38 but by the requirement in article 39 (1) that the buyer notify the seller of a lack of conformity "within a reasonable time after [the buyer] discovered or ought to have discovered it." In other words, even though this approach posits that a latent defect might not be reasonably discoverable during the examination required by article 38, the buyer still is charged with taking reasonable action to discover such defects under article 39. For further discussion related to this issue, see the discussion *infra* of article 39.

[81]Landgericht Paderborn, Germany, 25 June 1996 (see full text of the decision). For other decisions that may take a similar approach to the relationship between the article 38 examination and discovery of latent defects, see CLOUT case No. 280 [Oberlandesgericht Jena, Germany, 26 May 1998] (failure to examine goods as provided in art. 38 would be irrelevant if the buyer could show that an expert examination would not have detected the defect); CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999], also available on the Internet at http://www.cisg.at/1_22399x.htm (suggesting that, if buyer had conducted a thorough and professional post-delivery examination of the goods that did not reveal a latent lack of conformity, buyer would have satisfied its obligations under art. 38); Landgericht Ellwangen, Germany, 21 August 1995, Unilex (suggesting that buyer satisfied its art. 38 obligations by examining the goods without a chemical analysis that, when conducted later, revealed a latent defect).

[82]See footnote 41 *supra* and accompanying text.

[83]See Landgericht Landshut, Germany, 5 April 1995, Unilex (stating that the art. 38 examination must usually be conducted at the place for the performance of the obligation to deliver under art. 31).

[84]This will be true, for example, if the parties agree to any of the various trade terms under which the buyer bears the risk of loss while the goods are in transit—e.g., Free Carrier (FCA) named point under the Incoterms. The same result would occur in transactions involving carriage of the goods if the parties have not agreed upon the place of delivery: in such cases, article 31 *(a)* provides that delivery occurs when the seller hands the goods over to the first carrier for transmission to the buyer

[85]Helsinki Court of Appeal, Finland, 29 January 1998, available on the Internet at http://www.utu.fi/oik/tdk/xcisg/tap4.html#engl. For other cases applying article 38(2), see CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995] (see full text of the decision); ICC Arbitration Case No. 8247, June 1996, *International Court of Arbitration Bulletin*, vol. 11, p. 53 (2000); Tribunale Civile di Cuneo, Italy, 31 January 1996, Unilex; Landgericht Landshut, Germany, 5 April 1995, Unilex; China International Economic and Trade Arbitration Commission (CIETAC) Arbitration, China, 1995, Unilex (under a CIF contract, where delivery to the buyer occurs when the goods pass the ship's rail at the port for loading, the buyer's time for examination did not start until the goods arrived at the port of destination).

[86]Not only does article 6 of the CISG provide that the parties may "derogate from or vary the effect of any of [the Convention's] provisions," but article 38 (2) itself is phrased in permissive ("examination *may* be deferred") as opposed to mandatory fashion.

[87]CLOUT case No. 48, Germany, 1993 (see full text of the decision).

[88]Unless article 38 (3) applies, the time for the buyer to examine the goods usually commences when the goods are delivered or, in the case of goods transported by a third-party carrier, when the goods arrive at their destination. See para. 18 *supra*

[89]According to a statement of a delegate from the Netherlands at the 1980 Vienna Diplomatic Conference at which the final text of the CISG was adopted, the distinction between "redirected in transit" and "redispatched" is as follows: "'Redispatched' implied that the goods had reached their first destination and had subsequently been sent on. 'Redirected in transit' implied that they had never reached their first destination." Summary Records of the United Nations Conference on Contracts for the International Sale of Goods, 16th meeting of Committee 1, A/CONF.97/C.1/SR.16, reproduced in Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March–11 April 1980, at. p. 320, para. 18; Note to Secretariat Commentary on Article 38 (Article 36 of the draft Convention) available on the internet at http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-38.html.

[90]CLOUT case No. 120 [Oberlandesgericht Köln, Germany, 22 February 1994], see also Unilex.

[91]CLOUT case No. 292 [Oberlandesgericht Saarbrücken, Germany, 13 January 1993].

[92]CLOUT case No. 192 [Obergericht des Kantons Luzern, Switzerland, 8 January 1997] (see full text of the decision).

Article 39

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

(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time limit is inconsistent with a contractual period of guarantee.

OVERVIEW

1. Under article 39, a buyer who claims that delivered goods do not conform to the contract has an obligation to give the seller notice of the lack of conformity. The provision is divided into two subsections addressing different time periods for the required notice: article 39 (1) requires that notice of lack of conformity be given within a reasonable time after the buyer has discovered or ought to have discovered the lack of conformity; article 39 (2) specifies that, in any event, the buyer must give the seller notice of the claimed lack of conformity within two years of the date on which the goods were actually handed over to the buyer, unless this time limit is inconsistent with a contractual period of guarantee.

SCOPE OF ARTICLE 39

2. The notice obligation imposed by article 39 applies if the buyer claims that delivered goods suffer from a lack of conformity. The concept of conformity is defined in article 35. The great majority of decisions applying the article 39 notice requirements involve claims that the goods were defective or otherwise not of conforming quality under article 35. Nevertheless, the article 39 notice obligation has been applied not only to breaches of the quality obligations imposed by article 35, but also to a breach of a contractual warranty made in derogation of article 35.[1] It has also been applied where the claimed lack of conformity was a failure to provide proper instruction manuals to accompany the goods.[2] Several decisions have found that article 39 requires notice when the buyer claims that an inadequate quantity (as opposed to quality) of goods was delivered.[3] One court has also applied the article 39 notice requirement when the buyer complained that delivery of seasonal goods was late,[4] although that decision has not been followed in other cases.[5] Each separate lack of conformity is subject to the notice requirement, and the fact that the buyer may have given proper notice as to one defect does not necessarily mean it has given valid notice as to all claimed non-conformities.[6]

CONSEQUENCES OF FAILURE TO GIVE NOTICE

3. Both article 39 (1) and article 39 (2) state that failure to give the requisite notice results in the buyer losing the right to rely on the lack of conformity. This appears to mean that the buyer loses the right to any remedy for the non-conformity, including, e.g., the right to require the seller to repair the goods,[7] the right to claim damages,[8] the right to reduce the price,[9] and the right to avoid the contract.[10] One court, however, appears to have permitted the buyer to partially avoid the contract based on a lack of conformity that had not been timely noticed.[11] It should also be noted that a buyer's remedies for a lack of conformity concerning which it has not given proper notice may be restored in whole or in part under CISG articles 40 and 44.[12]

BURDEN OF PROOF

4. There appears to be a consensus in reported decisions that the buyer bears the burden of proving that it gave the required article 39 notice of non-conformity. This position has been adopted both expressly[13] and by implication.[14] Although several decisions have invoked domestic legal rules to justify allocating the burden to the buyer,[15] a larger number have based their allocation on the general principles underlying the CISG.[16] A decision by an Italian court, for example, expressly rejected reliance on domestic law in determining the burden of proof, and discovered in provisions such as article 79 (1) a general CISG principle (in the sense of article 7 (2)) requiring the buyer to prove valid notice.[17]

FORM OF NOTICE

5. Article 39 does not specify the form of notice required, although the parties can by agreement require a particular form.[18] Notice in written form has often been found satisfactory, and the contents of a series of letters have been combined in order to satisfy the article 39 requirement.[19]

Oral notice that occurred when the seller, at the buyer's suggestion, inspected the goods on the premises of the buyer's customer has been deemed adequate both in form and content.[20] Oral notice by telephone has also been found sufficient,[21] although in several cases evidentiary issues have caused a buyer's claim to have given telephonic notice to fail.[22] One court has found that a buyer claiming to have given notice by telephone must prove when the call took place, to whom the buyer spoke, and what was said during the conversation; the buyer's failure to prove these elements prevented it from establishing that the article 39 notice requirement was satisfied.[23] An earlier decision had similarly found that a buyer's claim of telephonic notice had not been sufficiently substantiated because the buyer had not proven the date of the call, the party spoken to, or the information conveyed concerning the lack of conformity.[24] In one decision, moreover, a court appeared to impose special requirements for sufficient oral notice by stating that, if the seller failed to respond to telephone notice given to the seller's agent, the buyer was obliged to follow-up with written notice to the seller.[25] Finally, a court has rejected a buyer's argument that it gave implied notice of lack of conformity when it refused to pay the seller, holding that the notice required by article 39 must be express.[26]

TO WHOM MUST NOTICE BE GIVEN

6. Article 39 states that the required notice of lack of conformity must be given to the seller.[27] Thus it has been stated that communications between the buyer and its customer concerning defects in the goods did not satisfy the article 39 notice requirement because they did not involve the seller.[28] Notice of defects conveyed by the buyer to an independent third party who had acted as an intermediary in the formation of the contract but who had no further relationship to the seller was found not to have been given by means appropriate in the circumstances within the meaning of article 27, and thus the buyer bore the risk when the notice was not received by the seller.[29] Similarly, notice given to an employee of the seller who was not authorized to receive such communications but who promised to transmit the information to the seller was found to be insufficient when the employee in fact did not inform the seller; the court noted that, when notice is not given to the seller personally, the buyer must ensure that the seller actually receives the notice.[30] On the other hand, it has been found that notice given to an agent of the seller would satisfy article 39, although the question of the recipient's agency status and authority were matters beyond the scope of the CISG to be determined under applicable domestic law.[31]

AGREEMENTS RELATING TO NOTICE

7. Article 39 is subject to the parties' power under article 6 to derogate from or vary the effect of any provision of the Convention. A significant number of decisions have involved agreements relating to the buyer's obligation to give the seller notice of claims that the goods do not conform to the requirements of the contract.[32] Such agreements have generally been enforced, and buyers have several times lost the right to complain of a lack of conformity because they failed to comply with the terms of such an agreement.[33] A few decisions, however, appear reluctant to enforce contractual provisions governing notice: they rely on the standards of article 39 even though the parties' contract included clauses addressing notice of defects,[34] and/or they suggest that the contract provisions are enforceable only to the extent they are judged reasonable by the standards of article 39.[35] Of course to be enforceable under any approach, terms relating to notice of lack of conformity must have become part of the parties' agreement under applicable contract formation rules, which in the case of the CISG are found in Part II of the Convention. Thus it has been found that, although the parties can derogate from article 39, they had not done so where a clause requiring the buyer to give notice within eight days of delivery was illegible and appeared on documents unilaterally generated by the seller after the contract was concluded.[36] Parties also have been found not to have derogated from article 39 just by agreeing to an 18-month contractual warranty,[37] or to a guaranty agreement that did not expressly address the buyer's obligation to give notice of lack of conformity.[38] On the other hand, it has been recognized that a trade usage relating to notice of defects can derogate from article 39 if the trade usage is binding on the parties under CISG article 9.[39] A decision has also held that a seller's standard term requiring the buyer to give written notice of claimed defects in the goods within eight days of delivery was incorporated into the contract where the buyer was familiar with the term from the parties' prior dealings and the seller had expressly referred to its standard terms in his offer.[40] To the extent an agreement by the parties relating to notice of non-conformity fails to address particular issues, the provisions of article 39 have been invoked to fill the gaps.[41]

WAIVER BY THE SELLER OR THE BUYER

8. Although article 39 gives a seller the right to prevent a buyer from relying on a lack of conformity if the buyer does not give the seller timely and proper notice thereof, a seller can waive this right by leading the buyer to think that the seller would not object to the buyer's notice. Thus where the seller, after receiving notice from the buyer that the delivered goods were not conforming, declared that it would give credit for the goods if the buyer's complaints about defects were confirmed, one court found that the seller had waived its right to object to the timeliness of the buyer's notice.[42] On the other hand, a court invoked domestic law and a policy to encourage amicable settlements in concluding that a seller had not waived its right to claim that notice was untimely: the fact that the seller had accepted return of the goods in order to examine them and had granted the buyer a provisional pro forma credit for the price did not constitute a waiver, the court held.[43] Another court has found that the mere fact that the seller examined the goods, at the buyer's request, after receiving the buyer's complaint of lack of conformity did not constitute a waiver of the right to argue that the buyer's notice of non-conformity was late.[44] A court has stated that a seller can waive its rights under article 39 either expressly or impliedly, and that implied waiver requires specific indications that would lead the buyer to understand that the seller's actions constituted a waiver; the court went on to

conclude that, although the seller in the case had not waived its right to object to the timeliness of notice of a lack of conformity merely by entering into settlement negotiations with the buyer over the non-conformity, the seller's willingness to negotiate—in combination with the extended period during which such negotiations continued (15 months), the failure of the seller to reserve its rights under article 39 during that time, and the seller's actions in acceding to the buyer's request to pay for an expert to examine the goods and in offering the buyer damages equal to seven time the price for the goods—supported the conclusion that the seller had waived its right to object to late notice.[45] Another court has distinguished between waiver of a seller's article 39 rights and estoppel from asserting such rights: it concluded that the seller had not waived its right to object to late notice because the intention of parties to waive rights had to be very clearly established, and the mere fact that the seller did not immediately reject the notice as late at the time it was given was not sufficient evidence of waiver; on the other hand, by remaining in communication with the buyer in order to keep informed of the buyer's customer's complaints, and by making statements to the buyer indicating that the seller would not raise the defence of late notice, the seller became estopped from invoking that defence when the buyer relied on the impression that the seller would not complain of untimely notice.[46]

9. Buyers have also been deemed to have waived (or to be estopped from exercising) their rights under article 39 when they affirmatively indicated acceptance of delivered goods and/or acknowledged an obligation for the price without raising objection to defects that were apparent. Thus a buyer was found to have lost its right to complain about missing parts and defects that should have been discovered when it agreed to the amount of a disputed balance remaining on the purchase price and signed bills of exchange for that balance.[47] Similarly, a buyer who negotiated a reduction in the price of video recorders on the basis of certain defects lost its right to object to other defects known to the buyer at the time the price-reduction was agreed to.[48] And a buyer who paid outstanding invoices with bank checks and then stopped payment on the checks before they were honoured was deemed to have lost its right to complain of defects known when the checks were provided.[49]

ARTICLE 39 (1)—PURPOSES

10. Article 39 (1) requires a buyer who claims that the goods do not conform to the contract to give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it. This requirement has been deemed to serve several different purposes. A number of decisions indicate that a purpose is to promote prompt clarification as to whether a breach has occurred.[50] It has also been suggested that the required notice is designed to give the seller the information needed to determine how to proceed in general with respect to the buyer's claim,[51] and more specifically to facilitate the seller's cure of defects.[52] One decision states that the purpose is to promote the quick settlement of disputes and to assist the seller in defending himself.[53] Another decision similarly suggests that article 39 (1) assists the seller in defending himself against invalid claims.[54] The notice requirement has also been associated with a buyer's obligation of good faith.[55] Another decision asserts that the purpose of Article 39 (1) notice is to permit a seller to prepare to defend itself against the allegations of lack of conformity and also, on the particular facts of the case, to serve the public health by allowing the seller to take measures against the spread of a virus allegedly infecting the goods (fish eggs).[56]

CONTENTS OF NOTICE; SPECIFICITY REQUIRED

11. The notice required by article 39 (1) must "specify the nature of the lack of conformity. . .". This language has been interpreted and applied in a large number of decisions. Several have made general pronouncements concerning the specificity requirement. It has been said that notice of the mere fact of a lack of conformity is insufficient, but that the buyer must specify the precise nature of the defects;[57] that notice should indicate both the nature and the extent of the lack of conformity, and should convey the results of the buyer's examination of the goods;[58] that notice should be specific enough to allow the seller to comprehend the buyer's claim and to take appropriate steps in response, i.e., to examine the goods and arrange for a substitute delivery or otherwise remedy the lack of conformity;[59] that the purpose of the specificity requirement is to enable the seller to understand the kind of breach claimed by the buyer and to take the steps necessary to cure it, such as initiating a substitute or additional delivery;[60] that notice should be sufficiently detailed that misunderstanding by the seller would be impossible and the seller could determine unmistakably what the buyer meant;[61] that the notice should be sufficiently specific to permit the seller to know what item was claimed to lack conformity and what the claimed lack of conformity consisted of.[62] Several decisions have emphasized that the notice should identify the particular goods claimed to be non-conforming;[63] one such decision found that, even though the piece of agricultural machinery that the buyer claimed was defective was the only one of its type that the buyer had purchased from the seller, the specificity requirement was not satisfied where the notice failed to identify the serial number or the date of delivery, because the seller should not be forced to search its files for the records of the machine in question.[64] A number of decisions have noted that each claimed non-conformity must be specifically described, and the fact that notice may be sufficiently specific as to one defect does not mean that the notice requirement for other claimed defects is satisfied.[65] The specificity requirement has been applied to oral notice of lack of conformity.[66] On the other hand, several decisions have warned against setting up an overly-demanding standard of specificity.[67] It has also been suggested that different standards of specificity are required of different kinds of buyers, with expert buyers expected to provide more detailed notice.[68] In the case of machinery and technical equipment, it has been found that the specificity requirement is satisfied by a description of the symptoms of a lack of conformity, and that an explanation of the underlying causes is not required.[69]

12. The following descriptions of a lack of conformity have been found to be sufficiently specific to satisfy

article 39 (1): notice informing a shoe seller that the buyers' customer had received an alarming number of complaints about the goods, that the shoes had holes, and that the outer sole and heel of the children's shoes became loose;[70] notice to a seller of a machine for processing moist hygienic tissues that the buyer's customer had found steel splinters in semi-finished products produced by the machine, resulting in patches of rust on the finished products;[71] notice that floor tiles suffered from serious premature wear and discoloration;[72] notice that occurred when the seller was actually shown the nonconforming goods on the premises of the buyer's customer.[73]

13. The following descriptions in notices have been found not to satisfy article 39 (1) because they were insufficiently specific:[74] notice that stones for the facade of a building were mislabelled, that some stones and sills were not the proper size, and that the glue provided for mounting the stones was defective, where the notice failed to specify which specific items were unlabelled, the quantity and specific items that were of the wrong size, and the exact quantity of stones treated with the defective glue;[75] notice that flowering plants were in miserable condition and suffered from poor growth (the court noted that the latter might refer to either the size or the appearance of the plants);[76] notice that cotton cloth was of bad quality;[77] notice that furniture had wrong parts and much breakage;[78] notice of poor workmanship and improper fitting as to fashion goods;[79] notice that failed to specify that cheese was infested with maggots;[80] notice that the quality of fabric was objectionable and the dimensions of the delivered cloth prevented it from being cut in an economical fashion, where the notice failed to specify the nature of the quality problems and failed to indicate what dimensions would permit economical cutting;[81] notice that agricultural machinery failed to function properly but that did not specify the serial number or the delivery date of the machine;[82] notice that truffles had softened when they in fact contained worms, even though most professional sellers would understand that softness implied worms;[83] notice that shoes were not of the quality required by the contract, but which did not describe the nature of the defects;[84] notice that frozen bacon was rancid, but which did not specify whether all or only a part of the goods were spoiled;[85] notice that documentation for a printer was missing, where it was ambiguous whether the buyer was referring to the entire printing system or just the printer component of system;[86] notice that sheets of vulcanized rubber for shoe soles had problems or contained defects;[87] notice stating that leather goods did not conform to the buyer's specifications, could not be sold to the buyer's customers, and 250 items were badly stamped;[88] notice that five reels of blankets were missing, but which did not specify the design of the missing blankets and therefore did not permit seller to cure.[89]

14. Beyond the specificity requirement discussed above, the CISG does not further define the contents of the notice required by article 39 (1). One court has stated that, so long as the notice precisely describes defects in the goods reported by the buyer's customer, the notice need not claim that such defects constitute a breach by the seller, and may even express doubts that the customer's complaints were justified.[90] On the other hand, another court has concluded that a buyer who merely requested the seller's assistance in addressing problems with computer software had not given notice of lack of conformity as required by article 39 (1).[91]

TIMELY NOTICE IN GENERAL

15. Article 39 (1) requires the buyer to give notice of lack of conformity within a reasonable time after he has discovered or ought to have discovered it. This limitation on the time in which notice must be given, it has been asserted, is to be determined on the basis of the interests of good business, so that neither side has an unfair advantage and the rapid settlement of disputes is promoted.[92] Framing the time for notice in terms of a reasonable time is designed to promote flexibility,[93] and the period varies with the facts of each case.[94] Several decisions have indicated that the reasonable time standard is a strict one.[95] The time for a buyer to give notice of lack of conformity under article 39 has been distinguished from the time within which he must give notice of the remedy (such as avoidance of contract) he is pursuing; a buyer's notice of remedy, it was suggested, need not be given until a reasonable time after article 39 notice.[96] A different decision, however, asserts that the reasonable time for giving notice of lack of conformity under article 39 (1) is the same as the reasonable time for giving notice of avoidance under article 49 (2) *(b)*.[97]

WHEN TIME FOR NOTICE BEGINS TO RUN— RELATION TO ARTICLE 38

16. The reasonable time within which the buyer must give notice under article 39 (1) commences at the moment the buyer discovered or ought to have discovered the lack of conformity. Thus the period for the buyer's notice begins to run at the earlier of two moments: the time the buyer actually (or subjectively) discovered the non-conformity, and the time the buyer theoretically should have discovered (ought to have discovered) the non-conformity.[98]

17. The time when the buyer actually discovered the lack of conformity can be shown if the buyer admits the time at which it became subjectively aware of the defects[99] or there are objective facts proving when the buyer acquired such knowledge.[100] Complaints that the buyer received from customers to whom the goods were resold may establish actual knowledge: it has been found that the time for giving notice of lack of conformity commences, if it has not started previously, when the buyer receives such complaints,[101] even if the buyer doubts their accuracy.[102]

18. As was earlier noted in the discussion of article 38,[103] the time at which the buyer should have discovered a lack of conformity for purposes of article 39 (1) is closely connected to the buyer's obligation under article 38 to examine the goods. In the case of a non-conformity that should reasonably have been discovered by the buyer upon the initial examination of the goods, the buyer's time for giving notice begins to run from the time such examination should have been conducted. As one court stated, "[t]he point in time at which the buyer was obligated to have determined the breach of contract is governed by the provisions regulating the duty to examine. In this context, CISG article 38

provides that the goods must be examined within as short a period of time as the circumstances permit".[104] Thus in cases in which an initial examination following delivery should have revealed the lack of conformity, the buyer's reasonable time for giving notice begins after the period for examining the goods under article 38 has run, and the deadline for buyer's notice should accommodate both the period for examination under article 38 and a further reasonable time for notice under article 39 (1). Many decisions have recognized these two separate components of the time for the buyer's notice of non-conformities,[105] although some decisions do not appear to acknowledge the distinction.[106]

19. In the case of latent defects not reasonably detectable before some period of actual use, the time when the buyer should discover the lack of conformity occurs later than the time for the initial examination of the goods immediately following delivery.[107] One decision raised the question whether the time for giving notice of latent defects should ever start before the buyer acquires actual knowledge of the defects, although the decision avoided resolving the issue.[108] Other decisions, however, have determined that the reasonable time for giving notice of latent defects commenced at a time when the buyer should have discovered the defects, whether or not the buyer had actual knowledge of the defects at that time.[109] Some decisions appear to recognize that the discovery of latent defects may be a process that occurs over a period of time, and have suggested that the buyer's notice need only convey the information reasonably available to the buyer at the time of the notice, to be supplemented by information in later notices.[110]

PRESUMPTIVE PERIODS FOR NOTICE

20. Although the time period set in article 39 (1) for the buyer to give notice—within a reasonable time after the buyer discovers or ought to have discovered the non-conformity—is designed to be flexible[111] and will vary with the circumstances of the case,[112] a number of decisions have attempted to establish specific presumptive time periods as general guidelines or default rules. Courts adopting this approach usually contemplate that the presumptive notice periods they put forward will be adjusted to reflect the facts of the particular case.[113] The suggested presumptive periods vary considerably both in length and in the approach taken to measuring the period. Several decisions propose presumptive periods measured from the time goods are delivered, so that the periods encompass not only the time for giving notice after discovery of the lack of conformity, but also the time for the buyer to discover the non-conformity in the first place. In this vein, presumptive periods of 8 days after delivery (in the case of durable, non-seasonal goods),[114] 14 days for examination and notice,[115] from two weeks to one month after delivery,[16] and one month after delivery[117] have been suggested. Other decisions distinguish between the time for discovering the lack of conformity and the time for giving notice following discovery, often proposing presumptive periods for both components and frequently indicating particular categories of goods to which the period would apply. The following have been suggested as the presumptive reasonable time for giving notice: a few days after discovery of the lack of conformity;[118] one week (following one week for examination under article 38);[119] eight days following discovery;[120] two weeks (following one week for examination).[121] A theory that in normal circumstances the reasonable time for giving notice is one month following the time the defect was or ought to have been discovered—sometimes referred to as the noble month approach—has been accepted in several decisions.[122] Where the goods are perishable, some decisions have suggested very short presumptive notice periods.[123]

FACTORS INFLUENCING REASONABLE TIME FOR NOTICE

21. It is clear that the reasonable time for notice will vary with the circumstances of the particular case.[124] Decisions have identified a variety of factors that will impact the length of the notice period. A frequently cited factor relates to the obviousness of the lack of conformity—a patent, easily noticeable defect tends to shorten the period for notice.[125] The nature of the goods is another frequently-cited factor:[126] goods that are perishable[127] or seasonal[128] require earlier notice of defects; notice with respect to durable or non-seasonal goods, in contrast, is subject to a longer notice period.[129] The buyer's plans to process the goods[130] or otherwise handle them in a fashion that might make it difficult to determine if the seller was responsible for a lack of conformity[131] may also shorten the time for notice. Trade practices[132] as well as usages established between the parties[133] can also influence the time for notice, as can the buyer's awareness that the seller itself was operating under a deadline that would require prompt notice of defects.[134] An expert or professional buyer has been found to be subject to a shorter period for notice.[135] One court has stated that notice should have been given within as short a period as was practicable where quick notice was required for public health reasons—to permit the seller to take measures against the spread of a virus allegedly infecting the goods (fish eggs).[136] The fact that the buyer asked for expedited delivery of the goods has been cited as a factor that shortens the time for giving notice of lack of conformity.[137]

APPLICATION OF REASONABLE TIME STANDARD

22. It has been found that a buyer who did not give any notice of a lack of conformity before filing suit against the seller had failed to meet the requirements for timely notice under article 39 (1), and had lost the right to rely on the lack of conformity.[138] Even where the buyer did provide notice, the notice has been found too late in many instances. As measured from the date the goods were delivered, notices given at the following times have been found untimely on the facts of particular cases: over two years;[139] 24 months;[140] one year;[141] nine months;[142] seven to eight months;[143] four months;[144] three and one-half months;[145] three months;[146] more than two and one-half months;[147] two months;[148] two months in the case of one delivery and approximately seven weeks in the case of another delivery;[149] seven weeks;[150] six weeks;[151] one month;[152] 25 days;[153] 24 days;[154] 23 days;[155] 21 days;[156] 20 days;[157] 19 days;[158] 16 days;[159] almost two weeks;[160] any time beyond the day of delivery (involving perishable flowers).[161] As measured from the date that the buyer discovered or ought to have discovered the lack of conformity, notices given at the

following times have been found too late on the facts of particular cases: seven months;[162] almost four months;[163] more than two months;[164] six weeks;[165] 32 days;[166] slightly more than one month;[167] one month (by fax) and three weeks (by telephone);[168] four weeks;[169] three weeks;[170] approximately two weeks;[171] seven days.[172] On the other hand, a number of decisions have found that the buyer gave notice in timely fashion. On the facts of particular cases, notices given at the following times have been found to be within the reasonable time mandated by article 39 (1): one day after the goods were handed over to the buyer;[173] one day after the goods were examined;[174] three days after delivery;[175] seven days after the buyer learned of the defects;[176] within eight days after the goods were examined;[177] eight days after an expert's report identified defects in the goods;[178] 11 days after delivery;[179] a series of notices, one given two weeks after an initial provisional test on the goods, another given a month after a second test, and final notices given six months after delivery of one machine and eleven months after delivery of another machine;[180] 19 days after delivery;[181] 19–21 days after the examination of the goods;[182] four weeks after the buyer hypothetically ought to have known of the lack of conformity;[183] within one month of delivery.[184]

ARTICLE 39 (2)

23. Article 39 (2) establishes an absolute cut-off date for notice of lack of conformity—two years from the date the goods were actually handed over to the buyer, subject to an exception where such a time limit would be inconsistent with a contractual period of guarantee.[185] Without such a limit the time for notice might not have a clear end under the flexible and variable time standards in article 39 (1). In the case of latent defects, for example, the time the buyer discovers or ought to discover the lack of conformity, and thus the moment that the buyer's reasonable time for giving notice under article 39 (1) commences, could be long after the goods are delivered. In such cases, absent a contractual guarantee period that protects the buyer for a longer time, article 39 (2) will cut-off the buyer's right to give notice at two years after the goods were actually handed over, and thus prevent the buyer from preserving its rights to rely on a lack of conformity which is not discovered and noticed before that point.[186] Unlike the period for notice established in 39 (1), which is designed to be flexible and to vary with the circumstances, the two-year limit in article 39 (2) is precise and non-variable (except where the contractual period of guarantee exception applies). Indeed, the apparent purpose of article 39 is to provide a specific, predictable period beyond which a seller can be confident that claims of a lack of conformity in the goods will not be legally cognizable.

24. The rather limited number of decisions applying article 39 (2) have addressed several aspects of the provision. Thus several decisions have indicated that notice which is not specific enough to satisfy article 39 (1) will not constitute adequate notice under article 39 (2), even though the latter provision does not expressly incorporate the language in article 39 (1) requiring that the notice specify the nature of the lack of conformity.[187] Several other decisions have explored the relationship between article 39 (2) and rules specifying a deadline for commencing litigation based on breach of a sales contract (statutes of limitation or prescription periods). One court which considered this question struggled to reconcile a one-year limitations period in domestic law with the two-year notice period in article 39 (2), eventually opting to extend the domestic limitations period to two years.[188] Other decisions were at pains to distinguish between the rule of article 39 (2), which establishes a deadline for giving notice of lack of conformity, and a statute of limitations or prescription period, which establishes deadlines for commencing litigation.[189] A number of decisions have involved claims that the parties had derogated from article 39 (2) by agreement. Thus an arbitral tribunal found that the parties had derogated from article 39 (2) by agreeing to a maximum guarantee period of 18 months, although the tribunal also explained that the prescription period for a buyer who has given timely notice was not governed by article 39 (2), and was a matter beyond the scope of the CISG to be subject to domestic law.[190] On the other hand, an arbitral panel has determined that a clause requiring that disputes be submitted to arbitration within 30 days after the parties reached an impasse in negotiations did not operate as a derogation from article 39 (2).[191] Yet another arbitral decision found that the parties had not derogated from the two-year cut-off in article 39 (2) just because the seller may have orally represented to the buyer that the goods (sophisticated machinery) would last 30 years.[192] This decision presumably implies that such a representation does not constitute a contractual period of guarantee within the meaning of article 39 (2), because otherwise the clause would have extended the cut-off period for notice. Another decision also dealt with the meaning of the phrase contractual period of guarantee, finding that a clause fixing a deadline for submitting disputes to arbitration did not create such a contractual guarantee period.[193]

Notes

[1]CLOUT case No. 237 [Arbitration—Arbitration Institute of the Stockholm Chamber of Commerce, 5 June 1998].

[2]CLOUT case No. 343 [Landgericht Darmstadt, Germany, 9 May 2000] (see full text of the decision).

[3]CLOUT case No. 48 [Oberlandesgericht Düsseldorf, Germany, 8 January 1993] (see full text of the decision); CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997]; Landgericht Landshut, Germany, 5 April 1995, Unilex.

[4]Amtsgericht Augsburg, Germany, 29 January 1996, Unilex.

[5]Note that the CISG provision governing time of delivery (art. 33) is not found in the section of the CISG entitled "Conformity of the goods and third party claims" (Section II of Part III, Chapter I), but rather is located in the section entitled "Delivery of the goods and handing over of documents" (Section I of Part III, Chapter II).

[6]CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995] (see full text of the decision); Landgericht Landshut, Germany, 5 April 1995, Unilex; Landgericht Bielefeld, Germany, 18 January 1991, Unilex; CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999], also available on the Internet at http://www.cisg.at/1_22399x.htm; CLOUT case No. 597 [Oberlandesgericht Celle, Germany, 10 March 2004].

[7]CLOUT case No. 196 [Handelsgericht des Kantons Zürich, Switzerland, 26 April 1995].

[8]CLOUT case No. 50 [Landgericht Baden-Baden, Germany, 14 August 1991]; CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997] (see full text of the decision), reversed on other grounds by CLOUT case No. 270 [Bundesgerichtshof, Germany, 25 November 1998].

[9]CLOUT case No. 232 [Oberlandesgericht München, Germany, 11 March 1998] (see full text of the decision); CLOUT case No. 273 [Oberlandesgericht München, Germany, 9 July 1997]. Compare also CLOUT case No. 46 [Landgericht Aachen, Germany, 3 April 1990] (finding that buyer had the right to reduce the price under art. 50 because it had given proper notice of lack of conformity) (see full text of the decision).

[10]CLOUT case No. 232 [Oberlandesgericht München, Germany, 11 March 1998]; CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997] (see full text of the decision).

[11]CLOUT case No. 50 [Landgericht Baden-Baden, Germany, 14 August 1991].

[12]See the Digests for arts. 40 and 44.

[13]CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000]; CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998]; CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999], also in Unilex; CLOUT case No. 305 [Oberster Gerichtshof, Austria, 30 June 1998]; Pretura di Torino, Italy, 30 January 1997, Unilex, also available on the internet at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/970130i3.html; CLOUT case No. 196 [Handelsgericht des Kantons Zürich, Switzerland, 26 April 1995] (see full text of the decision); CLOUT case No. 97 [Handelsgericht des Kantons Zürich, Switzerland, 9 September 1993].

[14]Rechtbank 's-Gravenhage, the Netherlands, 7 June 1995, Unilex; Landgericht Marburg, Germany, 12 December 1995, Unilex; Landgericht Duisburg, Germany, 17 April 1996, Unilex; CLOUT case No. 290 [Oberlandesgericht Saarbrücken, Germany, 3 June 1998]; CLOUT case No. 289 [Oberlandesgericht Stuttgart, Germany, 21 August 1995]; CLOUT case No. 291 [Oberlandesgericht Frankfurt a. M., Germany, 23 May 1995], (see full text of the decision); CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994] (see full text of the decision); ICC Award No. 8611 of 1997, Unilex; Arbitral Panel of the Zurich Chamber of Commerce, award No. ZHK 273/95, 31 May 1996, Unilex.

[15]Pretura di Torino, Italy, 30 January 1997, Unilex, also available on the INTERNET at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/970130i3.html.

[16]CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000]; CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998]; CLOUT case No. 196 [Handelsgericht des Kantons Zürich, Switzerland, 26 April 1995] (see full text of the decision); CLOUT case No. 97 [Handelsgericht des Kantons Zürich Switzerland 9 September 1993].

[17]CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000].

[18]CLOUT case No. 222 [Federal Court of Appeals for the Eleventh Circuit, United States, 29 June 1998], in which the buyer had signed an order form containing a clause requiring complaints of defects in the goods to be in writing and made by certified letter. The decision proceeds on the premise that, if this clause became part of the parties' contract, the buyer's oral notice of lack of conformity would not have been valid. The court remanded the case to determine whether the clause had in fact been incorporated into the agreement.

[19]CLOUT case No. 225 [Cour d'appel, Versailles, France, 29 January 1998] (see full text of the decision).

[20]CLOUT case No. 593 [Oberlandesgericht Karlsruhe, Germany, 6 March 2003] (see full text of the decision) (stating that the Convention does not require buyer's notice to be in a particular form).

[21]Landgericht Frankfurt, Germany, 9 December 1992, Unilex. This is one of the very rare decisions in which a particular telephonic notice was held to satisfy the notice requirement in fact. Another decision recognized the theoretical validity of telephone notice while finding on its particular facts that the requirements of article 39 had not been satisfied. Landgericht Frankfurt, Germany, 13 July 1994, Unilex. Some decisions have found that telephonic notice failed to satisfy article 39 in some respect (e.g., because it was given too late) without commenting on the form of the notice. CLOUT case No. 411 [Landgericht Bochum, Germany, 24 January 1996], also in Unilex; Rechtbank van Koophandel Kortrijk, Belgium, 16 December 1996, Unilex.

[22]Landgericht Marburg, Germany, 12 December 1995, Unilex; Amtsgericht Kehl, Germany, 6 October 1995, Unilex; CLOUT case No. 4 [Landgericht Stuttgart, Germany, 31 August 1989] (see full text of the decision).

[23]Landgericht Frankfurt, Germany, 13 July 1994, Unilex.

[24]CLOUT case No. 4 [Landgericht Stuttgart, Germany, 31 August 1989] (see full text of the decision).

[25]Rechtbank van Koophandel Kortrijk, Belgium, 27 June 1997, Unilex.

[26]Landgericht Aachen, Germany, 28 July 1993, Unilex, reversed on other grounds by the Oberlandesgericht Köln, Germany, 22 February 1994, Unilex [see also CLOUT case No. 120].

[27]Article 39 (1) requires the buyer to give notice "to the seller," and article 39 (2) states that the buyer must "give the seller notice."

[28]CLOUT case No. 220 [Kantonsgericht Nidwalden, Switzerland, 3 December 1997] (see full text of the decision).

[29]CLOUT case No. 409 [Landgericht Kassel, Germany, 15 February 1996], see also Unilex. The court also noted that the notice must be specifically directed to the seller.

[30] CLOUT case No. 411 [Landgericht Bochum, Germany, 24 January 1996], also in Unilex.

[31]CLOUT case No. 364 [Landgericht Köln, Germany 30 November 1999].

[32]See, e.g., CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002] (term requiring buyer to give written notice of claimed defects within eight days of delivery (although seller was found to have waived its rights under this term) (see full text of the decision).

[33]CLOUT case No. 336 [Canton of Ticino Tribunale d'appello, Switzerland, 8 June 1999]; Landgericht Gießen, Germany, 5 July 1994, Unilex; Landgericht Hannover, Germany, 1 December 1993, Unilex; CLOUT case No. 303 [Arbitration—International Chamber of Commerce No. 7331 1994] (see full text of the decision); CLOUT case No. 94 [Arbitration—Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft–Wien, 15 June 1994]; CLOUT case No. 50 [Landgericht Baden-Baden, Germany, 14 August 1991]. See also CLOUT case No. 305 [Oberster Gerichtshof, Austria, 30 June 1998] (remanding to determine whether contractual provision governing time for giving notice of defects had been complied with); but see Rechtbank Zwolle, the Netherlands, 5 March 1997, Unilex (the court notes that the seller's standard term setting the time for giving notice of defects was part of the contract, but the court apparently did not apply the term; its analysis of whether the buyer gave notice within a reasonable time, however, was influenced by the term).

[34]CLOUT case No. 232 [Oberlandesgericht München Germany 11 March 1998] (see full text of the decision); CLOUT case No. 292 [Oberlandesgericht Saarbrücken, Germany, 13 January 1993] (see full text of the decision).

[35]CLOUT case No. 232 [Oberlandesgericht München, Germany, 11 March 1998] (see full text of the decision); CLOUT case No. 303 [Arbitration International Chamber of Commerce No. 7331 1994] (see full text of the decision).

[36]CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (see full text of the decision). In CLOUT case No. 222 [Federal Court of Appeals for the Eleventh Circuit, United States, 29 June 1998] the court ruled that, although the parties had each signed a form with a provision requiring the buyer to give written notice of defects within 10 days of delivery, evidence showing the parties did not subjectively intend to be bound by the provision should have been admitted under CISG article 8 (1). One court has held that a term requiring the buyer to give notice of defects within 30 days of delivery bound the buyer because it had been incorporated into the contract under the rules of article 19 of the CISG; see CLOUT case No. 50 [Landgericht Baden-Baden, Germany, 14 August 1991] (see full text of the decision). Another court found that under article 18 (1) a buyer accepted terms on the seller's order confirmation, including a clause requiring notice of defects to be given within eight days after delivery, by accepting delivery of the goods; see CLOUT case No. 292 [Oberlandesgericht Saarbrücken, Germany, 13 January 1993] (see full text of the decision).

[37]CLOUT case No. 237 [Arbitration Arbitration Institute of the Stockholm Chamber of Commerce, 5 June 1998] (see full text of the decision).

[38]CLOUT case No. 542 [Oberster Gerichtshof, Austria, 17 April 2002] (see full text of the decision).

[39]CLOUT case No. 292 [Oberlandesgericht Saarbrücken, Germany, 13 January 1993]. On the facts of the particular case, the court found that the parties' agreement to a clause requiring notice within eight days of delivery excluded the applicability of any such trade usage.

[40]CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002 (see full text of the decision approving reasoning of lower appeals court).

[41]CLOUT case No. 229 [Bundesgerichtshof, Germany, 4 December 1996] (agreement requiring the buyer to give immediate notice of defects that arose after delivery of the goods did not govern the obligation to notify of defects existing at delivery; the latter was therefore regulated by article 39 (1)); ICC Arbitration Case No. 8611, 1997, Unilex (because the parties' agreement regarding notice of defects did not address, e.g., the specificity with which the notice must describe the claimed defect, the court supplemented the agreement by reference to article 39 (1)).

[42]CLOUT case No. 235 [Bundesgerichtshof, Germany, 25 June 1997]. See also CLOUT case No. 542 [Oberster Gerichtshof, Austria, 17 April 2002] (buyer argued seller had waived its right to object to late notice under article 39 (1) through a course of dealing in which seller had failed to object to the buyer's repeated untimely notice, although the court rejedcted the argument); CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002 (approving holding of lower appeals court that seller had waived his right to object to timeliness of notice of defects under contract clause requiring notice within eight days of delivery when seller accepted the buyer's late notice and offered a remedy) (see full text of the decision).

[43]CLOUT case No. 310 [Oberlandesgericht Düsseldorf, Germany, 12 March 1993]. The court indicated that waiver by the seller of its article 39 rights would only be deemed to occur in clear circumstances, as where the seller unconditionally accepted return of the goods by the buyer.

[44]CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998].

[45]CLOUT case No. 270 [Bundesgerichtshof, Germany, 25 November 1998].

[46]CLOUT case No. 94 [Arbitration—Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft–Wien, 15 June 1994]. According to the court, the buyer had relied on the impression that the seller would not object to late notice because the buyer refrained from taking immediate legal action against its customer or the seller.

[47]CLOUT case No. 337 [Landgericht Saarbrücken, Germany, 26 March 1996].

[48]CLOUT case No. 343 [Landgericht Darmstadt, Germany, 9 May 2000].

[49]Arrondissementsrechtsbank Hof's-Hertogenbosch, the Netherlands, 26 February 1992, Unilex.

[50]CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999], also available on the Internet at http://www.cisg.at/1_22399x.htm; CLOUT case No. 48 [Oberlandesgericht Düsseldorf, Germany, 8 January 1993] (see full text of the decision); CLOUT case No. 284 [Oberlandesgericht Köln, Germany, 21 August 1997] (see full text of the decision); CLOUT case No. 3 [Landgericht München, Germany, 3 July 1989] (see full text of the decision).

[51]CLOUT case No. 337 [Landgericht Saarbrücken, Germany, 26 March 1996]; CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (see full text of the decision).

[52]CLOUT case No. 344 [Landgericht Erfurt, Germany, 29 July 1998]; CLOUT case No. 3 [Landgericht München, Germany, 3 July 1989] (see full text of the decision). See also CLOUT case No 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997] (implying that purpose of notice is to facilitate cure by the seller).

[53]CLOUT cae No. 409 [Landgericht Kassel, Germany, 15 February 1996], see also Unilex.

[54]CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999], also available on the Internet at http://www.cisg.at/1_22399x.htm.

[55]Rechtbank Zwolle, 5 March 1997, the Netherlands, 1997, Unilex.

[56]CLOUT case No. 486 [Audiencia Provincial de La Coruña, Spain, 21 June 2002].

[57]Landgericht Hannover, Germany, 1 December 1993, Unilex. Compare CLOUT case No. 597 [Oberlandesgericht Celle, Germany, 10 March 2004] (stating that notice "must describe the non-conformity as precisely as possible") (see full text of the decision).

[58]CLOUT case No. 344 [Landgericht Erfurt, Germany, 29 July 1998] (see full text of the decision).

[59]Id. See also CLOUT case No. 593 [Oberlandesgericht Karlsruhe, Germany, 6 March 2003] (stating that buyer's notice should permit the seller to react to the claim of lack of conformity in an appropriate fashion, and to chose among the several responses available to it, such as curing the lack of conformity, replacing the nonconforming goods, or demanding the opportunity to examine the goods himself) (see full text of the decision); CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002] (approving approach of lower appeals court which had stated: "Notice must specify the nature of the lack of conformity adequately enough to put the seller in a position to be able to reasonably react to it") (see full text of the decision).

[60]CLOUT case No. 229 [Bundesgerichtshof, Germany, 4 December 1996] (see full text of the decision). For a similar statement, see CLOUT case No. 319 [Bundesgerichtshof, Germany, 3 November 1999] (see full text of the decision); see also CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997] (implying that the purpose of the specificity requirement is to permit the seller to remedy the lack of conformity).

[61]Id.

[62]See also CLOUT case No. 319 [Bundesgerichtshof, Germany, 3 November 1999].

[63]CLOUT case No. 319 [Bundesgerichtshof Germany, 3 November 1999]; ICC Arbitration Award No. 8611, 1997, Unilex; CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997]; Landgericht München, Germany, 20 March 1995, Unilex.

[64]Landgericht Marburg, Germany, 12 December 1995, Unilex.

[65]CLOUT case No. 597 [Oberlandesgericht Celle, Germany, 10 March 2004]; CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002]; CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995] (see full text of the decision); Landgericht Bielefeld, Germany, 18 January 1991; CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999], also available on the Internet at http://www.cisg.at/1_22399x.htm.

[66]CLOUT case No. 4 [Landgericht Stuttgart, Germany, 31 August 1989] (see full text of the decision). See also CLOUT case No. 593 [Oberlandesgericht Karlsruhe, Germany, 6 March 2003].

[67]CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002] (see full text of the decision) (stating that, after giving initial notice of lack of conformity the buyer need notify the seller of additional details only if they are discoverable within the examination period at reasonable cost); CLOUT case No. 229 [Bundesgerichtshof, Germany, 4 December 1996] (see full text of the decision); CLOUT case No. 252 [Handelsgericht des Kantons Zürich, Switzerland, 21 September 1998].

[68]CLOUT case No. 252 [Handelsgericht des Kantons Zürich, Switzerland, 21 September 1998]; CLOUT case No. 344 [Landgericht Erfurt, Germany, 29 July 1998] (see full text of the decision).

[69]CLOUT case No. 319 [Bundesgerichtshof, Germany, 3 November 1999]. See also Hoge Raad, the Netherlands, 20 February 1998, Unilex (implying that a description of symptoms rather than the causes of defects in floor tiles would be sufficient); Tribunale di Busto Arsizio, Italy, 13 December 2001, published in *Rivista di Diritto Internazionale Privato e Processuale*, 2003, 150–155, also available on Unilex (buyer was under no duty to indicate the specific cause of the malfunction in a machine, particularly where the seller could not provide the necessary information).

[70]CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999], also in Unilex.

[71]CLOUT case No. 319 [Bundesgerichtshof, Germany, 3 November 1999] (see full text of the decision).

[72]Hoge Raad, the Netherlands, 20 February 1998, Unilex.

[73]CLOUT case No. 593 [Oberlandesgericht Karlsruhe, Germany, 6 March 2003].

[74]For other decisions holding that buyer's notice lacked sufficient specificity, see CLOUT case No. 337 [Landgericht Saarbrücken, Germany, 26 March 1996]; CLOUT case No. 336 [Canton of Ticino Tribunale d'appello, Switzerland, 8 June 1999]; ICC Arbitration case No. 8611 of 1997; CLOUT case No. 4 [Landgericht Stuttgart, Germany, 31 August 1989] (see full text of the decision); CLOUT case No. 252 [Handelsgericht des Kantons Zürich, Switzerland, 21 September 1998] (see full text of the decision).

[75]CLOUT case No. 364 [Landgericht Köln, Germany, 30 November 1999].

[76]CLOUT case No. 290 [Oberlandesgericht Saarbrücken, Germany, 3 June 1998].

[77]Rechtbank van Koophandel Kortrijk, Belgium, 16 December 1996, Unilex.

[78]CLOUT case No. 220 [Kantonsgericht Nidwalden, Switzerland, 3 December 1997].

[79]CLOUT case No. 3 [Landgericht München, Germany, 3 July 1989].

[80]CLOUT case No. 98 [Rechtbank Roermond, the Netherlands, 19 December 1991].

[81]CLOUT case No. 339 [Landgericht Regensburg, Germany, 24 September 1998].

[82]Landgericht Marburg, Germany, 12 December 1995, Unilex.

[83] CLOUT case No. 411 [Landgericht Bochum, Germany, 24 January 1996], also in Unilex.

[84]Landgericht Hannover, Germany, 1 December 1993, Unilex.

[85]Landgericht München, Germany, 20 March 1995, Unilex.

[86]CLOUT case No. 229 [Bundesgerichtshof, Germany, 4 December 1996].

[87]CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000].

[88]CLOUT case No. 273 [Oberlandesgericht München, Germany, 9 July 1997] (see full text of the decision).

[89]CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997].

[90]Hoge Raad, the Netherlands, 20 February 1998, Unilex.

[91]CLOUT case No. 131 [Landgericht München, Germany, 8 February 1995].

[92]CLOUT case No. 310 [Oberlandesgericht Düsseldorf, Germany, 12 March 1993] (see full text of the decision).

[93]Tribunale Civile di Cuneo, Italy, 31 January 1996, Unilex.

[94]Id.; CLOUT case No. 310 [Oberlandesgericht Düsseldorf, Germany, 12 March 1993] (see full text of the decision); CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994] (see full text of the decision); CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000]; CLOUT case No. 593 [Oberlandesgericht Karlsruhe, Germany, 6 March 2003].

[95]CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999], also available on the Internet at http://www.cisg.at/1_22399x.htm; CLOUT case No. 310 [Oberlandesgericht Düsseldorf, Germany, 12 March 1993] (see full text of the decision); CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994] (see full text of the decision); CLOUT case No. 251[Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998] (see full text of the decision).

[96]CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002] (see full text of the decision).

[97]CLOUT case No. 196 [Handelsgericht des Kantons Zürich, Switzerland, 26 April 1995] (see full text of the decision). See also CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995] (distinguishing between late notice of lack of conformity under article 39 (1) and late notice of avoidance under article 49 (2) (*b*), but suggesting that the periods for both notices should be limited in the interest of promoting prompt clarification of the legal relationship between the parties) (see full text of the decision).

[98]For decisions in which the buyer's notice was found to be too late because it should have discovered the defects before it in fact did, see, e.g., CLOUT case No. 634 [Landgericht Berlin, Germany 21 March 2003]; CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000]; CLOUT case No. 4 [Landgericht Stuttgart, Germany, 31 August 1989]; CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994]; CLOUT case No. 482 [Cour d'appel Paris, France, 6 November 2001].

[99]This was the case in the decision of the Landgericht Berlin, Germany, 16 September 1992, Unilex.

[100]An example of such objective evidence can be found in Helsinki Court of First Instance, Finland, 11 June 1995, and Helsinki Court of Appeals, Finland, 30 June 1998, Unilex, where the buyer commissioned a chemical analysis of the goods which revealed their defects. See also CLOUT case No. 486 [Audiencia Provincial de La Coruña, Spain, 21 June 2002] (buyer of fish eggs who sent them to an expert for analysis should have known that they were infected with a virus, at the latest, by the end of the normal time for incubation and diagnosis of the virus).

[101]CLOUT case No. 210 [Audienca Provincial Barcelona, Spain, 20 June 1997].

[102]Hoge Raad, the Netherlands, 20 February 1998, Unilex.

[103]See the Digest for art. 38 at para. 2.

[104]CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994] (see full text of the decision). Accord, CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000]. For decisions finding that the buyer's notice came too late because the buyer should have discovered the lack of conformity during the initial examination of the goods, see CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994] (the buyer should have examined and discovered the lack of conformity within a few days after delivery, and therefore buyer's notice given more than two months after delivery was too late); CLOUT case No. 262 [Kanton St. Gallen, Gerichtskommission Oberrheintal, Switzerland, 30 June 1995] (buyer's time for giving notice of lack of conformity began to run upon delivery and substantial installation of sliding gates, even though the seller had not entirely completed its duties; notice given a year after delivery was too late); Pretura di Torino, Italy, 30 January 1997, Unilex, also available on the internet at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/970130i3.html; ICC Arbitration Case No. 8247, June 1996, *International Court of Arbitration Bulletin* vol. 11, p. 53 (2000); CLOUT case No. 48 [Oberlandesgericht Düsseldorf, Germany, 8 January 1993]; CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995]; Arrondissementsrechtsbank 's-Hertogenbosch, the Netherlands, 15 December 1997, Unilex; CLOUT case No. 4 [Landgericht Stuttgart, Germany, 31 August 1989].

[105]E.g., CLOUT case No. 634 [Landgericht Berlin, Germany 21 March 2003]; CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995] (see full text of the decision); CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998]; CLOUT case No. 285 [Oberlandesgericht Koblenz, Germany, 11 September 1998]; Landgericht Düsseldorf, Germany, 23 June 1994, Unilex; Landgericht Mönchengladbach, Germany, May 22 1992, Unilex; Amtsgericht Riedlingen, Germany, 21 October 1994, Unilex.

[106]E.g., Tribunal commercial de Bruxelles, Belgium, 5 October 1994, Unilex; CLOUT case No. 256 [Tribunal Cantonal du Valais, Switzerland, 29 June 1998] (concluding that notice given seven to eight months after delivery was too late, without distinguishing time for examination and discovery) (see full text of the decision).

[107]CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002] (see full text of the decision approving approach of lower appeals court); Landgericht Paderborn, Germany, 25 June 1996, Unilex; Landgericht Ellwangen, Germany, 21 August 1995, Unilex; Helsinki Court of First Instance, Finland, 11 June 1995, and Helsinki Court of Appeals, Finland, 30 June 1998, Unilex. In the case of latent defects not reasonably discoverable in an initial examination, it is not clear whether the obligation to examine under article 38 remains relevant to determining when the buyer ought to have discovered the non-conformity; see the Digest for art. 38 at para. 15.

[108]CLOUT case No. 319 [Bundesgerichtshof, Germany, 3 November 1999].

[109]CLOUT case No. 634 [Landgericht Berlin, Germany 21 March 2003]; CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (even supposing that the defects could not have been discovered at delivery, the buyer should have discovered them at the latest when processing the goods, and should have given notice immediately thereafter; the buyer in fact waited until it received complaints from its own customer before notifying the seller); Landgericht Düsseldorf, Germany, 23 June 1994, Unilex.

[110]CLOUT case No. 225, France, 1998; Hoge Raad, the Netherlands, 20 February 1998, Unilex; Tribunale di Busto Arsizio, Italy, 13 December 2001, published in *Rivista di Diritto Internazionale Privato e Processuale*, 2003, 150–155, also available on Unilex.

[111]Tribunale Civile di Cuneo, Italy, 31 January 1996, Unilex.

[112]Id.; see also CLOUT case No. 310 [Oberlandesgericht Düsseldorf, Germany, 12 March 1993]; CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994] (see full text of the decision); CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000]; CLOUT case No. 593 [Oberlandesgericht Karlsruhe, Germany, 6 March 2003].

[113]E.g., CLOUT case No. 593 [Oberlandesgericht Karlsruhe, Germany, 6 March 2003] (asserting that the time for giving notice varies with the circumstances of the case, but generally ranges from two weeks to one month) (see full text of the decision); CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002] (approving approach of lower appeals court that has set set a period of one week for notice as “a rough norm for orientation”, resulting in a total presumptive period of 14 days for examining the goods and giving notice) (see full text of the decision); CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999], also in Unilex (suggesting a presumptive period of 14 days for examining the goods and giving notice “[i]nsofar as there are no specific circumstances militating in favour of a shorter or longer period”); CLOUT case No. 284 [Oberlandesgericht Köln, Germany, 21 August 1997]; CLOUT case No. 164 [Arbitration—Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 5 December 1995] (see full text of the decision).

[114]CLOUT case No. 167 [Oberlandesgericht München, Germany, 8 February 1995] (see full text of the decision).

[115]CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999], also in Unilex.

[116]CLOUT case No. 593 [Oberlandesgericht Karlsruhe, Germany, 6 March 2003].

[117]CLOUT case No. 192 [Obergericht des Kantons Luzern, Switzerland, 8 January 1997]; CLOUT case No. 232 [Oberlandesgericht München, Germany, 11 March 1998] (see full text of the decision).

[118]Landgericht Landshut, Germany, 5 April 1993 Unilex database (presumptive time period for defects that are not hidden).

[119]CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002] (see full text of the decision approving approach of lower appeals court); CLOUT case No. 285 [Oberlandesgericht Koblenz, Germany, 11 September 1998]; Landgericht Mönchengladbach, Germany, 22 May 1992. The latter case indicated that the presumptive periods it proposed applied where the goods were textiles.

[120]CLOUT case No. 280 [Oberlandesgericht Jena, Germany, 26 May 1998]; CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997], reversed on other grounds, CLOUT case No. 270 [Bundesgerichtshof, Germany, 25 November 1998] (presumptive period applicable to non-perishable goods).

[121]CLOUT case No. 359 [Oberlandesgericht Koblenz, Germany, 18 November 1999] (applicable to case of obvious defects); CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998] (also proposing presumptive period of seven to 10 days for examination).

[122]CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995]; CLOUT case No. 289 [Oberlandesgericht Stuttgart, Germany, 21 August 1995]; Amtsgericht Augsburg, Germany, 29 January 1996; CLOUT case No. 319 [Bundesgerichtshof, Germany, 3 November 1999]. See also CLOUT case No. 164 [Arbitration—Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 5 December 1995] (suggesting acceptance of a notice period of approximately one month in general, but finding that facts of particular case required quicker notice) (see full text of the decision).

[123]CLOUT case No. 290 [Oberlandesgericht Saarbrücken, Germany, 3 June 1998] (in sales of fresh flowers, notice should be given on day of delivery); CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997] (see full text of the decision), reversed on other grounds CLOUT case No. 270 [Bundesgerichtshof, Germany, 25 November 1998] (asserting that notice of defects in perishable goods often due in a few hours). See also Amtsgericht Riedlingen, Germany, 21 October 1994, Unilex, where the court stated that the buyer should have examined ham within 3 days and given notice within further three days. Although the goods in that case were perishable, the court did not specifically mention this factor in setting out its time limits.

[124]Tribunale Civile di Cuneo, Italy, 31 January 1996, Unilex; CLOUT case No. 310 [Oberlandesgericht Düsseldorf, Germany, 12 March 1993]; CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994]; CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000].

[125]Rechtbank van Koophandel Kortrijk, Belgium, 16 December 1996, Unilex; CLOUT case No 310 [Oberlandesgericht Düsseldorf, Germany, 12 March 1993] (see full text of the decision): CLOUT case No. 284 [Oberlandesgericht Köln, Germany, 21 August 1997] (see full text of the decision); Landgericht Landshut, Germany, 5 April 1995, Unilex; Landgericht Berlin, Germany, 16 September 1992, Unilex; Amtsgericht Riedlingen, Germany, 21 October 1994, Unilex; Tribunale Civile di Cuneo, Italy, 31 January 1996, Unilex; Landgericht Berlin, Germany, 30 September 1993, Unilex. Consideration of the obviousness of the defect may be more relevant to determining when the reasonable time for notice should commence (i.e., when the buyer ought to have discovered the lack of conformity) than to the question of the duration of the reasonable time.

[126]CLOUT case No. 98 [Rechtbank Roermond, the Netherlands, 19 December 1991]; Pretura di Torino, Italy 30 January 1997, Unilex (referring to the “nature and value of the goods”), also available on the INTERNET at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/970130i3.html; CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000].

[127]CLOUT case No. 98 [Rechtbank Roermond, the Netherlands, 19 December 1991]; CLOUT case No. 290 [Oberlandesgericht Saarbrücken, Germany, 3 June 1998]; CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (see full text of the decision). See also Rechtbank Zwolle, the Netherlands, 5 March 1997, Unilex (citing perishable nature of goods as factor mandating a short period for examination under art. 38, which in turn meant that buyer’s notice was given beyond a reasonable time from when it should have

discovered the defects); CLOUT case No. 593 [Oberlandesgericht Karlsruhe, Germany, 6 March 2003] (dicta stating that perishability of the goods would shorten reasonable time for notice, although the goods in the case were not perishable).

[128]CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999], also in Unilex; Amtsgericht Augsburg, Germany, 29 January 1996, Unilex.

[129]CLOUT case No. 167 [Oberlandesgericht München, Germany, 8 February 1995] (see full text of the decision). See also CLOUT case No. 248 [Schweizerisches Bundesgericht, Switzerland, 28 October 1998] (noting that the appeals court did not review lower court's decision that notice was timely because the goods consisted of frozen rather than fresh meat).

[130]Arrondissementsrechtsbank 's-Hertogenbosch, the Netherlands, 15 December 1997, Unilex; Rechtbank van Koophandel Kortrijk, Belgium, 16 December 1996, Unilex; see also Rechtbank Zwolle, the Netherlands, 5 March 1997, Unilex (citing buyer's plans to process goods as factor mandating a short period for examination under art. 38, which in turn meant that buyer's notice was given beyond a reasonable time from when it should have discovered the defects).

[131]CLOUT case No. 284 [Oberlandesgericht Köln, Germany, 21 August 1997].

[132]Rechtbank van Koophandel Kortrijk, Belgium, 16 December 1996, Unilex; Rechtbank Zwolle, the Netherlands, 5 March 1997, Unilex.

[133]CLOUT case No 164 [Arbitration—Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 5 December 1995] (see full text of the decision).

[134]Landgericht Köln, Germany, 11 November 1993, Unilex.

[135]Gerechtshof Arnhem, the Netherlands, 17 June 1997, Unilex; CLOUT case No. 232 [Oberlandesgericht München, Germany, 11 March 1998] (see full text of the decision).

[136]CLOUT case No. 486 [Audiencia Provincial de La Coruña, Spain, 21 June 2002].

[137]CLOUT case No. 634 [Landgericht Berlin, Germany 21 March 2003].

[138]CLOUT case No. 219 [Tribunal Cantonal Valais, Switzerland, 28 October 1997] (see full text of the decision). See also CLOUT case No. 341 [Ontario Superior Court of Justice, Canada, 31 August 1999], where on disputed evidence the court concluded the buyer had not given the seller notice of lack of conformity.

[139]CLOUT case No. 596 [Oberlandesgericht Zweibrücken, Germany, 2 February 2004] (see full tet of the decision).

[140]Landgericht Düsseldorf, Germany, 23 June 1994, Unilex.

[141]CLOUT case No. 262 [Kanton St. Gallen, Gerichtskommission Oberrheintal, Switzerland 30 June 1995]; CLOUT case No. 263 [Bezirksgericht Unterrheintal, Switzerland, 16 September 1998].

[142]Tribunal commercial de Bruxelles, Belgium, 5 October 1994, Unilex.

[143]CLOUT case No. 256 [Tribunal Cantonal du Valais, Switzerland, 29 June 1998].

[144]CLOUT case No. 232 [Oberlandesgericht München, Germany, 11 March 1998] (see full text of the decision); CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000].

[145]CLOUT case No. 192 [Obergericht des Kantons Luzern, Switzerland, 8 January 1997]; Landgericht Berlin, Germany, 16 September 1992, Unilex.

[146]Hof Arnhem, the Netherlands, 17 June 1997, Unilex; Rechtbank van Koophandel Kortrijk, Belgium, 27 June 1997, Unilex; CLOUT case No. 167 [Oberlandesgericht München, Germany, 8 February 1995].

[147]CLOUT case No. 292 [Oberlandesgericht Saarbrücken, Germany, 13 January 1993].

[148]Rechtbank van Koophandel Kortrijk, Belgium, 16 December 1996, Unilex; CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994].

[149]CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999], also in Unilex.

[150]CLOUT case No. 634 [Landgericht Berlin, Germany 21 March 2003].

[151]Amtsgericht Kehl, Germany, 6 October 1995, Unilex.

[152]Landgericht Mönchengladbach, Germany, 22 May 1992, Unilex.

[153]CLOUT case No. 359 [Oberlandesgericht Koblenz, Germany, 18 November 1999]; CLOUT case No. 310 [Oberlandesgericht Düsseldorf, Germany, 12 March 1993].

[154]CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997].

[155]Tribunale Civile di Cuneo, Italy, 31 January 1996, Unilex.

[156]CLOUT case No. 285 [Oberlandesgericht Koblenz, Germany, 11 September 1998]; Landgericht Köln, Germany, 11 November 1993, Unilex, reversed on grounds that CISG was inapplicable by CLOUT case No. 122 [Oberlandesgericht Köln, Germany, 26 August 1994].

[157]Amtsgericht Riedlingen, Germany, 21 October 1994, Unilex; Landgericht Berlin, Germany, 16 September, 1992, Unilex.

[158]Landgericht Landshut, Germany, 5 April 1995, Unilex.

[159]CLOUT case No. 4 [Landgericht Stuttgart, Germany, 31 August 1989].

[160]CLOUT case No. 284 [Oberlandesgericht Köln, Germany, 21 August 1997] (see full text of the decision).

[161]CLOUT case No. 290 [Oberlandesgericht Saarbrücken, Germany, 3 June 1998].

[162]Pretura di Torino, Italy 30 January 1997, Unilex, also available on the INTERNET at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/970130i3.html.

[163]Hoge Raad, the Netherlands, 20 February 1998, Unilex.

[164]Landgericht Berlin, Germany, 16 September, 1992, Unilex.

[165]CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995] (see full text of the decision).

[166]CLOUT case No 164 [Arbitration—Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 5 December 1995] (see full text of the decision).

[167]CLOUT case No. 486 [Audiencia Provincial de La Coruña, Spain, 21 June 2002] (involving special circumstances requiring that notice be given as soon as was practicable).

[168]ICC Arbitration Case No. 8247, 1996, Unilex.

[169]CLOUT case No. 280 [Oberlandesgericht Jena, Germany, 26 May 1998]; CLOUT case No. 196 [Handelsgericht des Kantons Zürich, Switzerland, 26 April 1995] (see full text of the decision).

[170]Arrondissementsrechtsbank 's-Hertogenbosch, the Netherlands, 15 December 1997, Unilex.

[171]CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997].

[172]CLOUT case No. 48 [Oberlandesgericht Düsseldorf, Germany, 8 January 1993]. Several other decisions have found that the buyer's notice was untimely, although the precise time of the buyer's notice is not clear. In this respect see CLOUT case No. 210 [Audienca Provincial Barcelona, Spain, 20 June 1997]; CLOUT case No. 339 [Landgericht Regensburg, Germany, 24 September 1998]; CLOUT case No. 56 [Canton of Ticino Pretore di Locarno Campagna, Switzerland, 27 April 1992]; Rechtbank Zwolle, the Netherlands, 5 March 1997, Unilex.

[173]CLOUT case No. 229 [Bundesgerichtshof, Germany, 4 December 1996] (see full text of the decision).

[174]CLOUT case No. 46 [Landgericht Aachen, Germany, 3 April 1990] (see full text of the decision).

[175]Landgericht Bielefeld, Germany, 18 January 1991, Unilex.

[176]Helsinki Court of First Instance, Finland, 11 June 1995, and Helsinki Court of Appeals, Finland, 30 June 1998, available on the Internet at http://www.utu.fi/oik/tdk/xcisg/tap5.html#engl.

[177]CLOUT case No. 120 [Oberlandesgericht Köln, Germany, 22 February 1994], also Unilex (noting that buyer examined goods at the beginning of July and gave notice on or before July 8, which the court held was timely, particularly in light of fact that July 4 and 5 were weekend days).

[178]CLOUT case No. 45 [Arbitration—International Chamber of Commerce No. 5713 1989] (see full text of the decision).

[179]CLOUT case No. 593 [Oberlandesgericht Karlsruhe, Germany, 6 March 2003].

[180]CLOUT case No. 225 [Cour d'appel, Versailles, France, 29 January 1998] (see full text of the decision); see also Tribunale di Busto Arsizio, Italy, 13 December 2001, published in *Rivista di Diritto Internazionale Privato e Processuale*, 2003, 150–155, also available on Unilex (notice made immediately after installation of machinery reasonable, followed by subsequent notices regarding further discoveries made by the buyer).

[181]Landgericht Frankfurt, Germany, 9 December 1992, Unilex.

[182]CLOUT case No. 315 [Cour de Cassation, France, 26 May 1999] (see full text of the decision).

[183]CLOUT case No. 319 [Bundesgerichtshof, Germany, 3 November 1999].

[184]CLOUT case No. 202 [Cour d'appel, Grenoble, France, 13 September 1995]. Several other decisions have found that the buyer's notice was timely, although the precise period found reasonable by the court is not clear; see CLOUT case No. 98 [Rechtbank Roermond, the Netherlands 19 December 1991]; Landgericht Paderborn, Germany, 25 June 1996, Unilex.

[185]The buyer's obligation to give notice under article 39 (2) is also subject to article 40, which prevents the seller from invoking article 39 "if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer".

[186]See Landgericht Marburg, Germany, 12 December 1995, Unilex, where the court invoked article 39 (2) to deny the buyer any remedy for a claimed lack of conformity.

[187]CLOUT case No. 344 [Landgericht Erfurt, Germany, 29 July 1998]; Landgericht Marburg, Germany, 12 December 1995, Unilex. Both of these cases held that, because the notice given by the buyer was not specific enough to satisfy article 39 (1), the two-year period in article 39 (2) had elapsed before proper notice was given. Neither court, apparently, considered the possibility that the buyer's notice might have been sufficient to satisfy article 39 (2) even though it did not comply with the specificity requirement in article 39 (1).

[188]CLOUT case No. 249 [Cour de Justice, Genève, Switzerland, 10 October 1997].

[189]CLOUT case No. 202 [Cour d'appel, Grenoble, France, 13 September 1995] (see full text of the decision); CLOUT case No. 302 [Arbitration—International Chamber of Commerce No. 7660 1994]; CLOUT case No. 300 [Arbitration International Chamber of Commerce No. 7565 1994].

[190]CLOUT case No. 302 [Arbitration—International Chamber of Commerce No. 7660 1994].

[191]CLOUT case No. 300 [Arbitration—International Chamber of Commerce No. 7565 1994].

[192]CLOUT case No. 237 [Arbitration—Arbitration Institute of the Stockholm Chamber of Commerce, 5 June 1998] (see full text of the decision).

[193]CLOUT case No. 300 [Arbitration—International Chamber of Commerce No. 7565 1994].

Article 40

The seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.

OVERVIEW

1. Article 40 relieves the buyer from the consequences of failing to meet the requirements of articles 38 (which governs the buyer's obligation to examine delivered goods) and 39 (which regulates the buyer's obligation to notify the seller of lack of conformity in delivered goods). The relief provided by article 40 is available only if the buyer's failure to meet its examination and/or notice obligations relates to a lack of conformity that is known to the seller, or of which the seller "could not have been unaware."

ARTICLE 40 IN GENERAL

2. In an arbitral award that discusses article 40 at length the panel asserts that the provision expresses a principle of fair trading found in the domestic laws of many countries, and underlying many other provisions of the CISG; that article 40 constitutes "a safety valve" for preserving the buyer's remedies for non-conformity in cases where the seller has himself forfeited the right of protection, granted by provisions on the buyer's timely examination and notice, against claims for such remedies; that the application of article 40 "results in a dramatic weakening of the position of the seller, who loses his absolute defences based on often relatively short-term time limits for the buyer's examination and notice of non-conformity, and instead is faced with the risk of claims only precluded by . . . general prescription rules . . ."; and that article 40 should be restricted to "special circumstances" so that the protections offered by time limits for claims do not become "illusory."[1] A dissenting opinion from the same arbitration would limit the application of article 40 even further to "exceptional circumstances".[2] It has also been held that article 40 must be applied independently to each separate lack of conformity claimed by the buyer. Thus a seller can be precluded by article 40 from relying on articles 38 and 39 with respect to one non-conformity, but permitted to raise defences based on articles 38 and 39 with respect to a different non-conformity.[3]

SCOPE AND EFFECT OF ARTICLE 40

3. According to several court decisions, when its requirements are satisfied, article 40 prevents a seller from relying on a buyer's non-compliance with article 38 and/or article 39;[4] in other cases, a buyer's invocation of article 40 has failed.[5] It has also been found that article 40 applies to contractual examination and notice provisions agreed to in derogation of articles 38 and 39—i.e., it excuses a buyer who has failed to comply with a contract clause governing examination of goods or a contractual provision requiring notice of non-conformity.[6] Alternatively, it has been posited that, even if article 40 were not directly applicable to such contractual examination and notice provisions, the principle of article 40 would apply indirectly under CISG article 7 (2) to fill this gap in the Convention.[7] A court has also concluded that the general principle embodied in article 40 prevents a seller who knowingly and fraudulently misrepresented the mileage and age of a used car from escaping liability under article 35 (3), a provisions that shields a seller from liability for a lack of conformity of which the buyer knew or could not have been unaware at the time of the conclusion of the contract.[8]

REQUIREMENT THAT THE SELLER KNEW OR COULD NOT HAVE BEEN UNAWARE OF FACTS RELATED TO A LACK OF CONFORMITY: IN GENERAL

4. Article 40 applies with respect to a lack of conformity that relates to "facts of which [the seller] knew or could not have been unaware." The nature of the requirement of seller awareness has been examined in several decisions. It was discussed at length in an arbitration decision in which a majority of the arbitrators indicated that the level of seller awareness required by the provision was not clear, although in order to prevent the protections of article 39 from becoming illusory article 40 required something more than a general awareness that goods manufactured by a seller "are not of the best quality or leave something to be desired."[9] The decision states that there is a "general consensus that fraud and similar cases of bad faith" will meet the requirements of article 40, and that the requisite awareness exists if the facts giving rise to the lack of conformity "are easily apparent or detected."[10] With respect to situations in which the seller does not have actual knowledge of a lack of conformity, the arbitration decision indicates that there is a split between those who assert that the requirements of article 40 are met if the seller's ignorance is due to "gross or even ordinary negligence", and those who would require something more, approaching "deliberate negligence".[11] Similarly, according to the tribunal, there is a split between those who argue that a seller is under no obligation to investigate for possible non-conformities, and those who assert that the seller must not "ignore clues" and may have a duty to examine the goods for lack of

conformity "in certain cases".[12] A majority of the tribunal concluded that the level of seller awareness of non-conformities that is required to trigger Article 40 is "conscious disregard of facts that meet the eyes and are of evident relevance to the non-conformity". A dissenting arbitrator agreed with the standard, although he believed that it required a higher degree of "subjective blameworthiness" on the seller's part than had been proven in the case.[13] One court has indicated that the requirements of Article 40 are satisfied if the seller's ignorance of a lack of conformity is due to gross negligence.[14] Another decision asserts that article 40 requires that the seller have notice not only of the facts giving rise to the lack of conformity, but also that those facts would render the goods non-conforming.[15]

REQUIREMENT THAT THE SELLER KNEW OR COULD NOT HAVE BEEN UNAWARE OF FACTS RELATED TO A LACK OF CONFORMITY: BURDEN OF PROOF

5. Several decisions have indicated that the buyer bears the burden of proving that the seller knew or could not have been unaware of a lack of conformity.[16] Some decisions have noted, however, that the "could not have been unaware" language of article 40 reduces the evidentiary burden associated with proving the seller's actual knowledge of a lack of conformity.[17] An arbitral tribunal has asserted that the result of this language is a shifting burden of proof: "If the evidence [adduced by the buyer] and the undisputed facts show that it is more likely than not that the seller is conscious of the facts that relate to the non-conformity, it must be up to the seller to show that he did not reach the requisite state of awareness".[18] According to another decision, the buyer must prove that the seller had notice not only of the facts underlying a lack of conformity, but also that those facts rendered the goods non-conforming.[19]

REQUIREMENT THAT THE SELLER KNEW OR COULD NOT HAVE BEEN UNAWARE OF FACTS RELATED TO A LACK OF CONFORMITY: APPLICATION (EVIDENCE)

6. Although producing sufficient evidence that the seller knew or had reason to know of a lack of conformity can be a difficult task, buyers in several cases have successfully borne the burden. Where the seller admitted that it was aware of a defect, obviously, a court found that the requirement of article 40 was satisfied.[20] Even without such an admission, a buyer succeeded in establishing the awareness element where the seller, while manufacturing a complex piece of industrial machinery (a rail press), had replaced a critical safety component (a lock plate) with a part that the seller had not previously used for such an application: the fact that the seller drilled several unused trial holes for positioning the substitute lock plate on the rail press evidenced both that it was aware that it was improvising by using a part that did not fit properly, and that it realized proper positioning of the substitute plate was critical, yet the seller never tried to ascertain that the buyer properly installed the plate; as a result, the majority concluded, the seller had "consciously disregarded apparent facts which were of evident relevance to the non-conformity", and article 40 excused the buyer's failure to give timely notice of the defect.[21] The tribunal also indicated that the article 40 "knew or could not have been unaware" requirement would be satisfied where the non-conformity in identical or similar goods had previously resulted in accidents that had been reported to the seller or to the "relevant branch" of the seller's industry.[22] In another decision, a court found that the seller "could not have been unaware" that wine it sold had been diluted with water, because the non-conformity resulted from an intentional act.[23] Another court found that, because of the nature of the non-conformity (some of the jackets that seller had shipped were not the models that the buyer had ordered), the seller necessarily knew of the lack of conformity.[24] In another decision, the court continued the proceedings in order to permit the buyer to prove that the seller knew or could not have been unaware that the cheese it sold was infested with maggots: the court stated that the buyer would carry its burden by proving that the maggots were present when the cheese was frozen before shipment.[25]

7. In several other decisions, however, the court concluded that the article 40 requirement concerning seller's awareness of a lack of conformity had not been met. This was the case where the buyer simply failed to produce evidence that the seller was or should have been aware of the lack of conformity.[26] Where the seller sold a standard product suitable for use in modern equipment, but the product failed when processed by the buyer in unusually-old machinery, the court found that the buyer had not shown that the seller knew or could not have been unaware of the problem because the buyer had not informed the seller that it planned to employ obsolete processing equipment.[27] In another decision, the court relied on the fact that the buyer had re-sold the goods to its own customers in order to conclude that the defects complained of were not obvious; the buyer, therefore, had failed to show that the seller could not have been unaware of the lack of conformity.[28] Another court found that, although some of the picture frame mouldings supplied by the seller were non-conforming, it was not clear whether the number exceeded the normal range of defective mouldings tolerated in the trade, and there was insufficient evidence to conclude that the seller was aware, or should have been aware, of the defects.[29] Another decision by an arbitral tribunal rejected a buyer's argument that the nature and volume of the defects in the goods and the seller's procedure for inspecting its production established that the article 40 prerequisites relating to the seller's awareness of a lack of conformity were satisfied.[30]

REQUIREMENT THAT THE SELLER KNEW OR COULD NOT HAVE BEEN UNAWARE OF FACTS RELATED TO A LACK OF CONFORMITY: TIME AS OF WHICH SELLER'S AWARENESS IS DETERMINED

8. Article 40 does not specify the time as of which it should be determined whether the seller knew or could not have been unaware of a lack of conformity. One decision has indicated that this determination should be made as of the time of delivery.[31]

SELLER'S DISCLOSURE OF LACK OF CONFORMITY

9. Article 40 states that the relief it provides a buyer that has failed to comply with its obligations under articles 38 and/or 39 does not apply if the seller disclosed the lack of conformity to the buyer. The seller's obligation under article 40 to disclose known non-conformities on pain of losing its protections under articles 38 and 39 has been discussed in only a small number of decisions,[32] and has actually been applied in even fewer. In one arbitral proceeding, the majority opinion asserted that, "to disclose in the sense of Article 40 is to inform the buyer of the risks resulting from the non-conformity".[33] Thus where the seller, when manufacturing a complex industrial machine, had replaced a critical safety component (a lock plate) with a different part that required careful installation to function properly, the tribunal found that the seller had not adequately disclosed the lack of conformity for purposes of article 40 where the disclosure to the buyer was limited to a difference in the part numbers appearing on the substitute lock plate and in the service manual: "even if [seller] had informed [buyer] of the exchange as such (and without any further information on proper installation or the risks involved in the arrangement, etc.) this would not be enough . . .".[34] It has also been held that the fact the goods were loaded for shipment in the presence of representatives of the buyer was not adequate disclosure for purposes of article 40 where the goods' lack of conformity was not readily apparent to observers.[35] In another arbitration proceeding, however, the tribunal held that the seller had sufficiently disclosed a lack of conformity, thus preventing the buyer from invoking article 40, although the particular facts that supported this conclusion are unclear.[36] Another decision suggested that, although the buyer bears the burden of proving that the seller "knew or could not have been unaware" of a lack of conformity within the meaning of article 40, it is the seller who bears the burden of proving adequate disclosure to the buyer.[37]

DEROGATION AND WAIVER

10. Nothing in the CISG expressly excepts article 40 from the power of the parties, under article 6, to "derogate from or vary the effect of any of [the Convention's] provisions". An arbitration panel, however, has concluded that, because article 40 expresses fundamental "principles of fair dealing" found in the domestic laws of many countries and underlying many provisions of the CISG itself, a derogation from article 40 should not be implied from a contractual warranty clause that derogates from articles 35, 38 and 39[38]—even though the provisions expressly derogated from are closely associated and generally work in tandem with article 40. Indeed, the majority opinion suggests that, despite article 6, "even if an explicit derogation was made—a result of drafting efforts and discussions that stretch the imagination—it is highly questionable whether such derogation would be valid or enforceable under various domestic laws or any general principles for international trade".[39] On the other hand, a buyer was found to have waived its right to invoke article 40 when the buyer negotiated with the seller a price reduction based on certain defects in the goods, but did not at that time seek a reduction for other defects of which it then had knowledge.[40]

ARTICLE 40 AS EMBODYING GENERAL PRINCIPLES UNDERLYING THE CISG

11. Under article 7 (2) of the CISG, questions within the scope of the Convention that are not expressly settled in it are to be resolved "in conformity with the general principles on which [the Convention] is based . . .".[41] Several decisions have identified article 40 as embodying a general principle of the Convention applicable to resolve unsettled issues under the CISG. According to an arbitration panel, "Article 40 is an expression of the principles of fair trading that underlie also many other provisions of CISG, and it is by its very nature a codification of a general principle".[42] Thus, the decision asserted, even if article 40 did not directly apply to a lack of conformity under a contractual warranty clause, the general principle underlying article 40 would be indirectly applicable to the situation by way of article 7 (2). In another decision, a court derived from article 40 a general CISG principle that even a very negligent buyer deserves more protection than a fraudulent seller, and then applied the principle to conclude that a seller could not escape liability under article 35 (3)[43] for misrepresenting the age and mileage of a car even if the buyer could not have been unaware of the lack of conformity.[44]

Notes

[1]CLOUT case No. 237 [Arbitration—Arbitration Institute of the Stockholm Chamber of Commerce, 5 June 1998] (see full text of the decision).

[2]Id.

[3]CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998] (buyer's late notice of non-conformity prevented it from asserting that the colour and weight of jackets that the seller had delivered did not conform to the contract; the seller, however, was aware that some jackets were a different model than specified in the contract, and article 40 precluded seller from relying on late notice with regard to this lack of conformity) (see full text of the decision); Landgericht Landshut, Germany, 5 April 1995, Unilex (seller admitted pre-delivery knowledge that the goods (clothes) suffered a shrinkage problem, so that art. 40 prevented seller from relying on arts. 38 and 39 as a defence to buyer's claim for this lack of conformity; but buyer failed to prove that seller was aware or could not have been unaware that some items were missing from delivery boxes, and seller could use late notice as a defence as to this non-conformity).

[4]In the following cases, the tribunal found that article 40 precluded the seller from relying on articles 38 and/or 39: CLOUT case No. 45 [Arbitration—International Chamber of Commerce No. 5713 1989]; CLOUT case No. 237 [Arbitration—Arbitration Institute of the Stockholm

Chamber of Commerce, 5 June 1998]; CLOUT case No. 170 [Landgericht Trier, Germany, 12 October 1995]; Landgericht Landshut, Germany, 5 April 1995, Unilex. In the following cases, the tribunal found that further proceedings were required to determine whether article 40 prevented the seller from relying on articles 38 and 39: CLOUT case No. 98 [Rechtbank Roermond, the Netherlands, 19 December 1991].

[5]In the following cases, the tribunal found that the requirements to apply article 40 had not been established: CLOUT case No. 285 [Oberlandesgericht Koblenz, Germany, 11 September 1998]; CLOUT case No. 341 [Ontario Superior Court of Justice, Canada, 31 August 1999]; CLOUT case No. 232 [Oberlandesgericht München, Germany, 11 March 1998]; Landgericht Landshut, Germany, 5 April 1995, Unilex (re some but not all non-conformities); CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (see full text of the decision); Arbitration Case 56/1995 of the Bulgarska turgosko-promishlena palata, Bulgaria, 24 April 1996, Unilex; CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997]; CLOUT case No. 270 [Bundesgerichtshof, Germany, 25 November 1998].

[6]CLOUT case No. 237 [Arbitration—Arbitration Institute of the Stockholm Chamber of Commerce, 5 June 1998].

[7]Id.

[8]CLOUT case No. 168 [Oberlandesgericht Köln, Germany 21 March 1996].

[9]CLOUT case No. 237 [Arbitration—Arbitration Institute of the Stockholm Chamber of Commerce, 5 June 1998] (see full text of the decision).

[10]For another decision suggesting that article 40 applies in cases where the seller has acted in bad faith with respect to an undisclosed lack of conformity, and in which the obviousness of a lack of conformity rebutted any argument that the seller was unaware of it, see CLOUT case No. 596 [Oberlandesgericht Zweibrücken, Germany, 2 February 2004] (see full text of the decision)

[11]CLOUT case No. 237 [Arbitration—Arbitration Institute of the Stockholm Chamber of Commerce, 5 June 1998] (see full text of the decision). See CLOUT case No. 597 [Oberlandesgericht Celle, Germany, 10 March 2004] (stating that the phrase "could not have been unaware" requires, at a minimum, "gross negligence" by the seller in failing in failing to discover a lack of conformity).

[12]Id. See also CLOUT case No. 596 [Oberlandesgericht Zweibrücken, Germany, 2 February 2004] (seller argued that he was unaware of the lack of conformity because he was under the mistaken impression that goods of the type delivered would conform to the contract; court held that the argument would not prevent application of article 40 because the seller was not permitted to "ignore clues" that the buyer valued the particular type of goods specified in the contract) (see full text of the decision).

[13]CLOUT case No. 237 [Arbitration—Arbitration Institute of the Stockholm Chamber of Commerce, 5 June 1998] (dissenting opinion) (see full text of the decision).

[14]CLOUT case No. 232 [Oberlandesgericht München, Germany, 11 March 1998] (see full text of the decision).

[15]CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997]; CLOUT case No. 270 [Bundesgerichtshof Germany 25 November 1998].

[16]CLOUT case No. 98 [Rechtbank Roermond, the Netherlands, 19 December 1991]; CLOUT case No. 237 [Arbitration—Arbitration Institute of the Stockholm Chamber of Commerce, 5 June 1998] (see full text of the decision). Other decisions have implied that the buyer bore the burden of proving that seller was on notice of a lack of conformity within the meaning of article 40: CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (see full text of the decision); CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997]; Landgericht Landshut, Germany, 5 April 1995, Unilex. The last case distinguishes between the burden of proving that the seller knew or could not have been unaware of a lack of conformity (which the buyer bears) and the burden of proving that the seller disclosed the lack of conformity to the buyer (which the court suggests the seller bears).

[17]CLOUT case No. 237 [Arbitration—Arbitration Institute of the Stockholm Chamber of Commerce, 5 June 1998] (see full text of the decision); CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997] (see full text of the decision).

[18]CLOUT case No. 237 [Arbitration—Arbitration Institute of the Stockholm Chamber of Commerce, 5 June 1998] (see full text of the decision).

[19]CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997].

[20]Landgericht Landshut, Germany, 5 April 1995, Unilex.

[21]CLOUT case No. 237 [Arbitration—Arbitration Institute of the Stockholm Chamber of Commerce, 5 June 1998] (see full text of the decision).

[22]Id.

[23]CLOUT case No. 170 [Landgericht Trier, Germany, 12 October 1995] (see full text of the decision).

[24]CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998] (see full text of the decision). See also CLOUT case No. 596 [Oberlandesgericht Zweibrücken, Germany, 2 February 2004] (seller could not have been unaware that the goods delivered were from a different manufacturer than that specified in the contract because the difference was manifest).

[25]CLOUT case No. 98 [Rechtbank Roermond, the Netherlands, 19 December 1991]. In an arbitral award, the tribunal found that article 40 excused the buyer from failing to perform its obligations under articles 38 and 39 because the seller knew or could not have been unaware of the lack of conformity. The decision, however, does not specify the facts that supported this conclusion, indicating only very generally that "it clearly transpires from the file and the evidence that the Seller knew and could not be unaware" of the lack of conformity. See CLOUT case No. 45 [Arbitration—International Chamber of Commerce No. 5713 1989].

[26]Landgericht Landshut, Germany, 5 April 1995, Unilex.

[27]CLOUT case No. 285 [Oberlandesgericht Koblenz, Germany, 11 September 1998] (see full text of the decision).

[28]CLOUT case No. 232 [Oberlandesgericht München, Germany, 11 March 1998].

[29]CLOUT case No. 341 [Ontario Superior Court of Justice, Canada, 31 August 1999] (see full text of the decision). This situation may illustrate a seller's "general awareness" of defects that, as mentioned in para. 4 *supra*, an arbitration tribunal has indicated is insufficient to satisfy the requirements of Article 40; see CLOUT case No. 237 [Arbitration—Arbitration Institute of the Stockholm Chamber of Commerce, 5 June 1998] (see full text of the decision).

[30]CLOUT case No. 474 [Tribunal of International Court of Commercial Arbitration of the Chamber of Commerce and Industry, Russian Federation, Russian Federation, award in case No. 54/1999 of 24 January 2000], also in Unilex.

[31]Landgericht Landshut, Germany, 5 April 1995, Unilex.

[32]CLOUT case No. 285 [Oberlandesgericht Koblenz, Germany, 11 September 1998] (recognizing a seller's duty to warn of known non-conformities under art. 40, but finding no such duty in the case because the goods were in fact conforming); CLOUT case No. 237 [Arbitration—Arbitration Institute of the Stockholm Chamber of Commerce, 5 June 1998] (see full text of the decision); Arbitration Case 56/1995 of the Bulgarian Chamber of Commerce and Industry, 24 April 1996, Unilex. See also Landgericht Landshut, Germany, 5 April 1995, Unilex, which indicates that the seller bears the burden of proving adequate disclosure.

[33]CLOUT case No. 237 [Arbitration—Arbitration Institute of the Stockholm Chamber of Commerce, 5 June 1998] (see full text of the decision).

[34]Id. (see full text of the decision).

[35]CLOUT case No. 596 [Oberlandesgericht Zweibrücken, Germany, 2 February 2004] (see full text of the decision).

[36]Arbitration Case 56/1995 of the Bulgarian Chamber of Commerce and Industry, 24 April 1996, Unilex.

[37]Landgericht Landshut, Germany, 5 April 1995, Unilex.

[38]CLOUT case No. 237 [Arbitration—Arbitration Institute of the Stockholm Chamber of Commerce 5 June 1998] (see full text of the decision).

[39]Id. (see full text of the decision). Note that, under CISG article 4 (a), questions concerning the "validity" of a contract or its provisions are beyond the scope of the Convention, and thus are governed by other law as determined by the rules of private international law.

[40]CLOUT case No. 343 [Landgericht Darmstadt, Germany, 9 May 2000]. Contrast CLOUT case No. 596 [Oberlandesgericht Zweibrücken, Germany, 2 February 2004], where the court found that the parties' agreement as to the final payment due under the contract was not intended to civer a lack of conformity of which the buyer was unaware and which met the requirements of article 40, and thus buyer had not by such agreement waived its right to invoke article 40 (see full text of the decision).

[41]In the absence of general CISG principles that would settle an unresolved issue, article 7 (2) directs that the question be settled "in conformity with the law applicable by virtue of the rules of private international law".

[42]CLOUT case No. 237 [Arbitration—Arbitration Institute of the Stockholm Chamber of Commerce, 5 June 1998] (see full text of the decision).

[43]Article 35 (3) provides that a seller is not liable for a lack of conformity under article 35 (2) "if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity".

[44]CLOUT case No. 168 [Oberlandesgericht Köln, Germany, 21 March 1996].

Article 41

The seller must deliver goods which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim. However, if such right or claim is based on industrial property or other intellectual property, the seller's obligation is governed by article 42.

OVERVIEW

1. Article 41 governs the seller's duty to ensure that the goods it delivers are not subject to rights or claims by a third party. Freedom from such rights or claims permits the buyer to enjoy undisturbed possession and ownership of the goods. Under article 4 (*b*) of the Convention, questions concerning "the effect which the contract may have on the property in the goods sold" are beyond the scope of the CISG. Article 41, however, makes it clear that the seller's obligation to give the buyer clear property rights in the goods—so that the buyer is free from third party rights or claims—is a matter governed by the Convention: the seller will be in breach of its duties under the Convention if it does not meet the requirements imposed by article 41. The basic statement of the seller's obligation is found in the first sentence of article 41: the seller must deliver goods that "are free from any right or claim of a third party . . .". An exception to this obligation arises, however, if the buyer "agreed to take the goods subject to that right or claim". The second sentence of article 41 mandates a distinction between third party rights or claims based on "industrial or other intellectual property" and other rights or claims of third parties. Only the latter are within the scope of article 41, whereas the former are governed by article 42 of the Convention.

APPLICATION OF ARTICLE 41

2. There have been relatively few decisions applying article 41; they have tended to focus on what constitutes a breach of the seller's obligations under the provision. In one, the court stated that a seller would violate article 41 if it delivered goods subject to a restriction, imposed by the seller's own supplier, on the countries in which the buyer could resell the goods, unless the buyer had previously consented to the restriction.[1] In another, an arbitration panel indicated that article 41 required a seller to arrange for its wholly-owned subsidiary, which had obtained a court order putting under arrest the vessel in which the goods were loaded, to avoid or lift the effects of the order.[2]

Notes

[1]CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (see full text of the decision).

[2]ICC Arbitration Case No. 8204 of 1995, Unilex.

Article 42

(1) The seller must deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that the right or claim is based on industrial property or other intellectual property:

(*a*) Under the law of the State where the goods will be resold or otherwise used, if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State; or

(*b*) In any other case, under the law of the State where the buyer has his place of business.

(2) The obligation of the seller under the preceding paragraph does not extend to cases where:

(*a*) At the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim; or

(*b*) The right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.

OVERVIEW

1. Article 42 states the seller's duty to deliver goods that are free from intellectual property rights or claims of third parties. A seller is in breach if it delivers goods in violation of article 42, but the seller's obligation to deliver goods free of third party rights or claims based on intellectual property is subject to three significant limitations. First, the seller is only liable under article 42 if the third party's right or claim is one "of which at the time of the conclusion of the contract the seller knew or could not have been unaware".[1] Second, the seller is only liable if the third party's right or claim is based on the law of the State designated by articles 42 (1) *(a)* or *(b)*, whichever alternative is applicable. The third limitation on the seller's obligations under article 42 is stated in article 42 (2), and appears to be based on assumption of risk principles: the seller is not liable if the third party's right or claim is one of which the buyer "knew or could not have been unaware"[2] when the contract was concluded, or if the right or claim arose from the seller's compliance with technical specifications ("technical drawings, designs, formulae or other such specifications") that the buyer itself supplied to the seller.

APPLICATION OF ARTICLE 42

2. Few decisions have applied Article 42. In one case, both the lower court and the appeals court emphasized that the buyer bears the burden of proving that, at the time the contract was concluded, the seller knew or could not have been unaware of the third party intellectual property right or claim that the buyer alleges produced a violation of article 42.[3] Another decision involved a transaction governed by the 1964 Hague Convention on the Uniform Law for International Sales ("ULIS"), but the court invoked CISG article 42 (2) in deciding the case: the seller had delivered goods with a symbol that infringed a third party's well-known trademark, but the court found that the seller was not liable to the buyer because the buyer could not have been unaware of the infringement, and the buyer had itself specified attachment of the symbol in the designs that the buyer supplied the seller.[4] Similarly, a court found that a buyer, as a professional in the field, could not have been unaware that shoelaces used on the footware seller delivered violated a third party's trademark, and the buyer had in fact acted "with complete knowledge" of those trademark rights; the court therefore held that, under article 42 (2) *(a)* the buyer could not recover from the seller the payments buyer had made to compensate the holder of the trademark.[5]

Notes

[1]The phrase "knew or could not have been unaware" as a standard for a party's responsibility for awareness of facts is also used in articles 8 (1), 35 (3), 40 and 42 (2) (*a*).

[2]The phrase "knew or could not have been unaware" as was noted above, is also used in article 42 (1), and it appears in articles 8 (1), 35 (3), and 40.

[3]Hof Arnhem, the Netherlands, 21 May 1996, Unilex; Rechtbank Zwolle, the Netherlands, 1 March 1995 (final decision) and 16 March 1994 (interim decision), Unilex.

[4]Supreme Court of Israel, 22 August 1993, Unilex.

[5]CLOUT case No. 479 [Cour de Cassation, France 19 March 2002] (see full text of the decision).

Article 43

(1) The buyer loses the right to rely on the provisions of article 41 or article 42 if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he has become aware or ought to have become aware of the right or claim.

(2) The seller is not entitled to rely on the provisions of the preceding paragraph if he knew of the right or claim of the third party and the nature of it.

OVERVIEW

1. Article 43 (1) imposes on the buyer a notice requirement with respect to claims that the seller breached articles 41 or 42. In certain circumstances, Article 43 (2) provides for a defence if a buyer has failed to give the notice required by article 43 (1). The provisions of article 43 parallel in many ways the notice requirement and defence thereto that articles 39 and 40 establish with respect to breaches of article 35.

APPLICATION OF ARTICLE 43

2. At the time this is written there is little of note in the available case law concerning the proper construction of article 43. Presumably those called upon to interpret article 43 (1) or 43 (2) may look for guidance from the numerous decisions that apply the parallel provisions of article 39 and 40, although the differences between those provisions and article 43 should certainly be kept in mind.

Article 44

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

OVERVIEW

1. When it applies, Article 44 softens—although it does not eliminate—the consequences suffered by a buyer that has failed to give the notice called for by either article 39 (1) (which requires notice of lack of conformity in delivered goods) or article 43 (1) (which requires notice of third party claims relating to the goods).[1] Normally, a buyer that does not comply with these notice provisions loses its remedies against the seller for the alleged lack of conformity or third party claim. Under article 44, however, if a buyer has "a reasonable excuse" for its failure to give proper notice under articles 39 (1) or 43 (1), some of the buyer's remedies are restored: "the buyer may reduce the price in accordance with article 50 or claim damages, except for loss of profit . . .". However other remedies that the buyer would have if it had satisfied the notice requirements are not restored, such as remedies associated with avoidance of contract. Thus in one decision in which the buyer had a "reasonable excuse", as per article 44, for its failure to give proper notice under article 39 (1), an arbitral panel permitted the buyer to recover damages for a lack of conformity, although pursuant to article 44 the tribunal denied any damages for loss of profit.[2] In another arbitration ruling, a buyer that had failed to notify the seller of a lack of conformity within the time permitted by the contract was permitted to reduce the price as per article 50, although the panel noted that the buyer would be denied remedies premised on avoidance of the contract.[3]

SCOPE OF ARTICLE 44

2. The relief granted by article 44 is restricted to failure to comply with the notice requirements of articles 39 (1) or 43 (1). Article 44 does not by its terms grant a buyer relief from the two-year cut-off of notice of lack of conformity imposed by article 39 (2). A buyer that has failed to meet the notice deadline imposed by article 39 (2) cannot apply article 44 to escape the consequences, even if the buyer has a "reasonable excuse" for the failure. In addition a court has found that, because article 44 does not refer to the buyer's obligation to examine goods under article 38, a buyer cannot invoke article 44 if the reason it failed to comply with the notice requirements of article 39 (1) is because it did not examine the goods in a timely fashion, even if the buyer has a reasonable excuse for the tardy examination.[4] On appeal, however, this decision was reversed on other grounds,[5] and at least two other decisions appear to contradict it: they applied article 44 where a buyer gave untimely notice because it delayed its examination of the goods but had a reasonable excuse for the delay.[6] Apparently taking an expansive view of the scope of article 44, one of the latter decisions applied the provision to a buyer that failed to meet a deadline for notice of a lack of conformity that was imposed not by article 39 (1), but by a contractual provision.[7]

"REASONABLE EXCUSE" REQUIREMENT: IN GENERAL

3. Article 44 applies if the buyer "has a reasonable excuse" for failing to give the notice required by either article 39 (1) or article 43 (1). These notice provisions incorporate flexible standards in order to accommodate differing circumstances in the wide variety of transactions to which the CISG applies. Article 44 comes into play only if the flexible notice standards of articles 39 (1) and 43 (1) are not satisfied. Therefore, the "reasonable excuse" standard must take an even more particularized and "subjective" approach to the buyer's circumstances, and several decisions appear to have adopted this view.[8] Thus although one decision indicated that a reasonable excuse under article 44 requires that the buyer have acted "with the care and diligence required under the circumstances", the court stressed that this should be assessed by reference to the buyer's "concrete possibilities".[9] Another decision emphasized the particular situation of the buyer by asserting that an individual engaged in business (an independent trader, artisan or professional) is more likely to have a reasonable excuse for failing to give required notice than is a business entity engaged in a fast-paced business requiring quick decisions and prompt actions.[10] Yet another decision implied that the small size of the buyer's operation, which did not permit it to spare an employee full time to examine the goods, might form the basis for a reasonable excuse for delayed notice, although the court found that the buyer's claimed excuse was not in fact the cause of its failure to begin examining the goods until more than three months after it should have.[11]

"REASONABLE EXCUSE" REQUIREMENT: BURDEN OF PROOF

4. It has been expressly asserted that the buyer bears the burden of proving the applicability of article 44—in

particular, the burden of proving the existence of a "reasonable excuse" for the buyer's failure to comply with the notice requirements of articles 39 (1) or 43 (1).[12] Several other decisions appear to have implied the same rule when they held that a lack of sufficient evidence of a reasonable excuse meant that the buyer's article 44 argument should be rejected.[13]

"REASONABLE EXCUSE" REQUIREMENT: APPLICATION

5. Article 44 has been invoked in a number of decisions, but seldom successfully: in a substantial majority of decisions, the deciding tribunal found that the "reasonable excuse" requirement was not satisfied.[14] In one case, for example, a buyer argued that it had a reasonable excuse for failing to give timely notice of a non-conformity because the goods had been held up in customs when they arrived in the buyer's country, and the installation of processing machinery needed for a trial run of the goods had been delayed. The court, however, ruled that the buyer had failed to show that it could not have gotten access to the goods in order to examine them when they first arrived in the port of destination; furthermore, the buyer had failed to show that the delay in the installation of the processing machinery was not due to its own neglect.[15] In another case the buyer argued that the seller had delivered fish of a different type than the buyer had ordered. The buyer also argued that the fish had other non-conformities, and that its reasonable excuse for not giving timely notice of the additional non-conformities was that it considered the contract avoided because seller had delivered the wrong type of fish. The court, however, found that the buyer had acquiesced in the seller's written description of the fish that were delivered; thus the buyer could not object to the type of fish supplied, and its excuse for failing to give notice of the other non-conformities was also not valid under article 44.[16] Another decision asserted that, because the buyer's business was in general fast-paced, requiring quick decisions and prompt action, the buyer did not have a reasonable excuse for failing to give timely notice of a lack of conformity.[17] Another court found that a buyer who did not examine furs until they had been processed by a third party, and who as a result failed to give timely notice of a lack of conformity in the furs, did not have a reasonable excuse for its late notice because an expert could have examined a sample of the goods when they were delivered, and there existed means of communication between the parties that were adequate to convey prompt notice.[18] It has also been held that the buyer's decision to store goods for several years before they were installed, which delayed discovery of the lack of conformity, was not a "reasonable excuse" under article 44 because the buyer had not brought these circumstances forward during contract negotiations, and thus they did not become part of the basis of the parties' legal relationship.[19] And it has been held that giving notice of one non-conformity did not give a buyer a reasonable excuse for failing to notify the seller of other non-conformities.[20]

6. In at least two arbitration cases, however, a buyer successfully pleaded a reasonable excuse for failing to satisfy the article 39 (1) notice requirement, and as a result was able to invoke the remedies that article 44 preserves for the buyer. In one decision, coke fuel was examined by an independent inspector, appointed jointly by both parties, at the time it was loaded on the carrier, and the inspector issued a certificate of analysis. When the delivery arrived, however, the buyer discovered that the delivery differed in both quantity and quality from the certificate of analysis, and the buyer thereupon notified the seller of the problem. The tribunal ruled that the buyer's notice was not timely under article 39 (1), but that the erroneous certificate of analysis gave the buyer a reasonable excuse for the delay: because the certificate was the product of an independent body appointed by both parties, the buyer was not bound by it or responsible for its errors, and thus it could invoke article 44.[21] In another arbitration proceeding, a provision of the contract required claims of non-conformity to be brought forward within 50 days of the date stamped on a bill of lading issued when the goods were dispatched. Inspection of the goods at the port of shipment became unfeasible, and the buyer did not examine the goods until they arrived at their destination. As a result, the buyer did not give notice of lack of conformity within the 50-day deadline, but the court found that the buyer had a reasonable excuse for the delay and applied article 44 to permit the buyer to reduce the price of the goods pursuant to article 50 of the Convention.[22]

Notes

[1]Article 44 is not the only provision that limits the impact of a buyer's failure to give the required notice. Articles 40 and 43 (2) contain similar (but not identical) provisions excusing the buyer's failure to notify based upon the seller's awareness of a lack of conformity or of a third party's claim to the goods.

[2]ICC Arbitration No. 9187, June 1999, Unilex.

[3]CLOUT case No. 474 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, award in case No. 54/1999 of 24 January 2000], also in Unilex.

[4]CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997]. In other words, according to this decision only a failure or delay in actually dispatching notice is subject to the "reasonable excuse" doctrine of article 44; failure to comply with the article 38 (1) examination requirement, no matter what the reason, is not within the scope of article 44. Note that the "dispatch principle" of article 27, under which a delay or error in transmitting a notice or its failure to arrive does not deprive the notice of effect, apparently would apply to notice under articles 39 (1) or 43 (1).

[5]CLOUT case No. 270 [Bundesgerichtshof, Germany, 25 November 1998]. In this appeal the court found that the seller had waived its right to rely on the buyer's failure to give proper notice, and for this reason the court expressly left open the issue of whether buyer could invoke article 44.

[6]ICC Arbitration No. 9187, June 1999, Unilex; CLOUT case No. 474 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, award in case No. 54/1999 of 24 January 2000], also in Unilex.

[7]Id.

[8]All of the decisions discussed in this paragraph concluded that the buyer did not have a reasonable excuse and thus was not entitled to the benefits of article 44. See also CLOUT case No. 596 [Oberlandesgericht Zweibrücken, Germany, 2 February 2004] (stating that article 44 applies if "in the circumstances of the particular case" the buyer deserves "a degree of understanding and leniency") (see the full text of the decision).

[9]CLOUT case No. 285 [Oberlandesgericht Koblenz, Germany, 11 September 1998] (see full text of the decision). See also CLOUT case No. 542 [Oberster Gerichtshof, Austria, 17 April 2002] (asserting that, although article 44 excuse applies only if the buyer's failure to give timely notice is "due to reasons that would have excused an average buyer in the normal course of business conducted in good faith," the provision also requires that "the buyer acted with the diligence subjectively expected by it according to the circumstances").

[10]CLOUT case No. 167 [Oberlandesgericht München, Germany, 8 February 1995] (see full text of the decision).

[11]CLOUT case No. 192 [Obergericht des Kantons Luzern, Switzerland, 8 January 1997] (see full text of the decision).

[12]CLOUT case No. 285 [Oberlandesgericht Koblenz, Germany, 11 September 1998] (see full text of the decision); CLOUT case No. 292 [Oberlandesgericht Saarbrücken, Germany, 13 January 1993] (see full text of the decision).

[13]CLOUT case No. 280 [Oberlandesgericht Jena, Germany, 26 May 1998] (see full text of the decision); CLOUT case No. 303 [Arbitration—International Chamber of Commerce No. 7331 1994] (see full text of the decision); CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (see full text of the decision); ICC Arbitration Case No. 8611, 1997, Unilex.

[14]In the following cases, the court found that they buyer did not have a reasonable excuse for its failure to satisfy the notice requirement of article 39 (1): CLOUT case No. 596 [Oberlandesgericht Zweibrücken, Germany, 2 February 2004]; CLOUT case No. 542 [Oberster Gerichtshof, Austria, 17 April 2002] (asserting that, as an exception to the article 39 (1) notice requirement, article 44 must be interpreted strictly); Arrondissementsrechtsbank 's-Hertogenbosch, the Netherlands, 15 December 1997, Unilex; CLOUT case No. 285 [Oberlandesgericht Koblenz, Germany, 11 September 1998]; CLOUT case No. 280 [Oberlandesgericht Jena, Germany, 26 May 1998] (see full text of the decision); CLOUT case No. 167 [Oberlandesgericht München, Germany, 8 February 1995]; CLOUT case No. 192 [Obergericht des Kantons Luzern, Switzerland, 8 January 1997] (see full text of the decision); CLOUT case No. 303 [Arbitration—International Chamber of Commerce No. 7331 1994]; CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997] (see full text of the decision); CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (see full text of the decision); ICC Arbitration Case No. 8611, 1997, Unilex; CLOUT case No. 273 [Oberlandesgericht München, Germany, 9 July 1997]; CLOUT case No. 292 [Oberlandesgericht Saarbrücken, Germany 13 January 1993] (see full text of the decision); CLOUT case No. 263 [Bezirksgericht Unterrheintal, Switzerland, 16 September 1998] (see full text of the decision); Sø og Handelsretten, Denmark, 31 January 2002, available on the Internet at http://cisgw3.law.pace.edu/cases/020131d1.html.

The number of cases in which a buyer was able successfully to invoke article 44, in contrast, is quite small. See ICC Arbitration No. 9187, June 1999, Unilex; CLOUT case No. 474 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, award in case No. 54/1999 of 24 January 2000], also in Unilex. It should be noted, however, that in one decision in which the court found article 44 inapplicable the court nevertheless implied that the buyer had adduced facts that would have constituted a reasonable excuse had they been causally connected to the buyer's failure to satisfy the article 39 (1) notice requirement. See CLOUT case No. 192 [Obergericht des Kantons Luzern, Switzerland, 8 January 1997].

[15]CLOUT case No. 285 [Oberlandesgericht Koblenz, Germany, 11 September 1998].

[16]Sø og Handelsretten, Denmark, 31 January 2002, available on the Internet at http://cisgw3.law.pace.edu/cases/020131d1.html.

[17]CLOUT case No. 167 [Oberlandesgericht München, Germany, 8 February 1995] (see full text of the decision).

[18]Arrondissementsrechtsbank 's-Hertogenbosch, the Netherlands, 15 December 1997, Unilex.

[19]CLOUT case No. 596 [Oberlandesgericht Zweibrücken, Germany, 2 February 2004].

[20]CLOUT case No. 597 [Oberlandesgericht Celle, Germany, 10 March 2004]

[21]ICC Arbitration No. 9187, June 1999, Unilex.

[22]CLOUT case No. 474 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, award in case No. 54/1999 of 24 January 2000], also in Unilex. In another case, a court implied that the small size of the buyer's operation, which did not permit it to spare an employee full time to examine the goods, might constitute a reasonable excuse for delayed notice, although the court found that the buyer's excuse in this case was not causally connected to its failure to even begin examining the goods until more than three months after it should have. See CLOUT case No. 192 [Obergericht des Kantons Luzern, Switzerland, 8 January 1997].

Section III of Part III, Chapter II

Remedies for breach of contract by the seller (articles 45-52)

OVERVIEW

1. The provisions in Section III of Part III, Chapter II of the Convention address various aspects of the remedies available to a buyer that has suffered a breach of contract by the seller: they catalogue those remedies and authorize their use (article 45 (1)); they define their availability and operation (articles 45 (2) and (3), 46, 48, and 50); they provide for an aggrieved buyer's right to avoid the contract (articles 47 and 49), thereby regulating the buyer's choice between alternative sets of remedies; and they define the operation of the buyer's remedies in certain special circumstances (articles 51 and 52).

RELATION TO OTHER PARTS OF THE CONVENTION

2. The current section on buyer's remedies is paralleled by the Convention's section on seller's remedies (Section III of Part III, Chapter III, articles 61-65). Many of the individual provisions in these sections parallel each other. Thus article 45, which catalogues the buyer's remedies, parallels article 61, which catalogues the seller's remedies; article 46, which authorizes the buyer to require performance by the seller, parallels article 62, which authorizes the seller to require the buyer's performance; article 47, which permits the buyer to fix an additional period of time for the seller to perform, parallels article 63, which permits the seller to fix an additional period of time for the buyer to perform; and article 49, which governs the buyer's right to avoid the contract, parallels article 64, which governs the seller's right to avoid.

3. Given that remedies play a central role in any system of legal rules for transactions, it is not surprising that the provisions in Section III have important connections to a variety of other parts and individual articles of the Convention. For example, the buyer's right to require performance under article 46 is subject to the rule in article 28 relieving a court of the obligation to order specific performance in circumstances in which it would not do so under its own law. Article 48, which establishes the seller's right to cure a breach after the required time for delivery has passed, is closely related to the rule in article 37, permitting the seller to cure up to the required time for delivery. The Section III provisions on the buyer's right to avoid the contract have close connections to many provisions elsewhere in the CISG, including, inter alia, the definition of fundamental breach (article 25), the requirement that avoidance be effected by notice (article 26), the rules authorizing avoidance of contract in certain special circumstances (articles 72 and 73), the articles providing for damages conditioned upon avoidance (articles 75 and 76), the provisions dealing with a buyer's obligation to preserve goods in its possession if it intends to "reject" them (articles 86-88)[1], and, of course, the provisions of Section V of Part III, Chapter V on "effects of avoidance". There is a particularly close connection between article 45 (1) *(a)*, which authorizes an aggrieved buyer to recover damages, and the provisions defining how damages are to be calculated, which are found in Section II of Part III, Chapter V (articles 74-77).[2]

Notes

[1]A buyer's obligation under articles 86-88 to preserve goods in its possession may also come into play if the buyer invokes its right to demand substitute goods under article 46(2).

[2]Indeed, article 45 (1) (*a*) itself cross-references articles 74-76.

Article 45

(1) If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may:

(*a*) Exercise the rights provided in articles 46 to 52;

(*b*) Claim damages as provided in articles 74 to 77.

(2) The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.

(3) No period of grace may be granted to the seller by a court or arbitral tribunal when the buyer resorts to a remedy for breach of contract.

INTRODUCTION

1. This provision gives an overview of the remedies available to the buyer when the seller has committed a breach by non-performance of any of its duties under the contract or the Convention.[1] In its paragraph (1) *(a)*, the provision simply refers to other provisions, namely articles 46-52, which specify the conditions under which the rights provided by those provisions may be exercised. On the other hand, article 45 (1) *(b)* constitutes the basis for the buyer's right to claim damages and as such has great practical importance.[2] As far as the amount of damages is concerned, it is to be adjudicated according to articles 74-76. Article 45 (2) allows the combination of the right to damages with other remedies. Article 45 (3) limits the ability of courts and arbitral tribunals to grant periods of grace; such grace periods would interfere with the remedial system of the Convention.

2. Article 45 does not enumerate the buyer's remedies exhaustively. The Convention provides for further remedies, e.g., in articles 71-73 or 84 (1). Nevertheless, article 45 is exhaustive in the sense that it preempts the buyer from invoking remedies for breach of contract otherwise available under the applicable domestic law, since the Convention excludes recourse to domestic law where the Convention provides a solution.[3]

NON-PERFORMANCE OF AN OBLIGATION AS A PREREQUISITE FOR REMEDIES

3. The availability of any remedy to the buyer presupposes that the seller has failed to perform an obligation deriving either from the contract, from trade usages, from practices between the parties or from the Convention. Even if an additional duty not specifically addressed in the Convention—for instance, the duty to extend a bank guaranty in favour of the buyer[4]—has been breached, the buyer is entitled to the remedies available under the Convention. The extent of the seller's failure to perform is irrelevant for the purposes of deciding whether the buyer is entitled to remedies. Of course, some remedies are available to the buyer only where the breach is fundamental. Generally, the reasons for the seller's breach are irrelevant, except to the extent the seller can claim an exemption under article 79 (5). In particular, article 45 (1) does not require that the seller have acted with negligence, fault or intent in order for the buyer to claim the remedies mentioned in the provision.

4. However, if the seller's responsibility for a remedy for a breach depends on further conditions—in particular, on a timely and proper notice by the buyer (see articles 38, 39, 43)—then the additional conditions must be satisfied in order for the buyer to preserve its right to the remedy.

RIGHTS UNDER ARTICLES 46-52

5. Article 45 (1) *(a)* merely refers to articles 46-52. Although all the remedies provided for in these articles require that a breach of an obligation has occurred, the provisions make distinctions as to the kind of breach. Thus articles 46 (2), 49 (1) (*a*) and 51 (2) require a fundamental breach. Article 49 (1) (*b*) applies only in case of non-delivery, and it is doubtful whether article 50 applies to cases other than delivery of non-conforming goods. Article 51 addresses partial non-performance; article 52 deals with early delivery and excess delivery.

CLAIM OF DAMAGES

6. Article 45 (1) (*b*) lays down the substantive conditions for a claim to damages by the buyer.[5] In case of breach of a contractual obligation of any sort by the seller, the buyer who has suffered loss as a result of that breach can claim damages. Thus, for example, the buyer can claim damages for losses caused by the delivery of defective goods.[6] A buyer can also claim damages for an ensuing loss when the seller declares in advance that it will be unable to deliver on time, thereby committing an anticipatory breach of contract in the sense of article 71.[7] However, if the contract or the Convention imposes further conditions on the buyer's entitlement to damages—such as the requirement of notice under articles 38, 39, and 43—these conditions must also be satisfied.[8]

7. In contrast to many national systems, the right to claim damages under the Convention does not depend on any kind of fault, breach of express promise, or the like; it presupposes merely an objective failure of performance.[9] Only under the conditions described in article 79 or in a case falling within article 80 is the seller exempted from liability for damages.[10]

8. Articles 74-77 to which article 45 (1) *(b)* refers provide rules for the calculation of the amount of damages, but those provisions do not form a basis for a claim of damages.[11]

9. The decisions that have applied article 45 (1) *(b)* evidence no difficulty with the application of this provision as such.[12] Problems may arise as to the existence and extent of an obligation of the seller or to the amount of damages, but since both aspects are dealt with by other provisions (articles 30-44 and 74-77 respectively), article 45 (1) *(b)* is merely referred to in these cases, without being discussed in detail.[13]

CUMULATION OF REMEDIES (45 (2))

10. The right to claim damages is the remedy that is always available to the buyer if a breach of contract has caused the buyer any damage. This right can be invoked along with any other remedy in order to compensate for losses that occur despite the other remedy.[14] The amount of damages, however, depends on the other remedy to which the buyer has resorted.[15]

NO GRACE PERIODS (45 (3))

11. Article 45 (3) limits the ability of courts and arbitral tribunals to grant a period of grace and to extend the time for performance when the buyer holds the seller liable for a breach of contract.[16] Although this possibility could be regarded as a matter of procedural law and therefore outside the Convention's scope of application, article 45 (3) nevertheless explicitly excludes it. The provision is addressed to courts and arbitral tribunals. The parties themselves are free to extend or otherwise modify the period for performance at any time.

FURTHER QUESTIONS

12. The place of performance for all rights and claims under article 45 follows the place of performance of the primary obligation—to deliver, to hand over documents, et cetera—which has been breached.[17] Therefore it is important to determine the place of performance of the primary obligation.

13. The Convention does not deal with the statute of limitations.[18] The prescription period applicable to the rights and claims provided for in article 45 must thus be determined by reference to the applicable national law or—where it governs—to the United Nations Convention on the Limitation Period in the International Sale of Goods.

BURDEN OF PROOF

14. Because the other parts of article 45 do not grant concrete rights on the basis of which the buyer can sue, the question of the burden of proof under the provision is only relevant for a claim to damages under article 45 (1) (*b*). For damage claims the burden is on the buyer, who must prove a breach of an obligation by the seller as well as the losses caused by that breach. According to article 79, the burden is on the seller to prove any exempting circumstances.[19]

Notes

[1]See *Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980* (United Nations publication, Sales No. E.81.IV.3), 37 ("index to the remedies available to the buyer").

[2]See, e.g., CLOUT case No. 85 [Federal District Court, Northern District of New York, United States, 9 September 1994] (appellate decision: CLOUT case No. 138 [Federal Court of Appeals for the Second Circuit, United States, 6 December 1993, 3 March 1995]); CLOUT case No. 140 [Arbitration-Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry award No. 155/1994 of 16 March 1995]; CRCICA Arbitration Cairo, Egypt, 3 October 1995, Unilex; CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996] (see full text of the decision); ICC Court of Arbitration, France, award No. 8247, *ICC International Court of Arbitration Bulletin*, 2000, 53; CLOUT case No. 236 [Bundesgerichtshof, Germany, 23 July 1997]; CLOUT case No. 248 [Schweizerisches Bundesgericht, Switzerland, 28 October 1998] (see full text of the decision). See also the Digest for art. 74, para 9.

[3]*Geneva Pharmaceuticals Tech. Corp. v. Barr Labs. Inc.*, United States, 10 May 2002, available on the Internet at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/020510u1.html.

[4]See CRCICA Arbitration Cairo, Egypt, 3 October 1995, Unilex.

[5]A parallel provision, article 61 (1) (*b*), entitles the seller to claim damages for any breach of contract by the buyer.

[6]See for example CLOUT case No. 125 [Oberlandesgericht Hamm, Germany, 9 June 1995] (seller who had delivered and installed defective windows was held liable to compensate buyer's costs of replacing the defective windows).

[7]ICC Court of Arbitration, award No. 8786, January 1997 *ICC International Court of Arbitration Bulletin*, 2000, 70.

[8]See, e.g., ICC Court of Arbitration, France, award No. 8247, *ICC International Court of Arbitration* Bulletin 2000, 53; CLOUT case No. 364 [Landgericht Köln, Germany, 30 November 1999]; see also *Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980* (United Nations publication, Sales No. E.81.IV.3), 34-36.

[9]*See Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980* (United Nations publication, Sales No. E.81.IV.3), 37.

[10]For an instance in which the article 79 exemption was found not inapplicable, see CLOUT case No. 140 [Arbitration-Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, award No. 155/1994 of 16 March 1995].

[11]See *Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980* (United Nations publication, Sales No. E.81.IV.3), 37. See also the Digest for art. 74, para 9.

[12]See, e.g., the decisions cited above in footnote 2.

[13]See as examples: CLOUT case No. 82 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994] (see full text of the decision); CLOUT case No. 83 [Oberlandesgericht München, Germany, 2 March 1994] (see full text of the decision); CLOUT case No. 168 [Oberlandesgericht Köln, Germany, 21 March 1996] (see full text of the decision); ICC Court of Arbitration, France, award No. 8247, *ICC International Court of Arbitration Bulletin*, 2000, 53; CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997]; CLOUT case No. 219 [Tribunal Cantonal Valais, Switzerland, 28 October 1997], also in Unilex; CLOUT case No. 293 [Arbitration—Schiedsgericht der Hamburger freundschatlichen Arbitrage, 29 December 1998]; CLOUT case No. 348 [Oberlandesgericht Hamburg, Germany, 26 November 1999].

[14]See the Digest for article 46, para. 9.

[15]See the Digests for articles 74-76.

[16]Granting such grace periods is possible, e.g., under art. 1184 para. 3 and art. 1244 of the French Code civil and in legal systems which have been influenced by the French civil code.

[17]Bundesgerichtshof, Germany, 11 December 1996; CLOUT case No. 268 [Bundesgerichtshof, Germany, 11 December 1996]; Gerechtshof ’s-Hertogenbosch, Netherlands, 9 October 1995, Unilex; Cour d’appel de Paris, France, 4 March 1998; CLOUT case No. 244 [Cour d’appel, Paris, France, 4 March 1998]; CLOUT case No. 245 [Cour d’appel, Paris, France, 18 March 1998].

[18]See the Digest for article 4, para. 13.

[19]See the Digest for article 79, para. 20.

Article 46

(1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.

(2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

(3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

OVERVIEW

1. Article 46 gives the buyer a general right to require the seller to perform its contractual obligations in kind. Paragraphs 2 and 3 deal with replacement and repair of non-conforming goods (in the sense of article 35), and articulate some restrictions on these specific remedies; paragraph 1 applies to all other cases.

2. The right to require performance is subject to the restriction regarding specific performance set forth in article 28. If the seized court would not, on the facts of the case before, grant such remedy under its own national law, it will not be bound to do so under the Convention.[1] Therefore the courts of those jurisdictions that restrict the availability of specific performance may refuse to grant specific performance of the obligation in dispute, except in circumstances where the court would grant the remedy under its own domestic law, and may award only damages.

3. The fact that the right to performance is provided for first among the remedies described in articles 46-52 reflects that, under the Convention, the contractual bond should be preserved as far as possible; avoidance of the contract should be available only as a last resort (*ultima ratio*)[2], and only if the continuation of the contract would no longer be tolerable because of a severe breach of contract by the seller (see article 49). The same approach applies when the buyer has breached the contract (articles 62 and 64).

4. Despite its importance, the right to require performance has not been the subject of much case law. In practice aggrieved parties have preferred to pursue other remedies—in particular the right to claim damages.

GENERAL REQUIREMENTS

5. The right to require performance of an obligation presupposes that the obligation exists and has thus far not been fulfilled.

6. Furthermore to invoke his rights under article 46 the buyer must "require" performance. This calls for a clear demand that the disputed obligation should be fulfilled.[3] Article 46 (2) and (3) specify that notice of a "request" for the remedies they describe must be given within a reasonable time. The buyer is also entitled to set an additional period of time for performance in accordance with article 47.

THE GENERAL RIGHT TO REQUIRE PERFORMANCE (ARTICLE 46 (1))

7. Except in cases governed by article 46 (2) and (3), the buyer has a general right under article 46 (1) to require the seller's performance, in kind, of any obligation that is due. Thus the buyer is entitled to request that the goods be delivered, that the seller procure a stipulated bank guaranty, or that the seller respect an exclusive sales obligation.[4] The buyer could demand and, subject to the restrictions imposed by article 28, employ the assistance of the courts to obtain performance of these and other seller obligations.

8. If performance in kind is impossible—e.g., the contract covers a unique good that is destroyed before delivery—then the buyer's right to require performance is also extinguished.

9. Article 46 (1) restricts the right to compel performance when the buyer has already resorted to a remedy inconsistent with requiring performance. Such inconsistency exists when the buyer has avoided the contract, and also when the buyer has reduced the price pursuant to article 50.[5] The buyer can, however, combine a request for performance and a claim for any remaining damage—e.g., damage caused by delayed performance.[6] The buyer having once requested performance can still opt for a different remedy, e.g., can declare the contract avoided if all the requirements for avoidance are met. Only if the buyer has fixed an additional period of time for performance under article 47 is the buyer for that period excluded from requesting other remedies (although the buyer retains the right to recover damages for delayed performance by the seller)—see article 47 (2).

10. The general right to require performance under article 46(1) need not be asserted within a particular period of time apart from the normal period of limitation imposed by applicable national law[7] or, so far as it applies, by the United Nations Convention on the Limitation Period in the International Sale of Goods. Article 46 (2) and (3), in contrast, limit the time within which the buyer must make a request for the remedies provided in these provisions; article 46 (1) requires a clear declaration that the buyer requests the performance of a contractual obligation,[8] but it does not limit the time for such notice.

DELIVERY OF SUBSTITUTE GOODS (ARTICLE 46 (2))

11. Article 46 (2) applies if *(a)* the seller has delivered non-conforming goods; *(b)* the non-conformity constitutes a fundamental breach of contract; and *(c)* the buyer has requested replacement of the non-conforming goods "either in conjunction with notice given under article 39 or within a reasonable time thereafter." If these conditions are met, article 46 (2) entitles the buyer to require delivery of substitute goods.

12. Whether the goods are non-conforming must be determined by reference to article 35; a lack of conformity exists if the goods are defective, different from the goods required by the contract (*aliud*), improperly packaged, or deficient in quantity.[9]

13. A seller commits a fundamental breach by delivering non-conforming goods if the non-conformity substantially deprives the buyer of what the buyer is entitled to expect under the contract (article 25). A fundamental breach for purposes of article 46 (2) must be determined in the same way as it for purposes of avoidance of contract under article 49 (1)*(a)*, and in accordance with the general definition in article 25. Leading court decisions on what constitutes a fundamental breach (although rendered in respect of article 49) have held that a non-conformity concerning quality is not a fundamental breach of contract if the buyer can, without unreasonable inconvenience, use the goods or resell them, even with a rebate.[10] Thus, e.g., the delivery of frozen meat that contained too much fat and water—and which therefore, according to expert opinion, was worth 25.5 per cent less than meat of the contracted-for quality—was deemed not to constitute a fundamental breach of contract because the buyer could resell the meat at a lower price or could process it in an alternative manner.[11] If non-conforming goods cannot be used or resold with reasonable effort, however, there is a fundamental breach.[12] The same is true where the goods suffer from a serious defect, even thought they can still be used to some extent (e.g. flowers that should have flourished the whole summer but in fact did so only for a small part of the season),[13] or where the goods have major defects and the buyer requires the goods for its manufacturing processes.[14] Similarly, where the non-conformity resulted from the adulteration of the goods in a fashion that was illegal in the states of both the seller and the buyer, a fundamental breach was found.[15]

14. Special problems arise with the fundamental breach standard when the *goods are defective*—even *seriously* defective—*but reparable*. Several courts have found that, if the defects are easily repaired, the lack of conformity is not a fundamental breach.[16] At least where the seller offers and effects speedy repair without any inconvenience to the buyer, courts will not find that the non-conformity is a fundamental breach.[17] This is in line with seller's right to cure as provided for in article 48 of the Convention.

15. Article 46 (2) requires the buyer to give the seller notice requesting substitute goods, and to do so within a limited time. The request for substitute goods can be coupled with the notice of lack of conformity under article 39, in which case the time limits under that provision apply;[18] it can, however, also be given within a reasonable time after the article 39 notice.

16. The right to require delivery of substitute goods is subject to the buyer's obligation to return the delivered goods in substantially the condition in which he received them, pursuant to article 82 (1). Article 82 (2), however, provides for substantial exceptions to this restitutionary obligation.

REPAIR (ARTICLE 46 (3))

17. Article 46 (3) provides the buyer with a right to demand repair if the delivered goods do not conform to the contract under the standards of article 35. The remedy is available, however, only if it is reasonable in light of all the circumstances. The buyer must also request repair within the same time limits as those applicable to notice under article 46 (2)—i.e., "in conjunction with notice given under article 39 or within a reasonable time thereafter."[19]

18. Article 46 (3) applies only if the lack of conformity can be cured by repair. A request for repair would be unreasonable if the buyer could easily repair the goods himself, but the seller remains liable for the costs of such repair.[20]

19. Repair is effectively provided if after repair the goods can be used as agreed.[21] If the repaired goods subsequently become defective the buyer must give notice of the defects.[22] It has been held that the time limits of Article 39 apply to this notice,[23] but a request to repair the new defects can be given within a reasonable time thereafter.[24] A first notice within two weeks, a second notice after a month, and further notices after six and eleven months have been regarded as notices within a reasonable time.[25]

Notes

[1]See the Digest for art. 28.

[2]See CLOUT case No. 428 [Oberster Gerichtshof, 7 September 2000], also available on the Internet at http://www.cisg.at/8_2200v.htm.

[3]The commentary on the draft Convention prepared by the UNCITRAL secretariat contained an example of an ambiguous request that could be interpreted as either a demand for performance or a modification of the delivery date:

"Example 42A: When the goods were not delivered on the contract date, 1 July, Buyer wrote Seller 'Your failure to deliver on 1 July as promised may not be too serious for us but we certainly will need the goods by 15 July.' Seller subsequently delivered the goods by 15 July."

Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March–11 April 1980 (United Nations publication, Sales No. E.81.IV.3), 38.

[4]See the following cases (where, however, the buyers had resorted to other remedies—namely damages or (as far as possible) avoidance): ICC Court of Arbitration, award No. 8786, January 1997, *ICC International Court of Arbitration Bulletin* 2000, 70 (late delivery); CRCICA Arbitration Cairo, Egypt, 3 October 1995, Unilex (extension of bank guaranty); CLOUT case No. 2 [Oberlandesgericht Frankfurt a.M., Germany, 17 September 1991] (breach of exclusive sales agreement).

[5]See *Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March–11 April 1980* (United Nations publication, Sales No. E.81.IV.3), 38, at para. 7.

[6]Id at para. 4.

[7]See for example CLOUT case No. 346 [Landgericht Mainz, Germany, 26 November 1998].

[8]See *Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March–11 April 1980* (United Nations publication, Sales No. E.81.IV.3), 38, at paras. 4-5.

[9]See the Digest for art. 35.

[10]CLOUT case No. 171 [Bundesgerichtshof, Germany, 3 April 1996]; CLOUT case No. 248 [Schweizerisches Bundesgericht, Switzerland, 28 October 1998].

[11]CLOUT case No. 248 [Schweizerisches Bundesgericht, Switzerland, 28 October 1998].

[12]CLOUT case No. 150 [Cour de Cassation, France, 23 January 1996] (artificially sugared wine); CLOUT case No. 79 [Oberlandesgericht Frankfurt a.M., Germany, 18 January 1994] (shoes with fissures in leather); Landgericht Landshut, Germany, 5 April 1995, Unilex (T-shirts which shrink by two sizes after first washing).

[13]CLOUT case No. 107 [Oberlandesgericht Innsbruck, Austria, 1 July 1994].

[14]See CLOUT case No. 138 [Federal Court of Appeals for the Second Circuit, United States, 6 December 1993, 3 March 1995] (compressors with lower cooling capacity and higher power consumption than those contracted for, needed by the buyer to manufacture air conditioners); CLOUT case No.150 [Cour de Cassation, France, 23 January 1996] (artificially sugared wine); CLOUT case No. 315 [Cour de Cassation, France, 26 May 1999] (metal sheets absolutely unfit for the anticipated use by the buyer's customer) (see full text of the decision).

[15]CLOUT case No. 150 [Cour de Cassation, France, 23 January 1996] (artificially sugared wine, which is forbidden under EU law and national laws); CLOUT case No. 170 [Landgericht Trier, Germany, 12 October 1995] (artificially sugared wine).

[16]CLOUT case No. 196 [Handelsgericht des Kantons Zürich, Switzerland, 26 April 1995].

[17]CLOUT case No. 152 [Cour d'appel, Grenoble, France, 26 April 1995]; CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997].

[18]See the Digest for art. 39, paras. 15-22.

[19]See CLOUT case No. 225 [Cour d'appel, Versailles, France, 29 January 1998]. See also para. 15 above.

[20]CLOUT case No. 125 [Oberlandesgericht Hamm, Germany, 9 June 1995] (see full text of the decision).

[21]CLOUT case No. 152 [Cour d'appel, Grenoble, France, 26 April 1995].

[22]Landgericht Oldenburg, Germany, 9 November 1994, Unilex.

[23]Id.

[24]CLOUT case No. 225 [Cour d'appel, Versailles, France, 29 January 1998] (see full text of the decision).

[25]Id.

Article 47

(1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.

(2) Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in performance.

OVERVIEW

1. Article 47 (1) gives the buyer the right to fix an additional period of time—beyond that provided for in the contract—within which the seller must perform its obligations. The provision thus complements the right to require performance under article 46, but it has a particular association with the right to avoid the contract under article 49. In fact, article 47 has practical significance primarily in connection with the latter provision: article 49 (1) *(b)* provides that, if the seller fails to deliver by the expiration of the additional period of time fixed in accordance with article 47, the buyer can declare the contract avoided. Thus the fixing of an additional period of time paves the way for the avoidance of the contract. This mechanism for avoiding the contract, however, applies only in cases of non-delivery.[1]

2. Article 47 (2) states that a buyer who fixes an additional period of time pursuant to the provision binds itself not to resort to other remedies during that period, although it retains the right to claim damages for delay in performance that occurs during the period. This binding effect is intended to protect the seller who, in response to the buyer's notice fixing an additional period for performance, may as a result prepare the performance during that period, perhaps at considerable expense, and thus should be entitled to expect that the buyer will accept the requested performance if it is not otherwise defective.[2] Only if the seller informs the buyer that it will not perform during the additional period is the buyer be free to resort to other available remedies during the period, since in that case the seller needs no protection.

3. Article 47 allows the buyer to fix an additional period of time for performance of any obligation the seller has not performed. The provision thus can be applied to all obligations the seller has agreed to fulfil. The granting of an addition period under article 47 functions as a step toward avoidance of the contract, however, only if the seller has violated its duty to deliver the goods.

FIXING OF ADDITIONAL PERIOD OF TIME (Article 47 (1))

4. The buyer is entitled, but not obliged, to fix an additional period for the seller's performance under article 47 (1).[3] Where the seller has not delivered the goods by the due date, however, the buyer can benefit from fixing an additional period for the seller to perform his delivery obligations: the seller's failure to deliver within the period properly so fixed allows the buyer to avoid the contract without having to show that the seller's delay was a fundamental breach.[4] There are even cases stating that, if a buyer has not granted an additional period of time in a late delivery situation, the buyer has no right to avoid the contract.[5]

5. The additional period of time fixed by the buyer must be of reasonable length to satisfy the requirements of article 47 (1). An additional period of two weeks for the delivery of three printing machines from Germany to Egypt was deemed to be too short, whereas a period of seven weeks was regarded as reasonable.[6] In a Danish-German car sale an additional period of three to four weeks for delivery was found to be reasonable.[7] If the buyer fixes an unreasonably short period for delivery courts have substituted a reasonable period.[8] Courts have also found the reasonableness requirement satisfied if the buyer, having previously fixed an unreasonably short period, thereafter waits for delivery until a reasonable period time has expired before dispatching its notice of avoidance.[9]

6. The buyer must make clear that the seller has to perform within the additional time fixed in order to properly invoke article 47 and be entitled to avoid the contract if the seller does not deliver with the additional time.[10] A clear expression that the buyer is granting a final deadline is necessary (e.g. "final delivery date: 30 September 2002").[11] It has therefore been decided that a mere reminder demanding prompt delivery is not sufficient, since no additional time period for delivery had been fixed.[12] On the other hand, it has been held sufficient for purposes of article 47 (1) if the buyer accepts a new delivery date proposed by the seller provided the buyer makes clear that performance by that date is essential.[13] The same result was reached in a case where the buyer accepted several requests from the seller to extend the time for delivery.[14] Where a buyer tolerated the late delivery of several instalments of an instalment sale, it was held that the buyer's behaviour was equivalent to the granting of an additional period of time.[15]

7. There is generally no requirement as to the form the buyer must employ in fixing the additional period of time—

an approach that is consistent with article 11; where a reservation under article 96 is applicable, however, form requirements may have to be met. Where such a reservation does not apply, it is irrelevant whether the buyer's extension of time was communicated in writing or orally, or was done by implication.[16]

EFFECT OF FIXING AN ADDITIONAL PERIOD OF TIME (Article 47 (2))

8. The fixing of an additional period of time under article 47 (1) initially benefits the seller, who thereby gains an extension of time for performance. Article 47 (2) provides that the buyer may not avoid the contract or reduce the price (see article 50) while the additional period of time lasts, unless the seller has declared that it is not able or willing to perform within the additional period[17] or has made its performance dependant of conditions not stipulated in the contract.[18] If the seller performs during the additional period of time the buyer must accept the performance. The buyer nevertheless retains the right to claim damages for losses caused by the delay of performance. If the seller does not perform within the additional period, the buyer may resort to any available remedy, including avoidance.

Notes

[1]See the Digest for art. 49, para. 15.

[2]See *Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980* (United Nations publication, Sales No. E.81.IV.3), 39-40.

[3]Oberlandesgericht Hamburg, Germany, 4 July 1997, Unilex.

[4]See art. 49 (1) *(b)*.

[5]See, e.g., CLOUT case No. 7 [Amtsgericht Oldenburg in Holstein, Germany, 24 April 1990]; CLOUT case No. 82 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994]; CLOUT case No. 120 [Oberlandesgericht Köln, Germany, 22 February 1994].

[6]CLOUT case No. 136 [Oberlandesgericht Celle, Germany, 24 May 1995].

[7]CLOUT case No. 362 [Oberlandesgericht Naumburg, Germany, 27 April 1999] (see full text of the decision).

[8]CLOUT case No. 136 [Oberlandesgericht Celle, Germany, 24 May 1995] (see full text of the decision); Landgericht Ellwangen, Germany, 21 August 1995, Unilex; CLOUT case No. 362 [Oberlandesgericht Naumburg, Germany, 27 April 1999] (see full text of the decision).

[9]Landgericht Ellwangen, Germany, 21 August 1995, Unilex; CLOUT case No. 362 [Oberlandesgericht Naumburg, Germany, 27 April 1999] (see full text of the decision).

[10]See *Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980* (United Nations publication, Sales No. E.81.IV.3), 39, paras. 6–7.

[11]Id., para. 7.

[12]CLOUT case No. 275 [Oberlandesgericht Düsseldorf, Germany, 24 April 1997].

[13]CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997] (see full text of the decision).

[14]CLOUT case No. 225 [Cour d'appel, Versailles, France, 29 January 1998].

[15]CLOUT case No. 246 [Audiencia Provincial de Barcelona, Spain, 3 November 1997].

[16]See the decisions cited in the preceding paragraph.

[17]See CLOUT case No. 293 [Arbitration Schiedsgericht der Hamburger freundschatlichen Arbitrage, 29 December 1998].

[18]Id.

Article 48

(1) Subject to article 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. However, the buyer retains any right to claim damages as provided for in this Convention.

(2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.

(3) A notice by the seller that he will perform within a specified period of time is assumed to include a request, under the preceding paragraph, that the buyer make known his decision.

(4) A request or notice by the seller under paragraph (2) or (3) of this article is not effective unless received by the buyer.

INTRODUCTION

1. Article 48 (1) gives the seller the so-called right to "cure," which allows the seller to correct any failure to perform its obligations under the contract or under the Convention, and to do so even after the date for performance required under the contract, provided that the exercise of that right does not cause the buyer unreasonable inconvenience. If the seller has made an early non-conforming delivery, article 37, in comparison, permits the seller to cure up to the required date for delivery.

THE RIGHT TO REMEDY A FAILURE OF PERFORMANCE (ARTICLE 48 (1))

2. Article 48 (1) permits the seller to cure any failure of performance of any contractual obligation. This right to cure, however, is "subject to article 49", the provision governing the buyer's general right to avoid the contract. Avoidance of the contract, therefore, excludes the seller's right to cure. Generally, it is for the buyer to decide whether or not the contract should be avoided. The buyer may exercise a right to avoid without restriction from the seller's right to cure.[1] This approach is supported by article 48 (2) according to which the seller may ask whether the buyer will accept a cure.[2] Therefore the buyer who is entitled to avoid the contract need not wait to see if the seller will cure, but may declare the contract avoided as soon as it suffers a fundamental breach[3] (but see the notice procedure discussed in paragraphs 7-9, *infra*). There are courts, however, that have adopted the view that the buyer must first allow the seller to cure any breach (even a fundamental one) before avoiding, and who deny that there is a fundamental breach where the buyer has not given the seller the opportunity to remedy the failure of performance.[4] It should be noted, however, that a breach is rarely fundamental when the failure of performance could easily be remedied.[5] This rule, however, should not be misunderstood to mean that in each case the seller must be offered an opportunity to cure before the buyer can avoid the contract.[6]

3. The right to cure is only granted in certain circumstances—specifically, where the seller's failure to perform can be remedied without unreasonable delay, without unreasonable inconvenience to the buyer, and without uncertainty that the seller will compensate any costs the buyer may have advanced. It has been held that these conditions are satisfied if, e.g., defective motors can easily be cured in a short time and at minimal costs.[7]

4. It has been concluded, based on articles 46 and 48, that the seller is responsible for costs that the buyer incurs in connection with the seller's cure of defects in delivered goods.[8]

5. The willingness of the seller to cure a failure of performance has been taken into account as a factor in determining whether a lack of quality amounts to a fundamental breach of contract.[9]

RIGHT TO CLAIM DAMAGES

6. Even if the seller cures a failure of performance, the last sentence of article 48 (1) provides that the buyer retains the right to claim damages for losses suffered despite the cure. Therefore it has been held that a buyer was entitled to 10 per cent of the overall value of the sale as estimated damages when delivery was delayed and the buyer had to arrange for transportation of the goods.[10]

REQUEST TO REMEDY A FAILURE OF PERFORMANCE (ARTICLE 48 (2)-(4))

7. Under article 48 (2), the seller may give the buyer notice of its willingness to cure a failure of performance within a particular time, and may request that the buyer "make known whether he will accept" the cure. According to article 48 (3), a notice indicating the seller's willingness to cure is deemed to include such a request. If the buyer does not respond to such a request within a reasonable time (or, presumably, consents to the request),[11] the seller may cure within the time indicated and, pursuant to article 48 (2), the buyer may not during that period, resort to remedies inconsistent with the seller's curing performance.

8. A request for the buyer's response to a proposed cure by the seller under article 48 (2) or (3) must specify the time within which the seller will perform. Without such a time frame for the proposed cure, the request does not have the effect specified in article 48 (2).[12]

9. As an exception to the dispatch principle in article 27, under article 48 (4) the buyer must receive a request for the buyer's response to a proposed cure (or a notice of intent to cure deemed to include such a request under article 48 (3)), or the request or notice will not have the effect specified in article 48 (2). Article 27, however, applies to the buyer's reply, which is therefore effective whether or not received, provided it is dispatched by appropriate means.[13]

Notes

[1]See, e.g., CLOUT, case No. 90 [Pretura circondariale de Parma, Italy, 24 November 1989] (see full text of the decision); CLOUT case No. 2 [Oberlandesgericht Frankfurt a.M., Germany, 17 September 1991] (see full text of the decision); CLOUT case No. 165 [Oberlandesgericht Oldenburg, Germany, 1 February 1995]; CLOUT case No. 235 [Bundesgerichtshof, Germany, 25 June 1997]; CLOUT case No. 304 [Arbitration—International Chamber of Commerce No. 7531 1994].

[2]See CLOUT case No. 304 [Arbitration—International Chamber of Commerce No. 7531 1994] (see full text of the decision).

[3]See *Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March–11 April 1980* (United Nations publication, Sales No. E.81.IV.3), 41:

"5. If there has been a fundamental breach of contract, the buyer has an immediate right to declare the contract avoided. He need not give the seller any prior notice of his intention to declare the contract avoided or any opportunity to remedy the breach under [then] article 44 6. However, in some cases the fact that the seller is able and willing to remedy the non-conformity of the goods without inconvenience to the buyer may mean that there would be no fundamental breach unless the seller failed to remedy the non-conformity within an appropriate period of time."

[4]See, e.g., CLOUT case No. 339 [Landgericht Regensburg, Germany, 24 September 1998].

[5]See for example ICC Court of Arbitration, France, award No. 7754, *ICC International Court of Arbitration Bulletin* 2000, 46.

[6]See *Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March–11 April 1980* (United Nations publication, Sales No. E.81.IV.3), 41, para. 6 ("in some cases").

[7]ICC Court of Arbitration, France, award No. 7754, *ICC International Court of Arbitration Bulletin* 2000, 46.

[8]CLOUT case No. 125 [Oberlandesgericht Hamm, Germany, 9 June 1995] (costs for replacing defective windows).

[9]CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997].

[10]CLOUT case No. 151 [Cour d'appel, Grenoble, France, 26 February 1995] (sale of a dismantled second-hand hangar of which certain parts were defective and had to be repaired twice).

[11]See also Amtsgericht Nordhorn, Germany, 14 June 1994, Unilex.

[12]See *Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March–11 April 1980* (United Nations publication, Sales No. E.81.IV.3), 41, para. 14.

[13]Id., para. 16.

Article 49

(1) The buyer may declare the contract avoided:

(a) If the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or

(*b*) In case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed.

(2) However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so:

(*a*) In respect of late delivery, within a reasonable time after he has become aware that delivery has been made;

(*b*) In respect of any breach other than late delivery, within a reasonable time:

(i) After he knew or ought to have known of the breach;

(ii) After the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or

(iii) After the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of article 48, or after the buyer has declared that he will not accept performance.

OVERVIEW

1. Article 49 specifies the conditions under which the buyer is entitled to declare the contract avoided. Avoidance under article 49 is available in two situations: 1) if the seller's failure to perform its contractual obligations amounts to a fundamental breach of contradct as defined in article 25 (article 49 (1) *(a)*); or 2) if the seller fails to deliver the goods within an additional period of time fixed in accordance with article 47 (article 49 (1) *(b)*).

2. Avoidance of the contract is a remedy of last resort (ultima ratio) that is available when the buyer can no longer be expected to continue the contract.[1] A contract is avoided only when the buyer provides notice of avoidance (article 26). In cases of non-delivery, the buyer is entitled to avoid the contract at any time after all prerequisites for avoidance have been met. If the seller has delivered the goods, however, the buyer loses the right to avoid the contract if the buyer does not exercise it within the reasonable time periods specified in article 49 (2).

AVOIDANCE IN GENERAL

3. The buyer must declare the contract avoided by means of a notice (article 26). No specific form is prescribed for that notice, although form requirements may be relevant if the reservation under articles 12 and 96 applies. The notice must clearly express that the buyer now treats the contract as at an end. A mere announcement of future termination, a statement urging delivery, or returning the goods without comment does not suffice.[2] Commencing a law suit claiming avoidance of contract has been treated as notice of avoidance.[3]

4. Where a buyer wishes to avoid because the seller has delivered goods that are non-conforming or subject to third party rights, not only must the seller's breach constitute a fundamental breach of contract but also the buyer must have given notice of the lack of conformity or of the third-party claim in accordance with articles 39 and 43 (1) (unless such notice was excused under articles 40 or 43 (2)). The buyer loses the right to avoid the contract if he fails to comply with the notice requirement.[4]

AVOIDANCE FOR FUNDAMENTAL BREACH (Article 49 (1) *(a)*)

5. Under article 49 (1) *(a)* any fundamental breach as defined in article 25 justifies the avoidance of the contract. Thus in order for the buyer to have proper grounds to avoid the contract under article 49 (1) *(a)*, the seller must have failed to perform an obligation (i.e., have breached), and the seller's non-performance must substantially deprive the buyer of what he was objectively entitled to expect under the contract. The consequences of the seller's non-performance must be determined in light of all of the circumstances of the case.

6. A fundamental breach requires, first, that the seller has violated a duty it was obliged to perform either under the contract, according to trade usages or practices established between the parties, or under the Convention. The seller's non-performance of an agreed-upon duty beyond the core duty of delivering conforming goods (see article 30) can suffice—for instance, the violation of duties under an exclusive sales contract.[5] Breach of an additionally-agreed duty entitles the buyer to avoid the contract if the breach is fundamental, i.e. if it deprives the buyer of the main benefit of the contract. In order to be "fundamental," the breach must frustrate or essentially deprive the buyer of its justified contract expectations; what expectations are justified depends on the specific contract and the risk allocation envisaged by the contract provisions, on usages and established practices between the parties (where they exist), and on the additional provisions of the Convention. For instance, buyers are not normally justified in expecting that delivered goods will comply with regulations and official standards in the buyer's country.[6] Unless otherwise agreed, it is generally the standards in the seller's country that determine whether goods are fit for their ordinary purpose (article 35 (2) *(a)*).[7] Therefore, e.g., the delivery of mussels with a cadmium level exceeding standards in the buyer's county was not regarded as a breach, let alone a fundamental breach, since the buyer could not reasonably have expected the seller to meet those standards (which were not shown to apply in the country of the seller) and since the consumption of the mussels in small amounts did not endanger a consumer's health.[8]

7. A fundamental breach occurs only if the party in breach could reasonably foresee the substantial deprivation of expectations resulting from the breach (article 25). Even if the seller did not in fact foresee that the breach would deprive the buyer of most or all of the benefit of the contract, the breach remains fundamental if a reasonable person in the same conditions would have foreseen such a result. Article 25 does not state the time as of which the foreseeability of the consequences of the breach should be determined. One decision has determined that the time of the conclusion of the contract is the relevant time.[9]

SPECIFIC INSTANCES OF FUNDAMENTAL BREACH

8. Guidelines have developed in case law that may help, to some extent, in determining whether or not a breach of contract qualifies as fundamental. It has been found on various occasions that final non-delivery by the seller constitutes a fundamental breach of contract unless the seller has a justifying reason to withhold its performance.[10] However, if only a minor part of the contract is left unperformed—e.g., one of several instalments is not supplied—the breach is not fundamental unless the performed part is, absent the missing performance, of no use to the buyer.[11] On the other hand, the serious, definitive and unjustified refusal of the seller to fulfil its contractual obligations amounts to a fundamental breach.[12] It has been also held that a complete and final failure to deliver the first instalment in an instalment sale gives the buyer reason to believe that further instalments will not be delivered, and that therefore a fundamental breach of contract was to be expected.[13]

9. As a rule, late performance does not by itself constitute a fundamental breach of contract.[14] Only when the time for performance is of essential importance—either because that is so stipulated between the parties[15] or because timely performance is critical in the circumstances (e.g., seasonal goods)[16]—will delay amount to a fundamental breach.

10. A fundamental breach has also been found where the length of a delay in performance approached, in its effect, non-performance—for instance where the agreed delivery date was one week and the seller had delivered only one third of the goods after two months.[17] Even if a delay in delivery is not shown to be a fundamental breach, article 47 of the Convention allows the buyer to fix an additional reasonable period of time for delivery beyond the contractual due date, and if the seller fails to deliver by the end of the additional period the buyer may declare the contract avoided under article 49 (1) *(b)*.[18] A seller's failure to deliver within an additional period set pursuant to article 47, therefore, is the equivalent of a fundamental breach of contract.

11. The most challenging issues in determining whether a breach is fundamental arise with respect to the delivery of defective goods. Court decisions on this point have concluded that a non-conformity relating to quality remains a mere non-fundamental breach of contract as long as the buyer, without unreasonable inconvenience, can use the goods or resell them, even if the resale requires a rebate.[19] Thus, e.g., the delivery of frozen meat with an excessive fat and water content—and which, therefore, was worth 25.5 per cent less than meat of the contracted-for quality, according to expert opinion—was not regarded as a fundamental breach of contract since the buyer could resell the meat at a lower price or could otherwise make use of it.[20] On the other hand, if the non-conforming goods cannot be used or resold using reasonable efforts, the delivery constitutes a fundamental breach and entitles the buyer to declare the contract avoided.[21] The buyer was also permitted to avoid the contract where the goods suffered from a serious defect that could not be repaired, even though they were still useable to some extent (e.g. flowers which should bloom the whole summer but did so only for part of the season).[22] A fundamental breach has also been found, without reference to whether resale or alternative use was possible for the buyer, when the goods had major defects and the buyer required the goods for manufacturing its own products.[23] The same result was reached where the non-conformity resulted from the seller adding substances to the goods, the addition of which was illegal in the country of both the seller and the buyer.[24] The rules governing the delivery of non-conforming goods apply equally if the seller delivers the wrong goods (i.e., an *aliud*).[25]

12. Special problems arise when the goods are defective, even seriously defective, but repairable. Some courts have held that a lack of conformity that can easily be repaired does not constitute a fundamental breach.[26] If the seller offers and effects speedy repair or replacement without inconvenience to the buyer, several decisions have denied a fundamental breach.[27] This is consistent with the seller's right to cure under article 48 of the Convention. If repair

is delayed or causes the buyer unreasonable inconvenience, however, a breach that would otherwise qualify as fundamental remains fundamental. Furthermore, a fundamental brach cannot be denied merely because the buyer did not first request the seller to cure the defective performance.[28]

13. Defects in documents relating to the goods constitute a fundamental breach if they fundamentally impair the buyer's ability to resell or otherwise deal in the goods.[29] If the buyer itself can easily cure the defects in the document, e.g. by requesting new documents, however, the breach will not be considered fundamental.[30]

14. Violation of contractual obligations other than the aforementioned ones can also amount to a fundamental breach. Such a breach is fundamental if it deprives the buyer of the main benefit of the contract and that result could reasonably have been foreseen by the seller. Thus a court has held that the delivery of false certificates of origin did not constitute a fundamental breach if the goods were nevertheless merchantable and if the buyer itself could easily get the correct certificates.[31] Likewise, the unjustified denial of contract rights of the other party—e.g. denying the validity of a retention of title clause and of the seller's right to possession of the goods,[32] or the unjustified denial of a valid contract after having taken possession of the goods[33]—can amount to a fundamental breach of contract. Avoidance has also been permitted when resale restrictions were violated in a substantial fashion.[34]

AVOIDANCE FOR NON-DELIVERY DURING ADDITIONAL PERIOD OF TIME (Article 49 (1) *(b)*)

15. Article 49 (1) *(b)* states a second ground for avoidance of contract, applicable only in cases of non-delivery: the buyer can avoid if the seller does not deliver within the additional period of time for delivery that the buyer has fixed under article 47 (1). The buyer can also avoid the contract if the seller declares that it will not deliver within the additional period so fixed.

PERIOD OF TIME FOR DECLARATION OF AVOIDANCE WHEN GOOS HAVE BEEN DELIVERED (ARTICLE 49 (2))

16. Generally the buyer is not required to declare the contract avoided within a certain period of time; he can do so at any time if a ground for avoidance exists.[35] This principle is, however, subject to a limitation under article 49 (2) if the goods have been delivered. In such a case, the buyer must declare avoidance within a reasonable time. The moment as of which the reasonable time begins to run differs depending on whether the breach involves late delivery or a different kind of breach. In case of late delivery the period starts when the buyer becomes aware that delivery was made (article 49 (2) *(a)*). In case of other breaches the reasonable period of time for declaring the contract avoided starts running when the buyer becomes aware or ought to have been aware of the breach;[36] if, however, the buyer has fixed an additional period for delivery in accordance with article 47 (1), or if the seller has set a period for cure in accordance with article 48 (2), the buyer's reasonable time for avoidance begins to run from the expiration of the fixed period. Five months after the buyer was informed of the breach has been found not to constitute a reasonable period for declaring avoidance under article 49 (2) *(b)*;[37] an avoidance declaration made eight weeks after the buyer became aware of the breach has been held too late;[38] and avoidance eight months after the latest time that the buyer knew or ought to have known of the seller's alleged breach has been deemed untimely.[39] On the other hand, five weeks has been regarded as a reasonable period of time to declare the contract avoided under article 49 (2) *(b)*.[40] A declaration of avoidance made after several extensions of time for performance had been granted was found to be timely,[41] as was a declaration given within 48 hours after late delivery of an isntallment.[42] A declaration of avoidance made three weeks after notice of lack of conformity under article 39, furthermore, was considered timely.[43]

BURDEN OF PROOF

17. It has been observed that, to justify avoidance of contract, the burden is on the buyer to prove that the seller's breach of contract was fundamental and substantially deprived the buyer of what he was entitled to expect under the contract.[44]

Notes

[1]See, e.g., CLOUT case No. 171 [Bundesgerichtshof, Germany, 3 April 1996] (see full text of the decision); CLOUT case No. 428 [Oberster Gerichtshof, Austria, 7 September 2000], *Internationales Handelsrecht* 2001, 42; see also Tribunale di Busto Arsizio, Italy, 13 December 2001, published in *Rivista di Diritto Internazionale Privato e Processuale*, 2003, 150-155, also available on Unilex.

[2]CLOUT case No. 6 [Landgericht Frankfurt a.M., Germany, 16 September 1991]; CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997].

[3]See CLOUT case No. 481 [Court d' Appel Paris, France, 14 June 2001].

[4]See, e.g., CLOUT case No. 196 [Handelsgericht des Kantons Zürich, Switzerland, 26 April 1995]. A buyer who has "a reasonable excuse" for failing to give the notice required by articles 39 (1) or 43 (1) retains certain remedies, but not the right to avoid the contract. See the Digest for art. 44, para. 1.

[5]See, e.g., CLOUT case No. 2 [Oberlandesgericht Frankfurt a.M., Germany, 17 September 1991]; CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997]; CLOUT case No. 217 [Handelsgericht des Kantons Aargau, Switzerland, 26 September 1997]; CLOUT case No. 154 [Cour d'appel, Grenoble, France, 22 February 1995] (failure to disclose destination of goods sold).

[6]CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995]. See also CLOUT case No. 418 [Federal District Court, Eastern District of Louisiana, United States, 17 May 1999] (citing CLOUT case No. 123); CLOUT case No. 426 [Oberster Gerichtshof, Austria, 13 April 2000], also in *Internationales Handelsrecht* 2001, 117.

[7]See the decisions cited in footnote 5.

[8]CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995].

[9]CLOUT case No. 275 [Oberlandesgericht Düsseldorf, Germany, 24 April 1997].

[10]CLOUT case No. 90 [Pretura circondariale de Parma, Italy, 24 November 1989] (partial and very delayed delivery); CLOUT case No. 136 [Oberlandesgericht Celle, Germany, 24 May 1995].

[11]CLOUT case No. 275 [Oberlandesgericht Düsseldorf Germany, 24 April, 1997].

[12]See CLOUT case No. 136 [Oberlandesgericht Celle, Germany, 24 May 1995] (see full text of the decision) (seller gave notice that he had sold the goods to another buyer). Cf. Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russia, award in case No. 387/1995 of 4 April 1997, Unilex (buyer's final refusal to pay the price).

[13]CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997].

[14]Landgericht Oldenburg, Germany, 23 March 1996, Unilex (one day delay in dispatch of seasonal goods not a fundamental breach); Corte di Appello di Milano, Italy, 20 March 1998, Unilex (late delivery); CLOUT case No. 275 [Oberlandesgericht Düsseldorf, Germany, 24 April 1997] (late delivery).

[15]CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997] (on the facts of the particular case late delivery under a CIF sale was found to be a fundamental breach of contract).

[16]Corte di Appello di Milano, Italy, 20 March 1998, Unilex (buyer ordered seasonal knitted goods and pointed out the essential importance of delivery at the contract date, although it did so only after conclusion of the contract); ICC Court of Arbitration, France, award No. 8786, *ICC International Court of Arbitration Bulletin* 2000, 70.

[17]CLOUT case No. 90 [Pretura circondariale di Parma, Italy, 24 November 1989].

[18]See, e.g., CLOUT case No. 82 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994]; para. 15 *infra*.

[19]CLOUT case No. 171 [Bundesgerichtshof, Germany, 3 April 1996]; CLOUT case No. 248 [Schweizerisches Bundesgericht, Switzerland, 28 October 1998].

[20]CLOUT case No. 248 [Schweizerisches Bundesgericht, Switzerland, 28 October 1998].

[21]CLOUT case No. 150 [Cour de Cassation, France, 23 January 1996] (artificially sugared wine); CLOUT case No. 79 [Oberlandesgericht Frankfurt a.M., Germany, 18 January 1994] (shoes with cuts or cracks in the leather); Landgericht Landshut, Germany, 5 April 1995, Unilex (T-shirts which shrink by two sizes after the first washing).

[22]CLOUT case No. 107 [Oberlandesgericht Innsbruck, Austria, 1 July 1994]; see also Tribunale di Busto Arsizio, Italy, 13 December 2001, published in *Rivista di Diritto Internazionale Privato e Processuale*, 2003, 150–155, also available on Unilex (declaration of avoidance before waiting for result of seller's attempt to cure would be contrary to good faith).

[23]See CLOUT case No. 138 [Federal Court of Appeals for the Second Circuit, United States, 6 December 1993, 3 March 1995] (compressors with lower cooling capacity and higher power consumption than those contracted for, where buyer needed the compressors for manufacturing its air conditioners); CLOUT case No. 150 [Cour de Cassation, France, 23 January 1996] (artificially sugared wine); CLOUT case No. 315 [Cour de Cassation, France, 26 May 1999] (metal sheets unfit for the manufactureing processes of the buyer's customer); see also Tribunale di Busto Arsizio, Italy, 13 December 2001, published in *Rivista di Diritto Internazionale Privato e Processuale*, 2003, 150–155, also available on Unilex (delivery of a machine totally unfit for the particular purpose that was made known to the seller, and which was incapable of reaching the promised production level, represented a "serious and fundamental" breach of the contract, since the promised production level had been an essential condition for the conclusion of the contract; the breach therefore justified avoidance of the contract).

[24]CLOUT case No. 150 [Cour de Cassation, France, 23 January 1996] (artificially sugared wine, forbidden under EU-law and national laws); CLOUT case No. 170 [Landgericht Trier, Germany, 12 October 1995] (artificially sugared wine).

[25] CLOUT case No. 422 [Oberster Gerichtshof, Austria, 29 June 1999], Unilex. See CLOUT case No. 597 [Oberlandesgericht Celle, Germany, 10 March 2004] (see full text of the decision).

[26]CLOUT case No. 196 [Handelsgericht des Kantons Zürich, Switzerland, 26 April 1995].

[27]CLOUT case No. 152 [Cour d'appel, Grenoble, France, 26 April 1995]; CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997].

[28]See Digest, article 48.

[29]CLOUT case No. 171 [Bundesgerichtshof, Germany, 3 April 1996].

[30]Id.

[31]Id.

[32]CLOUT case No. 308 [Federal Court of Australia, 28 April 1995].

[33]CLOUT case No. 313 [Cour d'appel, Grenoble, France, 21 October 1999] (seller retained pattern samples) (see full text of the decision).

[34]CLOUT case No. 2 [Oberlandesgericht Frankfurt a.M., Germany, 17 September 1991]; CLOUT case No. 154 [Cour d'appel, Grenoble, France, 22 February 1995]; CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997]; CLOUT case No. 217 [Handelsgericht des Kantons Aargau, Switzerland, 26 September 1997].

[35]But see also CLOUT case No. 133 [Oberlandesgericht München, Germany, 8 February 1995], where the court denied the buyer's right to declare the contract avoided after 2½ years even thoiugh the goods had not been delivered. The court based its decision on the principle of good faith.

[36]One court grappled with the question of when the reasonable time under article 49 (2) began to run where the buyer had reeived delivery of allegedly-nonconfomring goods. It was unclear whether the lack of conformity arose during the seller's production of the goods as a result of transporting the goods (the buyer bore the risk of damage occurring during transportation), and the buyer arranged to have experts examine the goods to determine the source of the problem. The court suggested that the reasonable time might begin to run as soon as the buyer discovered the goods were defective, even before the experts had an opportunity to determine the cause: the court noted that only examination by a judicial expert would definitively establish the source of the nonconformity, and thus the period for declaring avoidance could not depend on the buyer being certain that the seller was responsible. The court did not rely solely on this view, however, as it noted that the buyer's avoidance was too late even if the reasonable time commenced when the last report by the experts was issued. See CLOUT case No. 481 [Court d' Appel Paris, France, 14 June 2001].

[37]CLOUT case No. 124 [Bundesgerichtshof, Germany, 15 February 1995]; see also CLOUT case No. 83 [Oberlandesgericht München, Germany, 2 March 1994] (four months).

[38]CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997].

[39]CLOUT case No. 481 [Court d' Appel Paris, France, 14 June 2001].

[40]CLOUT case No. 165 [Oberlandesgericht Oldenburg, Germany, 1 February 1995].

[41]CLOUT case No. 225 [Cour d'appel, Versailles, France, 29 January 1998].

[42]CLOUT case No. 246 [Audiencia Provincial de Barcelona, Spain, 3 November 1997] (delayed).

[43]CLOUT case No. 348 [Oberlandesgericht Hamburg, Germany, 26 November 1999] (see full text of the decision); see also Tribunale di Busto Arsizio, Italy, 13 December 2001, published in *Rivista di Diritto Internazionale Privato e Processuale*, 2003, 150–155, also available on Unilex (a "reasonable time" for art. 49 purposes differs from a "reasonable time" for art. 39 purposes both in starting point and duration; the time for notice of non-conformity under article 39 begins to run as soon as the lack of conformity is discovered (or ought to have been discovered), but avoidance can be declared only after it appears that the non-conformity amounts to a fundamental breach that cannot be otherwise remedied).

[44]CLOUT case No. 171 [Bundesgerichtshof, Germany, 3 April 1996] (see full text of the decision).

Article 50

If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 37 or article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price.

OVERVIEW

1. Article 50 provides for the remedy of price reduction when the seller has delivered goods that do not conform with the contract. In these circumstances, the buyer then may reduce the price in proportion to the reduced value of the goods. The remedy is, however, not available if the seller has cured the defects in the goods under articles 37 or 48, or if the buyer has refused the seller the opportunity for such cure.

PREREQUISITES FOR PRICE REDUCTION

2. Article 50 applies when goods that have been delivered do not conform with the contract.[1] Non-conformity is to be understood in the sense of article 35, i.e., defects as to quantity,[2] quality, description (*aliud*) and packaging. In addition, defects in documents relating to the goods can be treated as a case of non-conformity.[3] The remedy of price reduction is, however, not available if the breach of contract is based upon late delivery[4] or the violation of any obligation of the seller other than the obligation to deliver conforming goods.

3. Price reduction applies whether the non-conformity constitutes a fundamental or a simple breach of contract, whether or not the seller acted negligently, and whether or not the seller was exempted from liability under article 79. The remedy does not depend on whether the buyer has paid the price.[5]

4. Price reduction presupposes, however, that the buyer has given notice of the lack of conformity of the goods in accordance with article 39 (or 43).[6] Without due notice the buyer is not allowed to rely on the lack of conformity and loses all remedies.[7] Article 44 establishes an exception where the buyer can reasonably excuse its failure to give notice of defects, in which case the buyer retains the right to reduce the price under article 50 (or to claim damages other than damages for loss of profit).[8]

5. It has been observed that article 50 requires that the buyer express its intention to reduce the price.[9]

6. The second sentence of Article 50 states the more or less self-evident rule that the remedy of price reduction is not available if the seller has remedied any lack of conformity either under article 37 (cure in case of early delivery) or under article 48 (cure after date for delivery). The same result obtains if the buyer refuses to accept performance when the seller has offered cure in accordance with articles 37 or 48.[10]

7. As provided in article 45 (2), an aggrieved buyer can combine different remedies; consequently, the buyer can claim price reduction along with a damages claim. However, where damages are claimed in combination with price reduction, damages can only be awarded for loss other than the reduced value of the goods, since this loss is already reflected in the price reduction.[11]

CALCULATION OF PRICE REDUCTION

8. The amount of price reduction must be calculated as a proportion: the contract price is reduced in the same proportion as the value that the non-conforming delivered goods bears to the value that conforming goods would have. The relevant value is determined as of the date of actual delivery at the place of delivery.[12]

PLACE OF PERFORMANCE

9. The place of performance of the remedy of price reduction is where the goods were delivered.[13]

Notes

[1][Federal] Southern District Court of New York, 6 April 1994, Unilex; CLOUT case No. 377 [Landgericht Flensburg, Germany, 24 March 1999] (see full text of the decision).

[2]Including the weight of the goods; see [Federal] Southern District Court of New York, 6 April 1994, Unilex.

[3]Article 48, to which article 50 refers, covers the cure of non-conforming documents; see Digest of art. 48, para. 2.

[4]Landgericht Düsseldorf, Germany, 5 March 1996, Unilex.

[5]See *Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980* (United Nations publication, Sales No. E.81.IV.3), 42, para. 5.

[6]CLOUT case No. 56 [Canton of Ticino Pretore di Locarno Campagna, Switzerland, 27 April 1992].

[7]CLOUT case No. 48 [Oberlandesgericht Düsseldorf, Germany, 8 January 1993]; CLOUT case No. 273 [Oberlandesgericht München, Germany, 9 July 1997]; CLOUT case No. 303 [Arbitration International Chamber of Commerce No. 7331 1994]; CLOUT case No. 343 [Landgericht Darmstadt, Germany, 9 May 2000] (see full text of the decision).

[8]In this respect, see, e.g., CLOUT case No. 303 [Arbitration International Chamber of Commerce No. 7331 1994]; CLOUT case No. 273 [Oberlandesgericht München, Germany, 9 July 1997].

[9]CLOUT case No. 83 [Oberlandesgericht München, Germany, 2 March 1994].

[10]CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997].

[11]CLOUT case No. 248 [Schweizerisches Bundesgericht, Switzerland, 28 October 1998] (see full text of the decision).

[12]CLOUT case No. 56 [Canton of Ticino Pretore di Locarno Campagna, Switzerland, 27 April 1992]; CLOUT case No. 175 [Oberlandesgericht Graz, Austria, 9 November 1995] (see full text of the decision).

[13]CLOUT case No. 295 [Oberlandesgericht Hamm, Germany, 5 November 1997].

Article 51

(1) If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, articles 46 to 50 apply in respect of the part which is missing or which does not conform.

(2) The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract.

OVERVIEW

1. Article 51 deals with partial non-delivery and delivery of partially non-conforming goods. The general rule is that the buyer's remedies can be applied to that part of the contract that was not performed. The rest of the contract can remain unimpaired. In particular the entire contract cannot be declared avoided unless the partial non-performance amounts to a fundamental breach of the entire contract.[1]

PREREQUISITES

2. Article 51 presupposes that the seller has breached the contract either by delivering fewer goods than contracted for or by delivering goods that, in part, do not conform with the contract under article 35.[2] the application of article 51 requires that the delivered goods consist of separable parts, e.g., some tons of cucumber,[3] a shipment of tiles,[4] textiles,[5] quantities of stainless steel wire,[6] scaffold fittings[7] or even a complete automatic assembly line for batteries for which the contracted spare parts were missing.[8] In case of a defective piece of machinery, article 51 has been found to apply when the piece forms an independent part of the contracted-for goods.[9]

3. The availability of remedies pursuant to article 51 presupposes that the buyer has given notice of the lack of conformity as required by article 39.[10] This notice requirement applies in cases where the seller has delivered only a part of the goods.[11]

REMEDIES FOR PARTIAL NON-PERFORMANCE

4. With regard to a non-conforming part of delivered goods, article 50 provides that the buyer is entitled to any of the remedies referred to in articles 46-50. The requirements for these provisions to apply must, however, be satisfied in each case. Thus if the buyer wants to declare avoidance with regard to a part of delivered goods that do not conform with the contract then the lack of quality must constitute a fundamental breach—i.e., the non-conforming goods must be of no reasonable use to the buyer.[12] On the other hand, the fixing of an additional period of time for the delivery of conforming goods cannot help establish a right of avoidance because article 49 (1) *(b)* applies only in case of non-delivery, but not in case of delivery of defective goods.[13] Partial delay in delivery does not generally constitute a fundamental partial breach of contract, and therefore does not entitle the buyer to avoid the part of the cotract relating to the delayed portion. The buyer may, however, fix an additional period of time for delivery of the missing part, and may declare the contract partially avoided when delivery is not effected during the period so fixed (article 49 (1) *(b)*). Partial non-delivery by the contractual delivery date amounts to a fundamental breach with regard to the missing part only if the buyer has a special interest in delivery exactly on time, and if the seller could foresee that the buyer would prefer non-delivery instead of late delivery.[14]

5. Article 51 (1) refers only to the remedies provided for in articles 46-50. This does not mean that the remedy of damages, wich is authorized in article 45 (1) *(b)*, is excluded. On the contrary, this remedy remains unimpaired and can be exercised in addition to or instead of the remedies referred to in article 51 (1). Even if the buyer has lost its right to declare a part of the contract avoided because of lapse of time, it may still claim damages under article 74.[15]

AVOIDANCE OF THE ENTIRE CONTRACT (Article 51 (2))

6. As provided in article 51 (2), in case of partial non-dlievery or partial non-conforming delivery the buyer can avoid the entire contract only if the seller's breach constitutes a fundamental breach of the entire contract. Thus to juistify avoidance of the whole contract the partial breach must deprive the buyer of the main benefit of the whole contract (article 25). Such an effect from a partial breach, however, is the exception rather than the rule.[16]

Notes

[1]CLOUT case No. 302 [Arbitration—International Chamber of Commerce No. 7660 1994] (see full text of the decision).

[2]Article 35, however, also covers delivery of a smaller quantity of goods than that contracted for.

[3]CLOUT case No. 48 [Oberlandesgericht Düsseldorf, Germany, 8 January 1993].

[4]CLOUT case No. 50 [Landgericht Baden-Baden, Germany, 14 August 1991].

[5]CLOUT case No. 82 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994].

[6]CLOUT case No. 235 [Bundesgerichtshof, Germany, 25 June 1997].

[7]CLOUT case No. 304 [Arbitration—International Chamber of Commerce No. 7531 1994].

[8]CLOUT case No. 302 [Arbitration—International Chamber of Commerce No. 7660 1994].

[9]Id.

[10]CLOUT case No. 48 [Oberlandesgericht Düsseldorf, Germany, 8 January 1993]; CLOUT case No. 50 [Landgericht Baden-Baden, Germany, 14 August 1991].

[11]CLOUT case No. 48 [Oberlandesgericht Düsseldorf, Germany, 8 January 1993].

[12]See CLOUT case No. 235 [Bundesgerichtshof, Germany, 25 June 1997] (parts of delivered steel wire were sub-standard and therefore not useable for the buyer's purposes) (see full text of the decision); for details compare the Digest for article 49, footnotes 16, 17.

[13]See the Digest for article 49, footnote 21.

[14]CLOUT case No. 275 [Oberlandesgericht Düsseldorf, Germany, 24 April 1997].

[15]CLOUT case No. 82 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994]; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russian Federation, award in case No. 251/1993 of 23 November 1994, Unilex.

[16]CLOUT case No. 302 [Arbitration—International Chamber of Commerce No. 7660 1994].

Article 52

(1) If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery.

(2) If the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity. If the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate.

INTRODUCTION

1. Even where the seller does more than is required by the contract there is an issue of non-performance. Article 52 addresses two such situations—namely, if the seller delivers goods too early (article 52 (1)) or delivers too many goods (article 52 (2)). In both cases article 52 provides that the buyer is entitled to refuse delivery of the goods. If the buyer accepts a greater quantity of goods than that provided for in the contract, article 52 (2) provides that the buyer is bound to pay the contract price for the excess quantity.

EARLY DELIVERY (ARTICLE 52 (1))

2. If the seller delivers the goods before the time for delivery stipulated in the contract the buyer may refuse the tender. Early delivery occurs if the contract stipulates a certain date or period at or during which delivery must be effected (e.g., "delivery during the 36th week of the year") and delivery is made prior to that date. Under a term such as "delivery until 1 September", any delivery before that date would be in accordance with the contract.[1] If the buyer has rightfully refused the goods because of early delivery, the seller must redeliver the goods at the correct time.[2] Pursuant to article 86, if the buyer intends to reject goods delivered early he may be responsible for the goods in the interim.[3]

3. If, however, the buyer takes over goods that are delivered early, the buyer is obliged to pay the contract price.[4] Any remaining damage (additional storage costs and the like) may be recovered according to article 45 (1) *(b)*, unless the acceptance of the early tendered goods amounts to an agreement to modify the delivery date.[5]

4. The rules regarding early delivery also apply if documents relating to the goods are tendered prematurely.

DELIVERY OF EXCESS QUANTITY (ARTICLE 52 (2))

5. If the seller delivers a greater quantity of goods than stipulated, the buyer is entitled to reject the excess. According to case law, there is not a delivery of excess goods where the contract allows for delivery "+/-10 per cent" and delivery remains within those limits.[6] If the buyer does not wish to take and pay the contract price for excess goods he must give notice of the incorrect quantity because it constitutes a non-conformity to which the notice requirement of article 39 applies. After a rightful refusal to take the excess quantity, the buyer must preserve the excess goods pursuant to article 86. If the buyer takes all or part of the excess quantity, however, it is obliged to pay at the contract rate for the excess part.[7] If the buyer cannot separately reject the excess quantity, the buyer can avoid the entire contract if the delivery of the excess quantity amounts to a fundamental breach of contract;[8] if the buyer cannot avoid and thus must take delivery of the excess, the buyer must pay for it but (provided the notice requirement of article 39 is satisfied) can claim compensation for any damages he suffers from the breach.[9]

Notes

[1]See the Digest for article 33, para. 6.

[2]See *Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March–11 April 1980* (United Nations publication, Sales No. E.81.IV.3), 44, para. 5.

[3]Id., para. 4.

[4]CLOUT case No. 141 [Arbitration-Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, award in case No. 200/1994 of 25 April 1995] (dispatch, in mid-December, of chocolates for Christmas, before buyer transmitted bank guarantee which was supposed to establish the delivery date; buyer obliged to pay full price).

[5]See *Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980* (United Nations publication, Sales No. E.81.IV.3), 44, para. 6.

[6]CLOUT case No. 341 [Ontario Superior Court of Justice, Canada, 31 August 1999].

[7]Id. (see full text of the decision).

[8]See *Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March–11 April 1980* (United Nations publication, Sales No. E.81.IV.3), 44, para. 9.

[9]Id.

Part III, Chapter III

Obligations of the buyer (articles 53-65)

OVERVIEW

1. Chapter III of Part III of the Convention contains provisions addressing the buyer's obligations under an international sales contract governed by the CISG. Both the structure and the focus of the chapter parallel Chapter II ("Obligations of the seller", articles 30-52) of Part III. Thus Chapter III open with a single provision describing in general terms the fundamental duties of the buyer (article 53). This is followed by three sections that collect provisions addressing those duties in greater detail: Section I, "Payment of the price" (articles 54-59), Section II, "Taking delivery" (article 60), and Section III, "Remedies for breach of contract by the buyer" (articles 61-65).

Article 53

The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention.

INTRODUCTION

1. Article 53 states the principal obligations of the buyer, and serves as an introduction to the provisions of Chapter III. As the Convention does not define what constitutes a "sale of goods", article 53, in combination with article 30, also sheds light on this matter.[1] The principal obligations of the buyer are to pay the price for and take delivery of the goods "as required by the contract and this Convention". From this phrase, as well as from article 6 of the Convention, it follows that, where the contract provides for the performance to take place in a manner that differs from that set forth in the Convention, the parties' agreement prevails.

OTHER OBLIGATIONS OF THE BUYER

2. According to the Convention, the contract may impose on the buyer obligations other than paying the price and taking delivery,[2] such as an obligation to provide security for payment of the price, an obligation to supply materials needed for the manufacture or production of the goods (see article 3 (1)), or an obligation to submit specifications regarding the form, measurement or other features of the goods (article 65).

ILLUSTRATIONS FROM CASE LAW

3. Because it merely states the obligations of the buyer—which are treated more fully in subsequent provisions—article 53 has raised no particular difficulties for the courts. There have been numerous court decisions citing article 53 in connection with judgments requiring the buyer to pay the price.[3] Cases applying article 53 to other obligations of the buyer are less common.[4]

Notes

[1]Tribunale di Rimini, Italy, 26 November 2002, available on the Internet at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/021126i3.html; Kantonsgericht Schaffhausen, Switzerland, 25 February 2002, available on the Internet at

[2]http://www.cisg-online.ch/cisg/urteile/723.htm; Cour d'appel de Colmar, France, 12 June 2001, available on the Internet at http://witz.jura.uni sb.de/CISG/decisions/120601v.htm; Tribunal Cantonal de Vaud, Switzerland, 11 March 1996, available on the Internet at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/960311s1.html; CLOUT case No. 480 [Cour d'appel Colmar, France, 12 June 2001].

[3]See articles 61 (1) and 62.

[4]Landgericht Mönchengladbach, Germany, 15 July 2003, *Internationales Handelsrecht* 2003, 229; Landgericht Tübingen, Germany, 18 June 2003, *Internationales Handelsrecht* 2003, 236; CLOUT case No. 634 [Landgericht Berlin, Germany 21 March 2003]; Rechtbank van Koophandel Veurne, Belgium, 19 March 2003, available on the Internet at http://www.law.kuleuven.ac.be/int/tradelaw/WK/2003-03-19.htm; Hof van Beroep Gent, Belgium, 2 December 2002, available on the Internet at http://www.law.kuleuven.ac.be/int/tradelaw/WK/2002-12-02.htm; Tribunale di Rimini, Italy, 26 November 2002, available on the Internet at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/021126i3.html; Landgericht Saarbrücken, Germany, 25 November 2002, available on the Internet at http://www.cisg-online.ch/cisg/urteile/718.htm; Handelsgericht Aargau, Switzerland, 5 November 2002, available on the Internet at http://www.cisg-online.ch/cisg/urteile/715.htm; Oberlandesgericht Köln, Germany, 14 October 2002, available on the Internet at http://www.cisg-online.ch/cisg/urteile/709.htm; Oberlandesgericht Rostock, Germany, 25 September 2002, available on the Internet at http://www.cisg-online.ch/cisg/urteile/672.htm; Landgericht Göttingen, Germany, 20 September 2002, available on the Internet at http://www.cisg-online.ch/cisg/urteile/655.htm; Oberlandesgericht Schleswig, Germany, 22 August 2002,available on the Internet at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/020822g2.html; Cámara Nacional de Apelaciones en lo Comercial de Buenos Aires, Argentina, 21 July 2002, available on the Internet at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/020721a1.html; Landgericht Saarbrücken, Germany, 2 July 2002, available on the Internet at http://www.cisg-online.ch/cisg/urteile/713.htm; Amtsgericht Viechtach, Germany, 11 April 2002, available on the Internet at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/020411g1.html; Landgericht München, Germany, 27 February 2002, available on the Internet at http://www.cisg-online.ch/cisg/urteile/654.htm; Kantonsgericht Schaffhausen, Switzerland, 25 February 2002, available on the Internet at http://www.cisg-online.ch/cisg/urteile/723.htm; Landgericht München, Germany, 20 February 2002, available on the Internet at http://www.cisg-online.ch/cisg/urteile/712.htm; CLOUT case No. 432 [Landgericht Stendal, Germany, 12 October 2000], also in *Internationales Handelsrecht*, 2001, 30; CLOUT case No. 327 [Kantonsgericht des Kantons Zug, Switzerland, 25 February 1999]; CLOUT case No. 340 [Oberlandesgericht Oldenburg, Germany, 22 September 1998] (see full text of the decision); CLOUT case No. 318 [Oberlandesgericht Celle, Germany, 2 September 1998]; CLOUT case No. 288 [Oberlandesgericht München, Germany, 28 January 1998]; CLOUT case No. 236 [Bundesgerichtshof, Germany, 23 July 1997]; CLOUT case No. 273 [Oberlandesgericht München, Germany,

9 July 1997]; CLOUT case No. 275 [Oberlandesgericht Düsseldorf, Germany, 24 April 1997]; ICC Court of Arbitration, Case No. 8716, February 1997, available on the Internet at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/978716i1.html ; CLOUT case No. 163 [Arbitration—Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 10 December 1996] (see full text of the decision); CLOUT case No. 169 [Oberlandesgericht Düsseldorf, Germany, 11 July 1996]; Landgericht Duisburg, Germany, 17 April 1996, *Recht der internationalen Wirtschaft*, 1996, 774; CLOUT case No. 409 [Landgericht Kassel, Germany, 15 February 1996]; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 22 January 1996, available on the Internet at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/960122r1.html#cabc ; Amtsgericht Wangen, Germany, 8 March 1995, available on the Internet at http://www.cisg-online.ch/cisg/urteile/195.htm; CLOUT case No. 281 [Oberlandesgericht Koblenz, Germany 17 September 1993] (see full text of the decision); CLOUT case No. 104 [Arbitration—International Chamber of Commerce No. 7197 1993] (see full text of the decision); CLOUT case No. 26 [Arbitration—International Chamber of Commerce No. 7153/1992] (see full text of the decision); CLOUT case No. 46 [Landgericht Aachen, Germany, 3 April 1990] (see full text of the decision). See also CLOUT case No. 632 [[Federal] Bankruptcy Court, United States 10 April 2001] (holding that buyer's obligation to pay the price under CISG article 53 was a significant factor in determining whether title to goods had passed to the buyer. CLOUT case No. 133 [Oberlandesgericht München, Germany, 8 February 1995].

Section I of Part III, Chapter III

Payment of the price (articles 54-59)

OVERVIEW

1. Section I of Chapter III ("Obligations of the buyer") in Part III ("Sale of goods") of the Convention consists of six articles addressing one of the fundamental buyer obligations described in article 53 of the CISG: the obligation to pay the price. Although the amount of the price that the buyer must pay is usually specified in the contract, two articles in Section I contain rules governing the amount of the price in particular special circumstances: article 55 specifies a price when one is not fixed or provided for in the contract, and article 56 specifies the way to determine the price when it is "fixed according to the weight of the goods". The remaining four provisions in Section I relate to the manner of paying the price: they include rules on the buyer's obligation to take steps preparatory to and to comply with formalities required for paying the price (article 54); provisions on the place of payment (article 57) and the time for payment (article 58); and an article dispensing with the need for a formal demand for payment by the seller (article 59).

RELATION TO OTHER PARTS OF THE CONVENTION

2. In terms of general subject matter, the provisions of Section I of Chapter III parallel those in Section I ("Delivery of the goods and handing over of document", articles 31-34) of Chapter II ("Obligations of the seller"). Thus just as articles 31 and 33 of that earlier section address the place and time at which a seller should perform its delivery obligations, articles 57 and 58 of the current section govern the place and time at which the buyer should perform its payment obligations. Article 55 of the current section has a special relation to article 14 (1) (which addresses what constitutes an offer to enter into a contract for sale), as is discussed in the Digest for article 55.[1] In some decisions, furthermore, article 57 (place for payment) has been associated with the provisions governing avoidance of contract, in particular the rule of article 81 (2) providing for restitutionary obligations upon avoidance.[2] Some provisions in the current section have a special relation to matters beyond the scope of the Convention. Thus article 54, which give the buyer responsibility for taking preliminary steps necessary to effecting payment, interacts with non-Convention rules on letters of credit, security, bank guarantees, and bills of exchange.[3] Article 57, which governs the place at which the buyer should pay the price, has a special relationship to some jurisdictional rules.[4]

Notes

[1]See the Digest for art. 55, paras. 1, 3-4.

[2]See the Digest for art. 57, paras 6-8.

[3]See the Digest for art 54, para. 1.

[4]See the Digest for art. 57, paras. 4-5.

Article 54

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.

INTRODUCTION

1. This provision deals with actions preparatory to payment of the price which are specified in the contract or in applicable laws and regulations. For example, the contract may provide for the opening of a letter of credit, the establishment of security for or a bank guarantee of payment, or the acceptance of a bill of exchange. Preparatory actions required under applicable laws or regulations might include, for example, an administrative authorization needed to transfer funds.

2. Article 54 has two important effects. First, unless otherwise specified in the contract article 54 assigns responsibility for the tasks it references to the buyer, who must thus bear the costs thereof. Indeed, one court decision suggests that the costs associated with payment are generally the responsibility of the buyer.[1] Furthermore, the steps for which the buyer is responsible under article 54 are obligations, violation of which permits the seller to resort to the remedies specified in articles 61 *et seq*.; they are not considered merely "conduct in preparing to perform or in performing the contract" as described in article 71 (1)). Thus failure to perform those steps constitutes a breach, not merely a factor in a possible anticipatory breach of contract.[2]

SCOPE OF THE BUYER'S OBLIGATIONS

3. The question arises whether article 54 merely obliges the buyer to perform the steps necessary to satisfy the preconditions for payment, but does not make the buyer responsible for the result, or whether the buyer breaches his obligations if the necessary outcome is not attained. A number of decisions follow the principle that the buyer is in breach of an obligation to provide a letter of credit if he does not deliver the letter of credit opened on behalf of the seller, without inquiring into the efforts the buyer undertook.[3]

4. Questions arise under article 54 with regard to administrative measures that may be required under applicable laws or regulations in order to effect payment. Under one possible interpretation of article 54, a distinction should be drawn between measures of a commercial nature, as to which the buyer assumes a commitment to achieve the needed result, and administrative measures, with regard to which the buyer takes on only an obligation to employ best efforts. The rationale for the distinction is that the buyer cannot guarantee, for example, that administrative authorities will approve a transfer of funds, so that the buyer should only be obliged to carry out the steps needed to obtain the relevant administrative authorization. The argument against this distinction is that, under article 54, the buyer is responsible as a matter of law if a prerequisite to payment, whatever its nature, is not satisfied, subject to the possibility of exemption under article 79 of the Convention.

CURRENCY OF PAYMENT

5. Article 54 says nothing about the currency of payment. On this issue the intention of the parties is the primary consideration (article 6), along with commercial usages (article 9 (2)) and any practices the parties have established between themselves (article 9 (1)). In those cases where the currency of payment cannot be determined by reference to these considerations, the appropriate approach is unclear.

6. Most decisions refer to the currency of the seller's place of business or to the currency of the place where payment is to be made.[4] These decisions tend to rely on the general principles on which the Convention is based (article 7 (2)), and thus to define the currency of payment as the currency where the seller's place of business is located, since this is generally the place where the obligation to pay the price is discharged (article 57) and the place where delivery of the gods occurs (article 31 *(c)*). One court, however, has held that the currency of payment should be determined by the law applicable to matters beyond the scope of the Convention.[5]

Notes

[1]Landgericht Duisburg, Germany, 17 April 1996, *Recht der Internationalen Wirtschaft*, 1996, 774, concerning costs associated with payment of the price by cheque.

[2]CLOUT case No. 631 [Supreme Court of Queensland, Australia, 17 November 2000].

[3]Supreme Court of Queensland, Australia, 17 November 2000, available on the Internet at http://www.austlii.edu.au/au/cases/qld/QSC/2000/421.html; CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (the buyer, however, was not deemed in breach of its obligations because the seller failed to indicate the port of embarkation, and that fact was needed, under the contract, for establishing the letter of credit); CLOUT case No. 104 [Arbitration—International Chamber of Commerce No. 7197 1993]; Xiamen Intermediate People's Court, China, 31 December 1992, abstract available on the Internet at http://www.unilex.info/case.cfm?pid=1&do=case&id=212&step=Abstract. Similarly, it was decided in arbitration that a buyer who failed to effect payment for equipment delivered was liable if he merely gave instructions to his bank to make a transfer to the seller, but had not ensured that the payment would in fact be made in convertible currency: see CLOUT case No. 142 [Arbitration-Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, award No. 123/1992 of 17 October 1995].

[4]See CLOUT case No. 80 [Kammergericht Berlin, Germany, 24 January 1994], (see full text of the decision) (in case of doubt, the currency of payment is that of the place of payment); CLOUT case No. 281 [Oberlandesgericht Koblenz, Germany, 17 September 1993], (currency of the place where the seller has his place of business is the currency in which the price should be paid); CLOUT case No. 52 [Fovárosi Bíróság, Hungary, 24 March 1992], (court compelled the buyer to pay the seller in the seller's currency without stating a reason). See also the Digest for art. 57, para. 3.

[5]CLOUT case No. 255 [Tribunal Cantonal du Valais, Switzerland, 30 June 1998].

Article 55

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

INTRODUCTION

1. As is revealed by the Convention's *travaux préparatoires*, the interplay of articles 14 and 55 is one of the most difficult questions raised by the Convention.[1]

PRIORITY OF THE INTENTION OF THE PARTIES

2. Court and arbitral decisions consistently hold that, in determining the applicability of article 55 (as with other provisions of the Convention), one must refer first and foremost to the intention of the parties. Article 55 does not empower a judge or arbitrator to establish a price when the price has already been determined,[1] or made determinable, by the contracting parties.[2] Article 55 of the Convention is also inapplicable when the parties have made their contract subject to subsequent agreement on the price.[3]

SALVAGE OF A CONTRACT SPECIFYING NO PRICE

3. One court concluded that a proposal to sell aircraft engines did not meet the requirements of article 14 of the Convention because it did not include the price for all the types of aircraft engines among which the buyer could choose under the proposal, and that the contract allegedly resulting from the proposal was therefore invalid.[4] This decision suggests that article 55 does not rescue a contract that is invalid due to the absence of a price term, and that article 14 of the Convention thus prevails over article 55. Under this interpretation of article 55, the provision is applicable only if the contract of sale was validly concluded without a price, and under article 14 of the Convention a price provision may be required to make the contract valid.

4. On the other hand, one court invoked article 55 to determine the price of raw materials where the price had not been agreed upon beforehand by the parties.[5] Arbitrators, confronted with the difficulties presented by articles 14 and 55, have also given precedence to article 55 and indicated a willingness to establish a missing price with a view to rendering the contract effective.[6]

DETERMINING THE PRICE UNDER ARTICLE 55

5. Where article 55 applies, the parties are presumed to have intended "the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned". Implementing this provision should not be particularly difficult when the goods consist of raw materials or semi-finished products. The situation changes when the contract involves manufactured products. Thus the Supreme Court of a State concluded that the price of aircraft engines could not be determined under article 55 because there was no market price for the goods.[7] It has also been held that a current price for purposes of recovering damages under article 76 can be established using the methodology in article 55 for determining the price in a contract that does not expressly or implicitly fix or make provision for determining the price.[8]

Notes

[1]1980 Vienna Diplomatic Conference, Summary Records of Meeting of the First Committee, 8th meeting, Monday, 17 March 1980. See also the Digest for article 14, paras. 13-16.

[2]CLOUT case No. 343 [Landgericht Darmstadt, Germany, 9 May 2000]; CLOUT case No. 151 [Cour d'appel, Grenoble, France, 26 February 1995].

[3]ICC Court of Arbitration, award No. 8324, *Journal du droit international*, 1996, 1019; CLOUT case No. 106 [Oberster Gerichtshof, Austria, 10 November 1994].

[4]CLOUT case No. 139 [Arbitration-Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, award in case No. 309/1993 of 3 March 1995].

[5]CLOUT case No. 53 [Legfelsóbb Biróság, Hungary, 25 September 1992].

[6]CLOUT case No. 215 [Bezirksgericht St. Gallen, Switzerland, 3 July 1997]. See on this case, Digest, article 14, No. 16.

[7]See ICC Court of Arbitration, 1999, award No.9187, *Bulletin of the ICC International Court* of Arbitration, 2001, 60 ("Sale without prior fixing of a price is common in international trade, as is shown by the Vienna Convention of 11 April 1980 on the international sale of goods (art. 55) [. . .]").

[8]CLOUT case No. 53 [Legfelsóbb Biróság, Hungary, 25 September 1992].

[9]CLOUT case No. 595 [Oberlandesgericht München, Germany, 15 September 2004].

Article 56

If the price is fixed according to the weight of the goods, in case of doubt it is to be determined by the net weight.

OVERVIEW

1. Article 56 provides that, if the parties fix the price according to the weight of the goods, and it is unclear whether they intended to refer to gross weight or net eight, it is net weight—the weight remaining after subtracting the weight of the packaging—that governs the price. This is a rule of interpretation applied in the absence of contractual stipulations, usages or practices established between the parties on the matter

2. Court decisions referring to article 56 have been extremely rare.[1]

Notes

[1]See [Federal] Bankruptcy Court for the Northern District of Ohio, United States, 10 April 2001, *Victoria Alloys, Inc. v. Fortis Bank SA/NV*, 2001 Bankr. LEXIS 309.

Article 57

(1) If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller:

(*a*) At the seller's place of business; or

(*b*) If the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place.

(2) The seller must bear any increase in the expenses incidental to payment which is caused by a change in his place of business subsequent to the conclusion of the contract.

INTRODUCTION

1. Article 57 (1) defines the place where payment is to be made. Absent a different agreement between the parties, the price is to be paid at the seller's place of business (article 57 (1) *(a)*) or, if the parties agreed that the price would be payable against the handing over of the goods or of documents, at the place where such handing over takes place (article 57 (1) *(b)*). Several decisions have determined that the burden of proof of payment of the price rests on the buyer.[1]

2. After the conclusion of the contract, the seller might change its place of business, which under article 57 (1) *(a)* may be the place for payment. In that case, article 57 (2) provides that any increase in the expenses incidental to payment that is caused by the change is to be borne by the seller.

DETERMINATION OF THE PLACE OF PAYMENT OF THE PRICE

3. Article 57 (1) has attracted a large amount of comment in case law. The provision has been referred to, for example, in determining the currency of payment.[2]

4. Article 57 (1) plays an important role in the practice of countries whose legal systems provide for jurisdictional competence at the place of performance of obligations.[3] This is the case in Europe, for example. Article 5.1 of the 1968 Brussels Convention, which is binding for the countries of the European Union and relates to jurisdiction and the enforcement of judgements in civil and commercial matters, permits the plaintiff to sue the defendant "in matters relating to a contract, in the courts for the place of performance of the obligation in question". This same provision was incorporated in the Convention of Lugano of 16 September 1988, which is binding on the countries of the European Free Trade Association (EFTA). The combined effect of article 5.1 of the Brussels and Lugano Conventions and article 57 of the Sales Convention is that, with respect to an international sale of goods governed by the Convention, a seller can bring an action against a defaulting buyer in the court having jurisdiction at the seller's place of business. This approach is prevalent in countries of the European Union because the European Community Court of Justice eliminated doubts as to its validity by confirming that the place where the obligation to pay the price is to be performed "must be determined on the basis of the substantive law provisions governing the obligation at issue according to the rules of conflict of the jurisdiction in which the action was brought, even if those rules indicate that a unified substantive law, such as the 1964 Hague Convention relating to the Uniform Law on the International Sale of Goods, must apply to the contract".[4] Decisions applying article 57 of the CISG Convention in connection with the implementation of article 5.1 of the Brussels[5] and Lugano[6] Conventions have been numerous.

5. On 1 March 2002, in the countries of the European Union (with the exception of Denmark), Council Regulation No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[7] entered into force, replacing the Brussels Convention. For those European States article 57 of the United Nations Convention on Contracts for the International Sale of Goods will thus cease to play the role it has hitherto played in the determination of jurisdiction. In fact, the question of special competence in contractual matters is substantially revised by the new text. Although the prior basic rule is retained (article 5.1 *(a)*), the regulation specifies, substantively, the place of performance for two types of contracts—namely contracts for the sale of goods and contracts for the provision of services—unless otherwise agreed between the parties (article 5.1 *(b)*). For sales of goods, the place in question is "the place in a Member State where, under the contract, the goods were delivered or should have been delivered". The aim of the authors of this rule was to regroup such actions, whatever the obligations at issue might be, and to avoid making it too easy for the seller to sue the buyer before the courts of the seller's domicile or place of business. When the place of delivery is not in a Member State, article 5.1 *(b)*

does not apply, in which case the basic rule of article 5.1 *(a)* of the Council Regulation is applicable and article 57 of the CISG regains all its importance. Council Regulation No. 44/2001 of 22 December 2000 applies every time the defendant is domiciled (article 2) or has its statutory seat, its central administration, or its principle place of business (article 60) in a Member State, whatever its nationality. A similar rule exists in the 1968 Convention of Brussels (articles 2 and 53) and in the 1988 Convention of Lugano adopted by the member states of the EFTA (articles 2 and 53).

APPLICATION OF ARTICLE 57 (1) TO SUMS OF MONEY OTHER THAN THE PRICE

6. Case law is not uniform on the question whether the rule of article 57 (1), establishing payment of the price at the seller's place of business as a default principle, should also be applied to other monetary obligations arising out of a contract of sale governed by the CISG, such as the obligation of a party in breach to pay compensation, or a seller's obligation to return the sale price following avoidance of the contract.

7. Certain decisions on this question refer to the national law governing the contract. Thus the Supreme Court of one State held that article 57 of the Convention was not applicable to claims for restitution of the sale price following amicable avoidance of the contract, and stated that the place for bringing such claims should be determined by the law applicable to the avoided contract.[8] According to another decision, article 57 does not establish a general principle with regard to the place for restitution of the price following avoidance of a contract because the provision could be interpreted as embodying the principle of payment at the seller's domicile, or of payment at the creditor's domicile.[9] These decisions seem to be based on the idea that the solution lies in the applicable national law determined by choice-of-law rules.

8. Decisions that resolve the issue by discovering and applying a general principle of the Convention (see article 7 (2)) are more numerous. Thus in determining the place for payment of compensation for non-conforming goods a court has stated that "if the purchase price is payable at the place of business of the seller", as provided in article 57 (1) of the Convention, then "this indicates a general principle valid for other monetary claims as well".[10] Another court, in an action for restitution of excess payments received by the seller, stated that there was a general principle under which "payment is to be made at the creditor's domicile, a principle that is be extended to other international trade contracts under article 6.1.6 of the UNIDROIT Principles".[11] The Supreme Court of another State, which had previously adopted a different approach, decided that the gap in the Convention with respect to the performance of restitution obligations should be filled by reference to a general principle of the Convention according to which "the place for performance of restitution obligations should be determined by transposing the primary obligations—through a mirror effect—into restitution obligations".[12]

CHANGE IN THE SELLER'S PLACE OF BUSINESS

9. By providing that the seller must bear any increase in the expenses incidental to payment that is caused by a change in its place of business subsequent to the conclusion of the contract, article 57 (2) makes clear that the buyer must pay the price at the seller's new address. For this reason, the seller must inform the buyer of the change in a timely manner. Under article 80 of the Convention the seller has no right to rely on any delay in payment of the price that is caused by late notification of the change of address.

10. Does article 57 (2) remain applicable when the seller assigns the right to receive payment of the purchase price to another party? According to one decision, assignment of the right to receive the purchase price results in transferring the place of payment from the business premises of the assignor to those of the assignee.[13]

Notes

[1]CLOUT case No. 273 [Oberlandesgericht München, Germany, 9 July 1997]; see also Court of Tijuana, Mexico, 14 July 2000, *Internationales Handelsrecht*, 2001, 38 (decided on the basis of Mexican procedural law).

[2]See the Digest for art. 54, para. 6.

[3]It is rare for article 57 (1) to be applied except in connection with the question of jurisdiction. See, however, CLOUT case No. 605 [Oberster Gerichtshof, Austria, 22 October 2001], also available on the Internet at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/011022a3.html; the Digest for art. 54, para. 6.

[4]CLOUT case No. 298 [European Court of Justice, C-288/92, 29 June 1994].

[5]See in particular Bundesgerichtshof, Germany, 30 April 2003, available on the Internet at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/030430g1.html; Rechtbank van Koophandel Veurne, Belgium, 19 March 2003, available on the Internet at http://www.law.kuleuven.ac.be/int/tradelaw/WK/2003-03-19.htm; Bundesgerichtshof, Germany, 2 October 2002, available on the Internet at http://www.cisg-online.ch/cisg/urteile/700.htm; Hof van Beroep Gent, Belgium, 15 May 2002, available on the Internet at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/020515b1.html; Hof van Beroep Gent, Belgium, 31 January 2002, available on the Internet at http://www.law.kuleuven.ac.be/int/tradelaw/WK/2002-01-31.htm; Bundesgerichtshof, Germany, 7 November 2001, available on the Internet at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/011107g1.html; Cour de cassation, 1re chambre civile, France, 26 June 2001, *Recueil Dalloz*, 2001, Jurisprudence, 2593; Landgericht Flensburg, Germany, 19 January 2001, available on the Internet at http://www.cisg-online.ch/cisg/urteile/619.htm; CLOUT case No. 379 [Corte di Cassazione S.U., Italy, 14 December 1999]; CLOUT case No. 343 [Landgericht Darmstadt, Germany, 9 May 2000] (see full text of the decision); Landgericht Trier, Germany, 7 December 2000, *Inter-nationales Handelsrecht*, 2001, 35; CLOUT case No. 320 [Audencia Provincial de Barcelona, Spain, 7 June 1999] (see full text of the decision); CLOUT case No. 274

[Oberlandesgericht Celle, Germany, 11 November 1998]; CLOUT case No. 223 [Cour d'appel, Paris, France, 15 October 1997] (see full text of the decision); CLOUT case No. 287 [Oberlandesgericht München, Germany, 9 July 1997]; CLOUT case No. 284 [Oberlandesgericht Köln, Germany, 21 August 1997] (see full text of the decision); CLOUT case No. 162 [Østre Landsret, Denmark, 22 January 1996]; CLOUT case No. 205 [Cour d'appel, Grenoble, France, 23 October 1996]; Landgericht Siegen, Germany, 5 December 1995, available on the Internet at http://www.cisg-online.ch/cisg/urteile/287.htm; Gerechtshof 's-Hertogenbosch, the Netherlands, 9 October 1995, *Nederlands International Privaatrecht* 1996, No. 118; Oberlandesgericht München, Germany, 28 June 1995, available on the Internet at http://www.cisg online.ch/cisg/urteile/406.htm; CLOUT case No. 153 [Cour d'appel, Grenoble, France, 29 March 1995] (see full text of the decision); Rechtbank Middelburg, the Netherlands, 25 January 1995, *Nederlands International Privaatrecht*, 1996, No. 127; Hof 's-Hertogenbosch, 26 October 1994, *Nederlands International Privaatrecht*, 1995, No. 261; CLOUT case No. 156 [Cour d'appel, Paris, France, 10 November 1993] (see full text of the decision) CLOUT case No 25 [Cour d'appel, Grenoble, France, 16 June 1993].

[6]Handelsgericht Aargau, Switzerland, 5 November 2002, available on the Internet at http://www.cisg-online.ch/cisg/urteile/715.htm; Landgericht Freiburg, Germany, 26 April 2002, available on the Internet at http://www.cisg-online.ch/cisg/urteile/690.htm; CLOUT case No. 221 [Zivilgericht des Kantons Basel-Stadt, Switzerland, 3 December 1997]; CLOUT case No. 194 [Bundesgericht, Switzerland, 18 January, 1996].

[7]*Official Journal of the European Community*, Legislation, 16 January 2001.

[8]CLOUT case No. 421 [Oberster Gerichtshof, Austria, 10 March 1998], also in *Österreichische Zeitschrift für Rechtsvergleichung*, 1998, 161.

[9]CLOUT case No. 312 [Cour d'appel, Paris, France, 14 January 1998].

[10]CLOUT case No. 49 [Oberlandesgericht Düsseldorf, Germany, 2 July 1993]. To similar effect, see Oberster Gerichtshof, Austria, 18 December 2002, available on the Internet at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/021218a3.html; Landgericht Gießen, Germany, 17 December 2002, *Internationales Handelsrecht*, 2003, 276.

[11]CLOUT case No. 205 [Cour d'appel, Grenoble, France 23 October 1996] (see full text of the decision).

[12]CLOUT case No. 422 [Oberster Gerichtshof, Austria, 29 June 1999], *Transportrecht-Internationales Handelsrecht*, 1999, 48.

[13]CLOUT case No. 274 [Oberlandesgericht Celle, Germany, 11 November 1998].

Article 58

(1) If the buyer is not bound to pay the price at any other specific time, he must pay it when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and this Convention. The seller may make such payment a condition for handing over the goods or documents.

(2) If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price.

(3) The buyer is not bound to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity.

INTRODUCTION

1. Article 58 defines the time when the price becomes due in the absence of any particular contractual stipulation on the question.[1] Where it fixes the time at which payment of the price may be demanded, article 58 also determines the point in time at which interest based on article 78 of the Convention starts to accrue, as has been noted in a number of decisions.[2]

SIMULTANEOUS PAYMENT OF THE PRICE AND HANDING OVER OF THE GOODS OR DOCUMENTS (Article 58 (1))

2. The Convention does not require the seller, in the absence of a particular agreement on the subject, to grant credit to the buyer. Article 58 (1) establishes a default rule of simultaneous handing over of the goods (or of documents controlling their disposition) and payment of the price: the buyer must pay the price when the seller places either the goods or documents controlling their disposition at his disposal. As stated in the second sentence of article 58 (1), the seller may refuse to hand over the goods or documents controlling their disposition to the buyer if the latter does not pay the price at that time. The seller thus has the right to retain the goods (or the documents controlling their disposition) in these circumstances.

3. The inverse of the principle established in article 58 (1) also applies: unless otherwise agreed, the buyer is not bound to pay the price until the goods or documents controlling their disposition have been handed over. Article 58 (3) grants the buyer the complementary right to examine the goods prior to payment, although only to the extent that contractual provisions concerning delivery and the modalities of payment are consistent with the right.[3]

4. Contract terms, international usages and practices established between the parties may all result in derogation from the rule of simultaneous exchange of goods and price, a rule that applies (according to article 58 (1)) only "if the buyer is not bound to pay the price at any other specific time". One court found that the parties had derogated from the principle of simultaneous performance in a case where they had agreed on payment of 30 per cent of the price upon ordering of the goods, 30 per cent at the beginning of assembly, 30 per cent upon completion of installation, and the final 10 per cent due after successful start-up of the facility.[4]

5. The place for handing over the goods or documents depends on the relevant terms of the contract and, where no such terms exist, on the rules established by the Convention (article 31). For the sale of goods at the place specified in article 31 *(b)* or *(c)*), the price becomes payable when the seller has placed the goods at the disposal of the buyer in the agreed place or at the seller's place of business, and has given the buyer the opportunity to examine the goods. Article 58 (2) covers the case of sales involving a contract of carriage.[5]

6. Article 58 (1), like article 58 (2), places delivery of the goods and handing over of documents controlling their disposition on an equal level, on the grounds that they will have the same effect. One court found that handing documents controlling the disposition of the goods over to the buyer caused the price to become due, as provided in article 58 (1).[6] The difficulty is determining exactly what is meant by "documents controlling the disposition of the goods". It has been held that certificates of origin and quality,[7] as well as customs documents,[8] do not constitute documents controlling the disposition of the goods within the meaning of article 58 (1), and that their non-delivery therefore did not justify a buyer's refusal to pay the price.

SALES INVOLVING A CONTRACT OF CARRIAGE (Article 58 (2))

7. Article 58 (2) deals with a sale involving a contract with a third party to transport the goods. Under the provision, the seller may dispatch the goods on terms whereby the goods, or the documents controlling their disposition, will not be handed over to the buyer except against payment of the price. Thus, article 58 (2) does not entitle the seller to condition handing over the goods on advance payment of the price by the buyer, in the absence of a particular contractual provision to that effect. Thus absent an agreement otherwise, the buyer is not required to pay the price until the moment when the goods or documents controlling their disposition are handed over to him by the carrier.

THE BUYER'S RIGHT TO EXAMINE THE GOODS IN ADVANCE (Article 58 (3))

8. In principle, unless the buyer agrees to payment in advance it is not bound to pay the price until afforded an opportunity to examine the goods. The right to prior examination may be excluded by a contractual stipulation to that effect or by modalities of delivery or payment that are incompatible with such examination, such as clauses involving "payment against handing over of documents" or "payment against handing over of the delivery slip".

9. Article 58 (3) says nothing about whether the buyer is entitled to suspend payment of the price if examination reveals that the goods are not in conformity with the contract. No court decisions have yet addressed this issue.

Notes

[1]Landgericht Mönchengladbach, Germany, 15 July 2003, *Internationales Handelsrecht* 2003, 229; Kantonsgericht Schaffhausen, Switzerland, 25 February 2002, available on the Internet at http://www.cisg-online.ch/cisg/urteile/723.htm; CLOUT case No. 197 [Tribunal cantonal du Valais, Switzerland, 20 December 1994].

[2]See Landgericht Mönchengladbach, Germany, 15 July 2003, *Internationales Handelsrecht* 2003, 229; Amtsgericht Viechtach, Germany, 11 April 2002, available on the Internet at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/020411g1.html; CLOUT case No. 228 [Oberlandesgericht Rostock, Germany, 27 July 1995]; CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995] (see full text of the decision); CLOUT case No. 79 [Oberlandesgericht Frankfurt a.M., Germany, 18 January 1994] (see full text of the decision); CLOUT case No. 1 [Oberlandesgericht Frankfurt a.M., Germany, 13 June 1991] (see full text of the decision).

[3]See *infra*, para. 8 *et seq.*

[4]CLOUT case No. 194 [Bundesgericht, Switzerland, 18 January 1996] (see full text of the decision). See also Handelsgericht Aargau, Switzerland, 5 November 2002, available on the Internet at http://www.cisg-online.ch/cisg/urteile/715.htm.

[5]See *infra*, para. 7.

[6]CLOUT case No. 216 [Kantonsgericht St. Gallen, Switzerland, 12 August 1997].

[7]CLOUT case No. 171 [Bundesgerichtshof, Germany, 3 April 1996].

[8]CLOUT case No. 216 [Kantonsgericht St. Gallen, Switzerland, 12 August 1997].

Article 59

The buyer must pay the price on the date fixed by or determinable from the contract and this Convention without the need for any request or compliance with any formality on the part of the seller.

DISPENSING WITH FORMALITIES PRIOR TO PAYMENT OF THE PRICE

1. Under article 59 the buyer must pay the price as soon as it is becomes due without the need for any notice or compliance with any other formality by the seller.[1] As a result, one decision has noted, if the buyer defaults on its obligation to pay the price the seller can resort to the remedies provided under the Convention, and without prior demand for payment.[2] Furthermore, the interest provided for under article 78 begins to accumulate as soon as the price becomes due.[3]

DISPENSING WITH FORMALITIES PRIOR TO SETTLEMENT OF OTHER MONETARY OBLIGATIONS

2. It has been asserted that article 59 embodies a general principle (within the meaning of article 7 (2)) that is valid for any and all monetary claims by one party to a sales contract against the other. Such claims would include those for restitution of the price following avoidance of the contract, for payment of compensation, and for repayment of sums expended for conservation of the goods (see articles 85-86). No decisions have yet addressed this issue.

Notes

[1]For applications of this principle, see Landgericht Berlin, Germany, 21 March 2003, available on the Internet at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/030321g1.html; Handelsgericht Aargau, Switzerland, 5 November 2002, available on the Internet at http://www.cisg-online.ch/cisg/urteile/715.htm; Cámara Nacional de Apelaciones en lo Comercial de Buenos Aires, Argentina, 21 July 2002, available on the Internet at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/020721a1.html; Kantonsgericht Schaffhausen, Switzerland, 25 February 2002, available on the Internet at http://www.cisg-online.ch/cisg/urteile/723.htm; CLOUT case No. 432 [Landgericht Stendal, Germany, 12 October 2000], also in *Internationales Handelsrecht*, 2001, 30; CLOUT case No. 297 [Oberlandesgericht München Germany 21 January 1998] (see full text of the decision); CLOUT case No. 273 [Oberlandesgericht München Germany 9 July 1997]; CLOUT case No. 163 [Arbitration—Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 10 December 1996] (see full text of the decision); Amtsgericht Augsburg, Germany, 29 January 1996, available on the Internet at http://www.cisg-online.ch/cisg/urteile/172.htm; CLOUT case No. 197 [Tribunal Cantonal Valais, Switzerland, 20 December 1994] (see full text of the decision); Landgericht Hannover, Germany, 1 December 1993, available on the Internet at http://www.cisg-online.ch/cisg/urteile/244.htm; Amtsgericht Ludwigsburg, Germany, 21 December 1990, available on the Internet at http://www.cisg-online.ch/cisg/urteile/17.htm; CLOUT case No. 7 [Amtsgericht Oldenburg in Holstein, Germany, 24 April 1990] (see full text of the decision); CLOUT case No. 46 [Landgericht Aachen, Germany, 3 April 1990] (see full text of the decision).

[2]CLOUT case No. 281 [Oberlandesgericht Koblenz, Germany, 17 September 1993] (see full text of the decision).

[3]See, e.g., Oberlandesgericht Rostock, Germany, 25 September 2002, available on the Internet at http://www.cisg-online.ch/cisg/urteile/672.htm (see also, in an implicit manner, Tribunal de commerce de Namur, Belgium, 15 January 2002, available on the Internet at http://www.law.kuleuven.ac.be/int/tradelaw/WK/2002-01-15.htm); CLOUT case No. 275 [Oberlandesgericht Düsseldorf, Germany, 24 April 1997]; CLOUT case No. 409 [Landgericht Kassel, Germany, 15 February 1996], also available on the Internet at http://www.cisg-online.ch/cisg/urteile/190.htm; Landgericht München, Germany, 25 January 1996, available on the Internet at http://www.cisg-online.ch/cisg/urteile/278.htm; Amtsgericht Kehl, Germany, 6 October 1995, *Recht der internationalen Wirtschaft*, 1996, 957; CLOUT case No. 410 [Landgericht Alsfeld, Germany, 12 May 1995]; CLOUT case No. 79 [Oberlandesgericht Frankfurt a.M., Germany, 18 January 1994] (see full text of the decision); Landgericht Berlin, Germany, 6 October 1992, available on the Internet at http://www.cisg-online.ch/cisg/urteile/173.htm; Landgericht Mönchengladbach, Germany, 22 May 1992, available on the Internet at http://www.cisg-online.ch/cisg/urteile/56.htm; Pretore della giurisdizione di Locarno Campagna, Switzerland, 16 December 1991, *Schweizerische Zeitschrift für internationales und europäisches Recht*, 1993, 665; CLOUT case No. 7 [Amtsgericht Oldenburg in Holstein, Germany, 24 April 1990] (see full text of the decision).

Section II of Part III, Chapter III

Taking delivery (article 60)

OVERVIEW

1. The second section ("Taking delivery") of Chapter III of Part III consists of a single provision (article 60) that describes the constituent aspects of the remaining fundamental obligation of the buyer described in Article 53—the obligation to take delivery of the goods.

RELATION TO OTHER PARTS OF THE CONVENTION

2. Several aspects of the buyer's obligation to take delivery are not addressed in Section II and instead are controlled by provisions governing the seller's obligation to make delivery.[1] Thus article 31, which regulates the place for seller to make delivery, and article 33, which governs the time for seller to deliver, presumably apply also to the buyer's obligation to take delivery.

Notes

[1]These provisions are found in Section I of Chapter II of Part III: "Delivery of the goods and handing over of documents" (articles 31-34).

Article 60

The buyer's obligation to take delivery consists:

(*a*) In doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery; and

(*b*) In taking over the goods

INTRODUCTION

1. Article 60 defines the components of the buyer's obligation to take delivery of the goods, one of the two basic obligations of the buyer set forth in article 53. The obligation to take delivery involves the two elements described in the provision.

DUTY TO COOPERATE

2. Article 60 *(a)* imposes on the buyer a duty to cooperate: the buyer must "do all the acts which could reasonably be expected of him in order to enable the seller to make delivery".[1] The specific content of this duty to cooperate will vary with the terms of the contract. To illustrate the operation of article 60 *(a)*, if the place of delivery is the buyer's place of business, he must ensure that the seller has access to those premises; and if the seller is required to, e.g., install equipment, the site must be appropriately prepared for that purpose.

BUYER'S DUTY TO TAKE OVER THE GOODS

3. Article 60 *(b)* sets out the second element of the buyer's obligation to take delivery, namely the duty to take over the goods at the place where the seller is to deliver them.[2] The arrangements for taking over the goods depend on the form of delivery agreed upon by the parties. For example, when the obligation to deliver consists in putting the goods at the disposal of the buyer in the seller's place of business (article 31 *(c)*), the buyer must either remove the goods or have them removed by a third party of its own choice.

RIGHT TO REJECT THE GOODS

4. Article 60 does not specify when the buyer is entitled to reject the goods. Other articles of the Convention provides for two specific cases: where the seller delivers before the fixed date for delivery (article 52 (1)), and where the seller delivers a quantity of goods greater than that provided for in the contract (article 52 (2)). In addition, the buyer has the right to reject the goods if the seller commits a fundamental breach of contract (defined in article 25), which gives the buyer the right to declare the contract avoided (article 49 (1) *(a)*) or to demand delivery of substitute goods (article 46 (2)). The buyer also has a right to avoid (and thus a right to reject delivery) if the seller failed to deliver within an additional time period set in accordance with article 47 (see article 49 (1) *(b)*). As was noted in one decision, however, the buyer is required to take delivery of the goods if the seller fails to perform its obligations but the breach is not a fundamental breach.[3] If the buyer intends to reject goods he is required to take reasonable steps to preserve them, and may even be obligated to take possession of the goods for this purpose, but he is entitled to reimbursement for the expenses of preservation (article 86).

Notes

[1]US District Court for the Southern District of New York, United States, 10 May 2002, available on the Internet at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/020510u1.html.

[2]CLOUT case No. 47 [Landgericht Aachen, Germany, 14 May 1993] (see full text of the decision).

[3]CLOUT case No. 79 [Oberlandesgericht Frankfurt a.M., Germany, 18 January 1994] (see full text of the decision).

Section III of Part III, Chapter III

Remedies for breach of contract by the buyer (articles 61-65)

OVERVIEW

1. The remedies available to a seller that has suffered a breach of contract by the buyer are addressed in Section III of Chapter III of Part III. The first provision in the section, article 61, catalogues those remedies and authorizes an aggrieved seller to resort to them. The remaining provisions of the section address particular remedies or prerequisites to remedies: the seller's right to require the buyer to perform (article 62), the seller's right to set an additional period for the buyer's performance (article 63), the seller's right to avoid the contract (article 64), and the seller's right to set specifications if the buyer fails to do so in timely fashion (article 65).

RELATION TO OTHER PARTS OF THE CONVENTION

2. The subject matter of the current section—"Remedies for breach of contract by the buyer"—obviously parallels that of Section III of Chapter II of Part III—"Remedies for breach of contract by the seller" (articles 45-52). Many individual provisions within these sections form matched pairs. Thus article 61, which catalogs the seller's remedies, closely parallels article 45, which catalogs the buyer's remedies. Other provisions in the current section that have analogues in the section on buyer's remedies include article 62, seller's right to require buyer's performance (parallel to article 46); article 63, seller's right to fix an additional period for buyer to perform (parallel to article 47); and article 64, seller right to avoid the contract (parallel to article 49).

3. As was the case with the provisions on buyers' remedies,[1] the articles governing sellers' remedies operate in conjunction with a variety of provisions outside the current section. Thus the seller's right to require performance by the buyer is subject to the rule in article 28 relieving a court from the obligation to order specific performance in circumstances in which it would not do so under its own law. The authorization in article 61 (1) *(b)* for a seller to claim damages for a buyer's breach operates in connection with (and, indeed, expressly refers to) articles 74-76, which specify how damages are to be measured. Article 49, stating when an aggrieved seller can avoid the contract, is part of a network of provisions that address avoidance, including the definition of fundamental breach (article 25), the requirement of notice of avoidance (article 26), provisions governing avoidance in certain special circumstances (articles 72 and 73), measures of damages available only if the contract has been avoided (articles 75 and 76), and the provisions of Section V of Part III, Chapter V on "effects of avoidance".

Notes

[1]See para. 3 of the Introduction to Part III, Chapter II, Section III in the current Digest.

Article 61

(1) If the buyer fails to perform any of his obligations under the contract or this Convention, the seller may:

(*a*) Exercise the rights provided in articles 62 to 65;

(*b*) Claim damages as provided in articles 74 to 77.

(2) The seller is not deprived of any right he may have to claim damages by exercising his right to other remedies.

(3) No period of grace may be granted to the buyer by a court or arbitral tribunal when the seller resorts to a remedy for breach of contract.

REMEDIES AVAILABLE TO THE SELLER (Article 61 (1))

1. Article 61 (1) describes in general terms the various remedies available to the seller when the buyer does not perform one of its obligations. In stating that the seller may "exercise the rights provided in articles 62 to 65", article 61 (1) *(a)* merely refers to these provisions without independently giving them legal force: each of the referenced provisions itself authorizes an aggrieved seller to exercise the rights described therein, so that those rights would be available to the seller even absent the reference in article 61 (1) *(a)*.[1] On the other hand, in providing that the seller may "claim damages as provided in articles 74 to 77", article 61 (1) *(b)* provides the legal basis for the seller's right to claim such compensation; articles 74 to 77 merely specify the way in which damages, once they are found to be awardable, are to be measured. It is thus correct to cite article 61 (1) *(b)* as the source of a seller's right to claim damages, as a number of court and arbitrational decisions have done,[2] and not to refer merely to, e.g., article 74 of the Convention.

2. Failure on the part of the buyer to perform any one of its obligations is the only prerequisite for recourse to the remedies referred to in article 61 (1). Thus, as one decision stated, an aggrieved seller's recourse to remedies is not subject to a requirement that the seller prove the buyer was at fault.[3]

3. Article 61 (1) mentions only the principal remedies available to an aggrieved seller. Other remedies in addition to those referred to in this provision may be available when a seller suffers a breach by the buyer. These remedies are set out in articles 71, 72, 73, 78 and 88 of the Convention.

4. As reflected in case law, the main difficulty in applying article 61 (1) arises in cases in which the contract of sale imposes on the buyer obligations not provided for by the Convention. As suggested by the heading of the section of the Convention in which article 61 appears (Section III of Part III, Chapter III—"Remedies for breach of contract by the buyer"), failure by the buyer to perform any of its obligations gives the seller recourse to the remedies provided in the Convention, even when the failure relates to a contractual obligation created by an exercise of party autonomy. Thus in these cases there is no need to look to the national law governing the contract in order to determine the seller's remedies, as the approach adopted in several decisions confirms.[4] In one decision, however, the court resorted to national law.[5]

CLAIMING DAMAGES IN COMBINATION WITH OTHER REMEDIES (Article 61 (2))

5. Article 61 (2) provides that the seller is not deprived of any right to claim damages by choosing to exercise its right to other remedies. This provision is contrary to the legal tradition of certain countries, including that of Germany before the reform of the law of obligations which entered into force on 1 January 2002 and which authorized combined remedies.[6]

REFUSAL OF A PERIOD OF GRACE (Article 61 (3))

6. Under article 61 (3), a judge or arbitrator is deprived of the power to grant the buyer a period of grace for performance of its obligations, including the obligation to pay the price. The forbidden measures were judged contrary to the best interests of international trade.[7] Only the seller can grant the buyer an extension of time for performance.[8] An issue yet to be resolved is whether article 61 (3) creates an obstacle to the application of insolvency laws that grant a defaulting buyer a period of grace for making payment.[9]

Notes

[1]Article 61 (1) *(a)* is, nevertheless, cited in some decisions: Landgericht Mönchengladbach, Germany, 15 July 2003, *Internationales Handelsrecht* 2003, 229; Kantonsgericht Zug, Switzerland, 12 December 2002, available on the Internet at http://www.cisg-online.ch/cisg/urteile/720.htm; Handelsgericht St. Gallen, Switzerland, 3 December 2002, available on the Internet at http://www.cisg-online.ch/cisg/urteile/727.htm; Cámara Nacional de Apelaciones en lo Comercial de Buenos Aires, Argentina, 21 July 2002, available on the Internet at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/020721a1.html.

[2]See Landgericht Berlin, Germany, 21 March 2003, available on the Internet at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/030321g1.html; Cour de Justice, Genève, Switzerland, 13 September 2002, available on the Internet at http://www.cisg-online.ch/cisg/urteile/722.htm; Cour d'appel de Colmar, France, 12 June 2001, available on the Internet at http://witz.jura.uni-sb.de/CISG/decisions/120601v.htm; CLOUT case No. 169 [Oberlandesgericht Düsseldorf, Germany, 11 July 1996]; CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg 21 March, 21 June 1996]; CLOUT case No. 47 [Landgericht Aachen, Germany, 14 May 1993]; CLOUT case No. 227 [Oberlandesgericht Hamm, Germany, 22 September 1992].

[3]CLOUT case No. 281 [Oberlandesgericht Koblenz, Germany, 17 September 1993] (see full text of the decision).

[4]See CLOUT case No. 154 [Cour d'appel, Grenoble, France, 22 February 1995] (breach of a re-export prohibition) (see full text of the decision); CLOUT case No. 217 [Handelsgericht des Kantons Aargau, Switzerland, 26 September 1997] (violation of an exclusivity agreement); CLOUT case No. 311 [Oberlandesgericht Köln, Germany, 8 January 1997] (breach of an agreement to correct a lack of conformity within an agreed period of time); CLOUT case No. 104 [Arbitration—International Chamber of Commerce No. 7197 1993] (failure to open a letter of credit); CLOUT case No. 261 [Berzirksgericht der Sanne, Switzerland, 20 February 1997]; CLOUT case No. 631 [Supreme Court of Queensland, Australia, [2000] QSC 421 (17 November 2000)].

[5]Bundesgerichtshof, Germany, 5 February 1997, *Neue Juristische Wochenschrift*, 1997, 1578.

[6]German courts have succeeded in departing from their national law and granting damages in conjunction with other remedies such as avoidance of contract; see the following decisions (applying article 45 (2), which with respect to buyer's remedies incorporates the same principle as article 61 (2): CLOUT case No. 348 [Oberlandesgericht Hamburg, Germany, 26 November 1999]; CLOUT case No. 345 [Landgericht Heilbronn, Germany, 15 September 1997]; Landgericht Landshut, Germany, 5 April 1995, available on the Internet at http://www.cisg-online.ch/cisg/urteile/193.htm; Landgericht München, Germany, 20 March 1995, *Recht der internationalen Wirtschaft*, 1996, 688; CLOUT case No. 50 [Landgericht Baden-Baden, Germany, 14 August 1991]; implicitly, see CLOUT case No. 235 [Bundesgerichtshof, Germany, 25 June 1997].

[7]United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March–11 April 1980, Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee, 1981, p. 48.

[8]For the seller's right to fix an additional period of time for the buyer to perform, see article 63.

[9]One court avoided this question by holding that the contract in question was a distribution agreement not governed by the CISG. See CLOUT case No. 187 [Federal District Court, Southern District of New York, United States, 23 July 1997].

Article 62

The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement.

OVERVIEW

1. Article 62 entitles the seller to require the buyer to perform its obligations. This remedy is generally recognised in civil law systems, whereas common law systems generally allow for the remedy (often under the designation "specific performance") only in limited circumstances.[1]

2. Article 62 is a remedy for sellers who have a special interest in performance by the buyer, particularly in performance of the obligation to take delivery of the goods. Examples of recourse to this remedy where a buyer has refused to take delivery, however, are rare in case law.[2] Cases in which article 62 is invoked as a remedy for the buyer's failure to pay the purchase price, on the other hand, are numerous.[3]

LIMITATIONS ON THE SELLER'S RIGHT TO REQUIRE PERFORMANCE

3. The right to require performance under article 62 is subject to two kinds of limitations. One such limitation is expressed in article 62 itself: a seller is deprived of the right if he has resorted to a remedy that is inconsistent with requiring performance, as where the seller has declared the contract avoided (article 64) or fixed an additional period of time for performance (article 63). The second limitation derives from article 28 of the Convention, under which a court is not bound to order specific performance on behalf of a seller, even if that would otherwise be required under article 62, if the court would not do so under its domestic law in respect of similar contracts not governed by the Convention.

Notes

[1]For further comments on matter, see the Digest for article 28, para 1.

[2]For a general statement on the remedy, see CLOUT case No. 133 [Oberlandesgericht München, Germany, 8 February 1995] (see full text of the decision).

[3]See Landgericht Mönchengladbach, Germany, 15 July 2003, *Internationales Handelsrecht* 2003, 229; Hof van Beroep Gent, Belgium, 2 December 2002, available on the Internet at http://www.law.kuleuven.ac.be/int/tradelaw/WK/2002-12-02.htm; Cámara Nacional de Apelaciones en lo Comercial de Buenos Aires, Argentina, 21 July 2002, available on the Internet at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/020721a1.html; Landgericht München, Germany, 27 February 2002, available on the Internet at http://www.cisg-online.ch/cisg/urteile/654.htm; CLOUT case No. 344 [Landgericht Erfurt, Germany, 29 July 1998]; CLOUT case No. 273 [Oberlandesgericht München, Germany, 9 July 1997]; CLOUT case No. 376 [Landgericht Bielefeld, Germany, 2 August 1996]; CLOUT case No. 135 [Oberlandesgericht Frankfurt a.M., Germany, 31 March 1995]; CLOUT case No. 134 [Oberlandesgericht München, Germany, 8 March 1995]; CLOUT case No. 104 [Arbitration—International Chamber of Commerce No. 7197 1993].

Article 63

(1) The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations.

(2) Unless the seller has received notice from the buyer that he will not perform within the period so fixed, the seller may not, during that period, resort to any remedy for breach of contract. However, the seller is not deprived thereby of any right he may have to claim damages for delay in performance.

INTRODUCTION

1. In permitting the seller to fix an additional period of time for the buyer to perform, article 63 grants the seller a right equivalent to that granted to the buyer in article 47: the two provisions are conceived in the same fashion and worded in comparable terms. The principal purpose of article 63, parallel to that of article 47, is to clarify the situation that arises when a buyer has not performed one of his fundamental obligations—to pay the price or to take delivery of the good—in the required time: if a seller facing this situation fixes an additional period of time, pursuant to article 63, for the buyer to perform, and the additional period elapses without result, the seller is entitled to declare the contract avoided without having to prove that the buyer's delay in performance is a fundamental breach of contract (article 64 (1) *(b)*). Thus article 63 is especially useful when it is unclear whether the buyer's delay has become a fundamental breach.[1]

2. Article 63 (1) requires that the additional period of time fixed by the seller be of reasonable length. Decisions addressing what constitutes a reasonable length of time are rare.[2] Article 63 (2) specifies that, during the additional period that a seller has fixed he may not resort to remedies for the buyer's breach (although he retains the right to claim damages resulting from the buyer's delay); this limitation does not apply, however, if the buyer declares that he will not perform within the additional period.

ILLUSTRATIONS OF RECOURSE TO AN ADDITIONAL PERIOD OF TIME

3. Sellers have in fact invoked article 63 and fixed an additional period of time for the buyer to perform, thereby giving tribunals the opportunity to apply the provision. Examples in case law include granting an additional period to pay the price,[3] to secure issuance of a letter of credit,[4] and to take delivery of the goods.[5]

Notes

[1]CLOUT case No. 243 [Cour d'appel, Grenoble, France, 4 February 1999].

[2]CLOUT case No. 645 [Corte di Appello di Milano, Italy, 11 December 1998], available on the Internet at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/ 981211i3.html.

[3]Oberster Gerichtshof, Austria, 28 April 2000, also available on the Internet at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/000428a3.html.

[4]CLOUT case No. 261 [Bezirksgericht der Sanne, Switzerland, 20 February 1997]; CLOUT case No. 301 [Arbitration—International Chamber of Commerce No. 7585 1992]; Supreme Court of Queensland, Australia, 17 November 2000, available on the Internet at http://www.austlii.edu.au/au/cases/qld/QSC/2000/421.html. In the latter case, however, the fixing of an additional period of time by the seller was inconsequential, since the court found that a fundamental breach of contract had occurred. For a case involving the granting of an additional period of time for the opening of a letter of credit required under a distribution agreement, see CLOUT case No. 187 [Federal District Court, Southern District of New York, United States, 21 July 1997].

[5]CLOUT case No. 47 [Landgericht Aachen, Germany, 14 May 1993].

Article 64

(1) The seller may declare the contract avoided:

(a) If the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or

(b) If the buyer does not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 63, perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so within the period so fixed.

(2) However, in cases where the buyer has paid the price, the seller loses the right to declare the contract avoided unless he does so:

(a) In respect of late performance by the buyer, before the seller has become aware that performance has been rendered; or

(b) In respect of any breach other than late performance by the buyer, within a reasonable time:

(i) After the seller knew or ought to have known of the breach; or

(ii) After the expiration of any additional period of time fixed by the seller in accordance with paragraph (1) of article 63, or after the buyer has declared that he will not perform his obligations within such an additional period.

INTRODUCTION

1. Article 64 identifies situations in which the seller may declare the contract avoided because the buyer is in breach of one or more of its obligations. The rules mirror those of article 49 governing the buyer's right to declare the contract avoided for breach by the seller. The effects of avoidance are governed by articles 81 to 84. In all cases, avoidance requires a declaration by the seller as specified in article 26.

REQUIREMENTS FOR THE RIGHT TO DECLARE THE CONTRACT AVOIDED (Paragraph (1))

2. Article 64 (1) specifies two cases in which the seller has the right to declare the contract avoided: if the buyer has committed a fundamental breach, or if the buyer fails to pay the price or to take delivery of the goods (or declares that he will not do so) within an additional period of time for performance fixed by the seller pursuant to article 63.

THE CASE OF FUNDAMENTAL BREACH OF CONTRACT (Article 64 (1) *(a)*)

3. The first situation in which the seller can avoid the contract under article 64 (1) is where the buyer has committed a fundamental breach of contract as defined in article 25.[1] This requires that the breach of contract cause such damage to the seller that he is substantially deprived of what he was entitled to expect under the contract. One arbitral award found that, "according to both the general framework of the Convention and its interpretation in case law, the notion of fundamental breach is usually construed narrowly in order to prevent an excessive use of the avoidance of the contract".[2] Case law affords several illustrations of fundamental breaches involving the three conceivable types of contract violations, namely failure to pay the purchase price, failure to take delivery of the goods, and failure to perform other obligations specified in the contract.

4. Thus it has been held that a definitive failure to pay the price constitutes a fundamental breach of contract.[3] One decision declared that delay in opening a letter of credit does not in itself constitute a fundamental breach of contract[4] whereas another decision stated that refusal on the part of the buyer to open the letter of credit does constitute a fundamental breach.[5]

5. A buyer's final refusal to take delivery, or his return of the goods to the seller in the absence of a fundamental breach by the seller, have been judged to constitute a fundamental breach of contract.[6] Generally, a mere delay of a few days in the delivery of the goods is not deemed a fundamental breach.[7]

6. Non-performance of obligations that arise from the contract—as opposed to being imposed by the Convention—may also constitute a fundamental breach, as is demonstrated by decisions involving the buyer's violation of a

re-export prohibition[8] and a seller's breach of an exclusive rights clause.[9]

BUYER'S FAILURE TO PAY OR TO TAKE DELIVERY WITHIN AN ADDITIONAL PERIOD OF TIME FIXED BY THE SELLER (Article 64 (1) *(b)*)

7. If the buyer does not perform its obligation to pay the price or to take delivery of the goods within the additional period of time for performance that a seller has fixed under article 63 (1), or if the buyer declares that it will not do so within the period so fixed, the seller may declare the contract avoided under article 64 (1) *(b)*.[10]

8. The buyer's obligation to pay the price encompasses taking the necessary steps for that purpose, as provided in article 54. It has been decided that the buyer's failure to take those steps within the additional period of time granted to him by the seller pursuant to article 63 permits the seller to avoid under article 64 (1) *(b)*.[11]

TIMING OF THE DECLARATION OF AVOIDANCE OF THE CONTRACT (Article 64 (2))

9. Article 64 (2) addresses the time within which a seller must exercise a right to declare the contract avoided. The provision makes clear that the seller's right to declare avoidance is not subject to time limitations as long as the buyer has not paid the price. Once the price has been paid, however, the seller's right to avoid must be exercised within specified periods. In cases of late performance by the buyer, the seller loses the right to declare the contract avoided unless he does so before he becomes aware that the buyer has (tardily) performed (article 64 (2) *(a)*). For other kinds of breaches, the right to avoid is lost upon the expiration of a reasonable period of time measured from either the time the seller knew or ought to have known of the breach (article 64 (2) *(b)* (i)) or from the end of an additional period of time the seller has fixed in accordance with article 63 (1) (article 64 (2) *(b)* (ii)). There are, as of the time this is written, no decisions which have applied the rules in article 64 (2).

Notes

[1]See the Digest for art. 25.

[2]ICC Court of Arbitration, award No. 9887, *ICC International Court of Arbitration Bulletin*, 2000, 118.

[3]Id.; see also CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994]. Similarly, Tribunal cantonal du Valais, Switzerland, 2 December 2002, available on the Internet at http://www.cisg-online.ch/cisg/urteile/733.pdf; CLOUT case No. 578 [US District Court for the Western District of Michigan, United States, 17 December 2001], also available on the Internet at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/011217u1.html.

[4]Landgericht Kassel, 21 September 1995, available on the Internet at http://www.cisg-online.ch/cisg/urteile/192.htm.

[5]Supreme Court of Queensland, Australia, 17 November 2000, available on the Internet at http://www.austlii.edu.au/au/cases/qld/QSC/2000/421.html.

[6]See Kantonsgericht Zug, Switzerland, 12 December 2002, available on the Internet at http://www.cisg-online.ch/cisg/urteile/720.htm; CLOUT case No. 217 [Handelsgericht des Kantons Aargau, Switzerland, 26 September 1997] (failure to take delivery) (see full text of the decision); CLOUT case No. 227 [Oberlandesgericht Hamm, Germany, 22 September 1992] (refusal to take delivery of more than half of the goods).

[7]CLOUT case No. 243 [Cour d'appel, Grenoble, France, 4 February 1999].

[8]CLOUT case No. 154 [Cour d'appel, Grenoble, France, 22 February 1995].

[9]Compare CLOUT case No. 217 [Handelsgericht des Kantons Aargau, Switzerland, 26 September 1997].

[10]See the cases cited in the Digest for art. 63, footnotes 3-5. See also Handelsgericht St. Gallen, Switzerland, 3 December 2002, available on the Internet at http://www.cisg-online.ch/cisg/urteile/727.htm; Oberlandesgericht Graz, Austria, 24 January 2002, available on the Internet at http://www.cisg-online.ch/cisg/urteile/801.pdf.

[11]CLOUT case No. 261 [Bezirksgericht der Sanne, Switzerland, 20 February 1997] (failure to open a letter of credit within the additional period of time fixed by the seller under article 63).

Article 65

(1) If under the contract the buyer is to specify the form, measurement or other features of the goods and he fails to make such specification either on the date agreed upon or within a reasonable time after receipt of a request from the seller, the seller may, without prejudice to any other rights he may have, make the specification himself in accordance with the requirements of the buyer that may be known to him.

(2) If the seller makes the specification himself, he must inform the buyer of the details thereof and must fix a reasonable time within which the buyer may make a different specification. If, after receipt of such a communication, the buyer fails to do so within the time so fixed, the specification made by the seller is binding.

INTRODUCTION

1. Article 65 applies in cases where the contract leaves it to the buyer to specify features of the goods sold, such as dimensions, colour or shape. The provision addresses the problems that arise if the buyer fails to provide promised specifications by the date agreed upon or within a reasonable period of time after receipt of a request by the seller for the information.

THE SELLER'S RIGHT TO MAKE SPECIFICATIONS

2. Where the buyer fails to timely provide the required information concerning the form, measurement or features of the goods, article 65 (1) gives the seller the right to decide upon the missing specifications "in accordance with the requirements of the buyer that may be known to him." The seller, however, is not obliged to make the specification. He may prefer to rely on the remedies available in case the buyer's conduct constitutes a breach of contract.

IMPLEMENTATION OF THE RIGHT TO MAKE SPECIFICATIONS

3. Article 65 (2) regulates the seller's exercise of his right to make specification on behalf of the buyer under article 65 (1). It requires the seller to inform the buyer of the details of the seller's specification, and to allow the buyer a reasonable period of time to make a different specification. If the buyer fails to take advantage of the right to provide a different specification within a reasonable time after receiving the seller's notice, the seller's specification is binding. It has been decided that, if a seller makes a specification without fulfilling the requirements of the first part of article 65 (2), the buyer retains the right to make its own specification.[1]

Notes

[1]Landgericht Aachen, Germany, 19 April 1996, available on the Internet at http://www.cisg-online.ch/cisg/urteile/165.htm.

Part III, Chapter IV

Passing of risk (articles 66-70)

OVERVIEW

1. Chapter IV of Part III of the Convention deals with the passing to the buyer of the risk of loss of or damage to goods. The first article of the chapter (article 66) states the consequences for the buyer after such risk passes to the buyer. The following three articles (articles 67-69) set out rules for when the risk passes to the buyer. The final article of the chapter (article 70) states the allocation of the risk of loss or damage if the seller commits a fundamental breach.

2. As a general rule, a seller that satisfies its obligation to deliver goods or documents (see Section I of Chapter II of Part III (articles 31-34), entitled "Delivery of the goods and handing over of documents") will cease to bear the risk of loss or damage. The language used in chapter IV and in articles 31-34 is often identical. One decision therefore concludes that the same interpretation should be given to the word "carrier" in articles 31 and 67.[1]

3. The rules in chapter IV apply without regard to whether the seller or the buyer owns the goods.[2] Chapter IV therefore displaces domestic sales law that allocates risk to the "owner" of the goods, although the outcome may be the same in any particular case under both the Convention and the domestic law.[3]

NATURE OF RISK

4. Chapter IV deals with loss of or damage to the goods sold. This is stated expressly in the first clause of article 66 and implicitly in the other articles. The loss of goods includes cases where the goods cannot be found,[4] have been stolen, or have been transferred to another person.[5] Damage to the goods includes total destruction, physical damage,[6] deterioration,[7] and shrinkage of the goods during carriage or storage.

5. Several courts have applied provisions of Chapter IV to the passing of risks other than the risk of loss of or damage to goods. These risks include the risk of delay by the carrier after the seller has handed over the goods to the carrier[8] and the risk that the attribution of a painting is incorrect.[9]

PARTIES' AGREEMENT ON PASSING OF RISK

6. The seller and buyer may agree on when the risk of loss or damage passes to the buyer. They will frequently do so by expressly incorporating into their agreement trade terms, such as the International Chamber of Commerce's Incoterms.[10] They may agree to vary a standard trade term,[11] adopt a trade term that is local,[12] or use a trade term in connection with the price rather than delivery.[13] The parties may also agree to the allocation of risk by incorporating the standard terms or general business conditions of the seller or buyer.[14] In accordance with article 6, the parties' agreement will govern even if it derogates from the provisions of Chapter IV that would otherwise apply. Notwithstanding article 6, however, a German court interpreted a trade term set out in a French seller's general business conditions in accordance with German law because the seller had used a clause common in German commerce, drafted in the German language, and the buyer was German.[15]

7. The Convention's rules in article 8 on the interpretation of statements and acts of the parties apply to agreements relating to risk. Thus, one court found that the parties had agreed that the seller would deliver the goods at the buyer's place of business because, in accordance with article 8 (2), a reasonable person in the same circumstances as the buyer would understand use of the German term "*frei Haus*" ("free delivery") to mean delivery at the buyer's place of business.[16]

OTHER BINDING RULES ON PASSING OF RISK

8. Article 9 (1) provides that parties are bound by any practices, including those allocating risk of loss or damage, that they have established between themselves. Courts have occasionally looked to the prior practices of the parties for evidence of the parties' intent with respect to risk of loss.[17] One court has concluded, however, that conduct by one party with respect to risk on two prior occasions is insufficient to establish a binding practice.[18]

9. The seller and buyer may also be bound by trade usages with respect to risk of loss or damage. Under article 9 (1), they are bound if they agree to a usage, whether international or local. They are also bound under article 9 (2) by widely-observed international usages which they know or should know unless they agree otherwise. If the parties expressly incorporate an incoterm into their contract, article 9 (1) makes the definition of the term by the International Chamber of Commerce binding, but the Incoterms are so widely-used courts may enforce the ICC's definition of a term even absent express incorporation of those definitions.[19]

BURDEN OF ESTABLISHING THE PASSING OF RISK

10. Article 66 and the other provisions of Chapter IV are silent on who has the burden of establishing that the risk of loss or damage has passed to the buyer.[20] One court has endorsed the view that the burden is on the party that argues that the risk has passed.[21] The issue of who bears the risk arises, however, in the context of actions to enforce obligations of the seller (e.g. to deliver conforming goods) or buyer (e.g. to pay for the goods) under other provisions of the Convention.

11. The cases place the burden upon a seller that brings an action to recover the price in accordance with article 62. In several cases sellers failed to establish that they had delivered the goods and therefore the buyers were found not to be obliged to pay. In one case, the court found that a bill of lading that accurately described the goods sold but did not indicate the name of the buyer as the recipient was insufficient proof.[22] In a second case, the court found that a stamped but unsigned receipt was not sufficient proof of delivery at the buyer's place of business as required by the contract of sale.[23]

12. Where damaged goods are delivered and there is a dispute over whether the damage occurred before or after the risk of loss passed to the buyer, the buyer has the burden of establishing that the damage occurred before risk passed to it. Thus, where a seller produced a bill of lading with the master's annotation "clean on board" and the buyer produced no evidence that deterioration occurred before the seller handed over the goods to the carrier, the buyer bore the risk of the deterioration.[24]

RISK OF LOSS OR DAMAGE FOLLOWING TERMINATION OR AVOIDANCE

13. If the parties agree to terminate the contract after the risk has passed to the buyer, it has been held that the risk rules implicit in the Convention's provisions on the effects of avoidance of contract (Section V of Part III, Chapter V, articles 81 through 84), including the rules with respect to restitution following avoidance, supersede the risk provisions of Chapter IV.[25] When the goods are returned following termination of the contract, the obligations of the parties should mirror the obligations of the parties in the performance of the terminated contract: if the seller agreed to deliver goods "ex factory", then when goods are returned following termination the risk passes to the seller when the buyer hands over the goods to a carrier at the buyer's place of business.[26] It has also been held that, where the seller was responsible for carriage of the goods, the principle of article 31 *(c)* determined when risk of loss passed back to the seller for nonconforming goods that the buyer was (with the agreement of the seller) returning to the seller; thus risk returned to the seller when the buyer placed the goods at the seller's disposal, properly packaged for shipment, at the buyer's place of business.[27]

Notes

[1]CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000] (see full text of the decision).

[2]CLOUT case No. 447 [Federal Southern District Court of New York, United States, 26 March 2002], also in 2002 Westlaw 465312 (*St. Paul Guardian Ins. Co. v. Neuromed Medical Systems & Support GmbH*).

[3]CLOUT case No. 163 [Arbitration—Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 10 December 1996] (Yugoslav law that risk passes with title and that title passes on handing over goods yields same result as Convention) (see full text of the decision).

[4]See, e.g., CLOUT case No. 338 [Oberlandesgericht Hamm, Germany, 23 June 1998] (goods could not be found at insolvent warehouse).

[5]See, e.g., CLOUT case No. 340 [Oberlandesgericht Oldenburg, Germany, 22 September 1998] (insolvent processor of raw salmon transferred processed salmon to other customers)

[6]See, e.g., CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000] (physical damage).

[7]See, e.g., CLOUT case No. 377 [Landgericht Flensburg, Germany, 24 March 1999] (deterioration); CLOUT case No. 191 [Cámara Nacional de Apelaciones en lo Comercial, Argentina, 31 October, 1995] (deterioration).

[8]CLOUT case No. 219 [Tribunal Cantonal Valais, Switzerland, 28 October 1997] (buyer bears risk of subsequent delay) (see full text of the decision).

[9]*Kunsthaus Math. Lempertz OHG v. Wilhelmina van der Geld,* Arrondissementsrechtbank Arnhem, the Netherlands, 17 July 1997, Unilex, *affirmed on other grounds*, Hof Arnhem, 9 February 1999 (Convention not applicable).

[10]Not all trade terms address the issue of risk of loss or damage. See, e.g., CLOUT case No. 247 [Audiencia Provincial de Córdoba, Spain, 31 October 1997] ("CFFO" allocates cost of shipment to the destination, but has no relevance to passing of risk).

[11]See, e.g., CLOUT case No. 191 [Cámara Nacional de Apelaciones en lo Comercial, Argentina, 31 October 1995] ("C & F") (see full text of the decision).

[12]See, e.g., CLOUT case No. 317 [Oberlandesgericht Karlsruhe, Germany, 20 November 1992] ("frei Haus").

[13]See, e.g., CLOUT case No. 283 [Oberlandesgericht Köln, Germany, 9 July 1997] ("list price ex works").

[14]See, e.g., CLOUT case No. 317 [Oberlandesgericht Karlsruhe, Germany, 20 November 1992] (French seller's general business conditions enforced). Whether the parties have agreed to standard terms or general conditions is left to the applicable rules on contract formation and the validity of such terms and conditions.

[15]CLOUT case No. 317 [Oberlandesgericht Karlsruhe, Germany, 20 November 1992].

[16]CLOUT case No. 317 [Oberlandesgericht Karlsruhe, Germany, 20 November 1992] (art. 69 rather than art. 67 governed passing of risk).

[17]CLOUT case No. 317 [Oberlandesgericht Karlsruhe, Germany, 20 November 1992] (seller's practice of delivering in its own trucks used to interpret parties' agreement).

[18]CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000] (practice permitting buyer to offset value of physical damage).

[19]See, e.g., CLOUT case No. 447 [Federal Southern District Court of New York, United States, 26 March 2002], also in 2002 Westlaw 465312 (*St. Paul Guardian Ins. Co. v. Neuromed Medical Systems & Support GmbH*)("CIF"); CLOUT case No. 253 [Cantone del Ticino Tribunale d'appello, Switzerland, 15 January 1998] ("CIF") (see full text of the decision); CLOUT case No. 340 [Oberlandesgericht Oldenburg, Germany, 22 September 1998] ("DDP") (see full text of the decision); CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] ("FOB").

[20]CLOUT case No. 253 [Cantone del Ticino Tribunale d'appello, Switzerland, 15 January 1998] (finding it unnecessary to decide whether to apply CISG general principles, which would place burden on buyer, or to apply national law because the result was the same under each alternative).

[21]CLOUT case No. 338 [Oberlandesgericht Hamm, Germany, 23 June 1998].

[22]CLOUT case No. 283 [Oberlandesgericht Köln, Germany, 9 July 1997].

[23]CLOUT case No. 317 [Oberlandesgericht Karlsruhe, Germany, 20 November 1992].

[24]CLOUT case No. 247 [Audiencia Provincial de Córdoba, Spain, 31 October 1997].

[25]CLOUT case No. 422 [Oberster Gerichtshof, Austria, 29 June 1999], available on the Internet at www.cisg.at/1_7499k.htm.

[26]CLOUT case No. 422 [Oberster Gerichtshof, Austria, 29 June 1999], available on the Internet at www.cisg.at/1_7499k.htm.

[27]CLOUT case No. 594 [Oberlandesgericht Karlsruhe, Germany 19 December 2002] (see full text of the decision).

Article 66

Loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.

INTRODUCTION

1. Article 66 provides that the buyer is not discharged from the obligation to pay the price if the goods are lost or damaged after the risk has passed to the buyer unless the loss or damage was caused by the seller. Article 66 does not create the obligation to pay the purchase price; that obligation is set out in article 53. Article 66 is also silent as to when the risk of loss or damage passes. The parties' contract and articles 67-70 set out rules for determining when the risk passes.

CONSEQUENCE OF PASSING OF RISK TO BUYER

2. Once it has been established that the risk passed before loss or damage to the goods occurred, decisions routinely require the buyer to pay the price unless it is established that the seller was responsible for the loss or damage.[1] Most, but not all, of these decisions cite both article 53 and article 66.[2] Several decisions cite article 66 for the proposition that a buyer is not obligated to pay the price for lost or damaged goods if the seller is unable to establish that risk had passed.[3]

3. Other articles explicitly or implicitly state the consequences for the buyer of bearing the risk. If, for example, the buyer takes delivery of goods without notifying the seller of lack of conformity and the goods are later discovered to be non-conforming, the buyer bears the burden of establishing that the goods did not conform at the time the risk of loss passed.[4]

EXCEPTION WHEN LOSS OR DAMAGE DUE TO SELLER'S ACTS OR OMISSIONS

4. Although the buyer normally is not discharged from its obligation to pay the price if the goods are lost or damaged after the risk has passed to the buyer, the last clause of article 66 provides an exception to this non-dischargability rule if it is established that the loss or damage was due to an act or omission of the seller. An arbitral tribunal found that the seller's failure to give the carrier agreed instructions on the temperature at which the goods were to be stored during carriage caused the goods to be damaged through melting and leakage, and the buyer was therefore not responsible for the damage.[5] Several cases place the burden of showing this exception on the buyer; in none of these cases has the buyer carried this burden.[6]

5. This exception to the buyer's obligation to pay is distinct from the seller's continuing liability under article 36 (1) for nonconformities that exist at the time the risk of loss passes even if they do not become apparent until a later time; the exception in article 66 (2) is also distinct from the seller's liability under article 36 (2) for nonconformities that arise subsequent to passage of risk if the seller has guaranteed the goods against these nonconformities.

Notes

[1]CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000] (obligation to pay not discharged where goods suffered damage after risk passed to buyer); CLOUT case No. 340 [Oberlandesgericht Oldenburg, Germany, 22 September 1998] (risk had passed to the buyer upon delivery of raw salmon to processing plant, and buyer's obligation to pay therefore was not discharged even though the plant sent the processed salmon to other customers) (see full text of the decision); CLOUT case No. 338 [Oberlandesgericht Hamm, Germany, 23 June 1998] (buyer not obliged to pay for goods that had disappeared from warehouse because risk had not shifted to buyer under art. 69 (2)); CLOUT case No. 163 [Arbitration Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 10 December 1996] (risk having passed to buyer under FOB term, buyer's obligation to pay was not discharged even if buyer was unable to make proper use of goods because of subsequent UN embargo); CLOUT case No. 191 [Cámara Nacional de Apelaciones en lo Comercial, Argentina, 31 October 1995] (obligation to pay was not discharged despite deterioration of goods during transit because risk had passed on shipment and buyer was unable to establish that seller was responsible for the deterioration).

[2]The following cases cite both article 53 and article 66: CLOUT case No. 377 [Landgericht Flensburg, Germany, 24 March 1999]; CLOUT case No. 340 [Oberlandesgericht Oldenburg, Germany, 22 September 1998] (see full text of the decision); CLOUT case No. 338 [Oberlandesgericht Hamm, Germany, 23 June 1998]; CLOUT case No. 163 [Arbitration—Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 10 December 1996] (see full text of the decision).

[3]CLOUT case No. 283 [Oberlandesgericht Köln, Germany, 9 July 1997] (under articles 66 and 67 (1) buyer had no obligation to pay the price for goods buyer did not receive where seller did not establish delivery to first carrier); CLOUT case No. 317 [Oberlandesgericht Karlsruhe, Germany, 20 November 1992] (under articles 66 and 67 (1) buyer had no obligation to pay the price for goods it did not receive because risk of loss had not passed under "*Frei Haus*" trade term).

[4]CLOUT case No. 377 [Landgericht Flensburg, Germany, 24 March 1999].

[5]CIETAC arbitral award, 23 February 1995, Unilex, see also http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950223c1.html.

[6]CLOUT case No. 163 [Arbitration—Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 10 December 1996] (see full text of the decision); CLOUT case No. 191 [Cámara Nacional de Apelaciones en lo Comercial, Argentina, 31 October 1995].

Article 67

(1) If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of the risk.

(2) Nevertheless, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise.

OVERVIEW

1. Article 67 provides rules governing the time at which the risk of loss or damage passes to the buyer if the contract of sale involves carriage of the goods.[1] In general, the risk passes to the buyer when the seller hands over the goods to the specified carrier. The risk passes without regard to whether the seller or the buyer has title to the goods,[2] and without regard to who is responsible for arranging transport and insurance.[3] The consequence of the passing of the risk on the buyer's obligation to pay is dealt with in article 66. The effect on the passing of risk in cases where the seller commits a fundamental breach is addressed in article 70.

2. Article 67 states a generally-accepted international rule. A constitutional court, hearing a challenge to a similar domestic rule on the ground that it was inconsistent with the constitutional principle of equality, cited articles 31 and 67 of the Convention as evidence of general acceptance.[4]

3. Under article 6 the parties may agree to derogate from the provisions of article 67, or they may be bound by usages of trade or a course of dealing that derogate (article 9). If the parties' agreement is consistent with article 67, courts frequently cite the article. This is also true when the parties agree on trade terms that address the passage of risk. Decisions have found the terms "CIF",[5] "C & F"[6] and "list price ex works"[7] to be consistent with article 67 (1). If the trade term is inconsistent with article 67 (1), the parties' agreement prevails in accordance with article 6. Thus, although the goods in the particular case were handed over to a third-party carrier, a court did not apply article 67 in a case where the parties agreed that the goods would be delivered "*frei Haus*" ("free delivery"), which the court construed to mean that the seller undertook to deliver the goods to the buyer's place of business.[8]

CONTRACTS OF SALE INVOLVING CARRIAGE OF GOODS

4. Article 67 does not define when a contract of sale involves carriage of goods. A similar formula is used in article 31 *(a)*, which provides that if the contract of sale involves carriage of goods the seller satisfies its obligation to deliver the goods when it hands them over to the first carrier. Given the identical language in the two provisions, they should be read to cover the same transactions.[9]

5. Article 68 sets out special rules for passage of risk when goods are sold in transit. Therefore, a sale of goods in transit is not a contract "involving the carriage of goods" within the meaning of article 67.

6. A contract of sale involves the carriage of goods when it expressly or implicitly provides for subsequent carriage. The contract may expressly provide that the goods are to be carried by, e.g., including details with respect to the manner of carriage. This is often done most efficiently by incorporating trade terms, such as the International Chamber of Commerce's Incoterms (e.g. "CIF"), which spell out the obligation of the seller to deliver the goods by a carrier. Other terms of the contract may, however, imply that the goods are to be carried. An arbitral tribunal found that the contract involved carriage when it provided that "the buyer shall pick up the fish eggs at the seller's address and bring the goods to his facilities in Hungary" and the price was stated to be "FOB Kladovo".[10]

7. Article 67 refers to "carriage of the goods" and does not expressly require that the goods be carried by a third-party carrier. One decision assumes that delivery to a freight forwarder is the equivalent of delivery to the "first carrier".[11]

ALLOCATION OF RISK

8. Paragraph (1) of article 67 sets out separate rules for two different situations: first, if the seller is not bound to hand the goods over to the carrier at a particular place (first sentence of article 67 (1)), and second, if the seller is so bound (second sentence). In both cases, the risk passes to the buyer when the seller hands over the goods to the specified carrier.

– If the seller is not bound to hand over the goods to the carrier at a particular place

9. If the seller is not bound to hand over the goods to a carrier at a particular place, the risk of loss or damage passes when the goods are handed over to the first carrier. This rule is consistent with the seller's obligation to deliver the goods as set out in article 31 *(a)*. In the absence of proof that the parties agreed on delivery at another location, one court found that the seller delivered and the risk passed when the seller handed over the goods to the first carrier.[12] Another court found that the risk had passed when a seller handed over the goods to a carrier in a timely fashion and therefore the seller was not responsible for any subsequent delay in delivery.[13]

10. Where the parties agreed that the goods would be delivered "*frei Haus*" ("free delivery"), a court construed the term to mean that the seller undertook to deliver the goods to the buyer's place of business even though actual delivery of the goods in the case involved carriage. The court therefore did not apply article 67 (1).[14]

– Where seller is bound to hand over goods to carrier at particular place

11. The second sentence of paragraph (1) provides that if the seller is bound to hand over goods to a carrier at a particular place, the risk passes when the goods are handed over to the carrier at that place. An agreement by a seller whose place of business is inland to send the goods from a port falls within paragraph (1). There are no reported decisions interpreting this provision.

RETENTION OF DOCUMENTS BY SELLER

12. The third sentence of paragraph (1) provides that the passage of risk under article 67 is not affected by the seller's retention of documents controlling the disposition of the goods. There are no reported decisions interpreting this provision.

IDENTIFICATION OF GOODS

13. Paragraph (2) of article 67 conditions the passage of risk on clear identification of the goods to the contract of sale.[15] This rule is designed to protect against the possibility that a seller will identify to the contract goods that have already suffered casualty. One court found that the requirement that the goods be clearly identified was satisfied by the description of the goods in the shipping documents.[16] Another court noted that the parties to a CIF contract agreed that the risk of loss would pass when cocoa beans clearly identified to the contract of sale were handed over to the carrier at the port of shipment.[17]

Notes

[1]See CLOUT case No. 447 [Federal] Southern District Court of New York, United States, 26 March 2002 (plaintiffs' experts wrongly asserted that Convention did not include rules on passage of risk).

[2]CLOUT case No. 447 [Federal] Southern District Court of New York, United States, 26 March 2002 (passage of risk and transfer of title need not occur at the same time).

[3]CLOUT case No. 247 [Audiencia Provincial de Córdoba, Spain, 31 October 1997] (risk passes without regard to who must arrange for transport or insurance).

[4]CLOUT case No. 91 [Corte Costituzionale, Italy, 19 November 1992].

[5]CLOUT case No. 253 [Cantone del Ticino Tribunale d'appello, Switzerland, 15 January 1998] (see full text of the decision).

[6]CLOUT case No. 191 [Cámara Nacional de Apelaciones en lo Comercial, Argentina, 31 October 1995].

[7]CLOUT case No. 283 [Oberlandesgericht Köln, Germany, 9 July 1997].

[8]CLOUT case No. 317 [Oberlandesgericht Karlsruhe, Germany, 20 November 1992].

[9]See, e.g., CLOUT case No. 360, Germany, 2000 (the word "carrier" means the same in both art. 31 and art. 67).

[10]CLOUT case No. 163 [Arbitration—Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 10 December 1996].

[11]CLOUT case No. 283 [Oberlandesgericht Köln, Germany, 9 July 1997].

[12]CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000].

[13]CLOUT case No. 219 [Tribunal Cantonal Valais, Switzerland, 28 October 1997].

[14]CLOUT case No. 317 [Oberlandesgericht Karlsruhe, Germany, 20 November 1992].

[15]Article 32 (1) requires the seller to notify the buyer of the consignment of the goods if they are not otherwise clearly identified.

[16]CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000].

[17]CLOUT case No. 253 [Cantone del Ticino Tribunale d'appello, Switzerland, 15 January 1998].

Article 68

The risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract. However, if the circumstances so indicate, the risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage. Nevertheless, if at the time of the conclusion of the contract of sale the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller.

OVERVIEW

1. Article 68 provides rules for the time when risk passes if goods are sold while in transit. The general rule is that the risk passes from the time the contract of sale is concluded. If, however, the circumstances so indicate, the risk is deemed to have passed when the goods were handed over to the carrier. Only if the seller knew or ought to have known that the goods were lost or damaged at the time the contract was concluded and did not inform the buyer will the risk remain with the seller. Although article 68 has been cited in reported decisions, these decisions do not interpret its contents.[1]

Notes

[1]CLOUT case No. 338 [Oberlandesgericht Hamm, Germany 23 June 1998] (affirming lower court without reference to art. 68); Schiedsgericht der Börse für landwirtschaftliche in Wien, Austria, 10 December 1997, Unilex (citing art. 68); CLOUT case No. 170 [Landgericht Trier, Germany, 12 October 1995] (citing art. 68).

Article 69

(1) In cases not within articles 67 and 68, the risk passes to the buyer when he takes over the goods or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery.

(2) However, if the buyer is bound to take over the goods at a place other than a place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.

(3) If the contract relates to goods not then identified, the goods are considered not to be placed at the disposal of the buyer until they are clearly identified to the contract.

OVERVIEW

1. Article 69 provides residual rules on the time of passing of risk in cases not covered by the preceding two articles of the Convention. Paragraph (1) covers cases where delivery is to take place at the seller's place of business, while paragraph (2) addresses all other cases. The consequence of the passing of the risk on the buyer's obligation to pay is dealt with in article 66. The effect on the passing of risk in cases where the seller commits a fundamental breach is addressed in article 70.

2. Article 69 applies only if the preceding two articles of the Convention do not apply.[1] Article 67 governs cases where the contract of sale involves carriage of goods, and cases falling within that provision are thus beyond the scope of article 69. If the contract of sale is silent as to the carriage of goods, however, article 69 rather than article 67 will govern the passing of risk. This is true whether or not the buyer arranges for subsequent transportation of the goods by its own vehicles or by a third-party carrier. Which article applies in a particular case often turns on interpretation of the parties' agreement. A court concluded that a contract term "list price ex works" was not inconsistent with article 67 (1) where the goods were to be taken by a third-party carrier from Japan.[2] An arbitral tribunal also applied article 67 (1) to a contract providing that "the buyer has to pick up the fish eggs at the seller's address and take the goods to his facilities in Hungary" and that the price was "FOB Kladovo".[3] On the other hand, with respect to a contract where the seller agreed to deliver the goods under the "DAF" ("Delivery at Frontier") Incoterm, an arbitral tribunal found that article 69 (2) rather than article 67 governed the issue of when risk passed.[4]

TAKING OVER GOODS AT SELLER'S PLACE OF BUSINESS

3. When goods are to be delivered at the seller's place of business, paragraph (1) of article 69 provides that the risk passes to the buyer when it takes over the goods. A court has applied the paragraph to the passing of risk in the sale of a painting at an auction.[5]

4. If the buyer fails to take over the goods, paragraph (1) provides that the risk passes when the goods have been placed at the buyer's disposal and the buyer's failure to take them over breaches the contract. Under paragraph (3), goods are at the buyer's disposal when they are clearly identified to the contract. There are no reported cases applying this provision.

TAKING OVER GOODS AT OTHER LOCATIONS

5. Paragraph (2) of article 69 addresses the passing of risk in cases where the buyer is bound to take over the goods at a place other than the seller's place of business. In these cases, the risk passes when the buyer is aware that the goods are placed at its disposition and delivery is due. Under paragraph (3), goods are at the buyer's disposal when they are clearly identified to the contract.

6. Paragraph (2) covers a variety of cases, including cases involving delivery of goods stored in a third party's warehouse, delivery at some place other than the seller's or buyer's place of business, and delivery at the buyer's place of business.[6] In one case, a court found that the risk that furniture stored in a warehouse would be lost had not passed to the buyer; the buyer had been issued storage invoices but delivery was not yet due because, by the parties' agreement, delivery was due only on the buyer's demand and it had not yet made a demand.[7] Another case found, however, that risk of loss had passed when the seller delivered raw salmon to a third party processor because the buyer acquiesced in the delivery and delivery was due.[8] In another case, an arbitral tribunal found that the seller, who had stored the goods following the buyer's failure to open an agreed letter of credit, bore the risk of loss because the seller had not delivered the goods "DAF" ("Delivery at Frontier") as agreed, nor had the seller placed the goods at the buyer's disposal.[9]

Notes

[1]CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000] (art. 69 (1) applies only if preceding two articles do not apply) (see full text of the decision).

[2]CLOUT case No. 283 [Oberlandesgericht Köln, Germany, 9 July 1997].

[3]CLOUT case No. 163 [Arbitration—Arbitration Court attached to the Hungarian Chamber of and Industry, Hungary, 10 December 1996].

[4]CLOUT case No. 104 [Arbitration—International Chamber of Commerce No. 7197 1992].

[5]*Kunsthaus Math. Lempertz OHG v. Wilhelmina van der Geld*, Arrondissementsrechtbank Arnhem, the Netherlands, 17 July 1997, Unilex, affirmed on other grounds, Hof Arnhem, 9 February 1999 (Convention not applicable).

[6]CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000] (paragraph (2) covers cases where buyer takes over goods at place other than seller's place of business).

[7]CLOUT case No. 338 [Oberlandesgericht Hamm, Germany, 23 June 1998].

[8]CLOUT case No. 340 [Oberlandesgericht Oldenburg, Germany, 22 September 1998].

[9]CLOUT case No. 104 [Arbitration—International Chamber of Commerce No. 7197 1993] (see full text of the decision).

Article 70

If the seller has committed a fundamental breach of contract, articles 67, 68 and 69 do not impair the remedies available to the buyer on account of the breach.

OVERVIEW

1. Under article 70, even though risk of loss or damage to the goods has passed to the buyer as provided in the preceding three articles, the buyer retains its remedies unimpaired if the seller has committed a fundamental breach of contract. There are no reported cases applying this article.

Part III, Chapter V

Provisions common to the obligations of the seller and of the buyer (articles 71-88)

OVERVIEW

1. Chapter V, which contains provisions applicable with respect to both the seller's obligations and the buyer's obligations, is the final chapter of Part III ("Sale of Goods"), and thus is the last chapter of the Convention containing substantive rules for international sales.[1] It's six constituent sections are: Section I—"Anticipatory breach and instalment contracts"; Section II—"Damages"; Section III—"Interest"; Section IV—"Exemption"; Section V—"Effects of avoidance"; and Section VI—"Preservation of the goods".

Notes

[1]Part IV of the Convention, the sole subsequent remaining division, contains "Final provisions" addressing such matters as the depository for the Convention, relation of the Convention to other international agreements, ratification, acceptance or approval of the Convention, declarations and reservations, effective dates, and denunciation of the Convention.

Section I of Part III, Chapter V

Anticipatory breach and instalment contracts (articles 71-73)

OVERVIEW

1. The first section of Chapter V of Part III of the Convention contains three provisions, applicable to both buyers and sellers, that address avoidance (or partial avoidance) of contract or suspension of performance under a contract in certain special situations—specifically, where a party has in some fashioned threatened future non-performance of its obligations (articles 71, 72 and, in certain respects, article 73 (2)) or where there is a breach of an instalment contract (article 73). Thus under the first two articles of the section, an aggrieved party may suspend its obligations (article 71) or avoid the contract (article 72) before the time for performance is due if the conditions of these articles are satisfied. Where the parties have entered into a contract by which the goods are to be delivered in instalments, an aggrieved party may avoid the contract with respect to a single instalment, future instalments, or the contract as a whole as provided in the third article (article 73).

Article 71

(1) A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of:

(*a*) A serious deficiency in his ability to perform or in his creditworthiness; or

(*b*) His conduct in preparing to perform or in performing the contract.

(2) If the seller has already dispatched the goods before the grounds described in the preceding paragraph become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. The present paragraph relates only to the rights in the goods as between the buyer and the seller.

(3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance.

INTRODUCTION

1. Article 71 authorizes a seller or a buyer to suspend performance of its obligations under the sales contract if the party is unlikely to receive a substantial part of the counter-performance promised by the other party. The suspending party does not breach the contract if the suspension is rightful.[1] If, however, the suspension is not authorized by article 71, the suspending party will breach the contract when it fails to perform its obligations.[2] The right to suspend exists until the time for performance is due, but once the date for performance has passed the aggrieved party must look to other remedies under the Convention.[3] The right continues until the conditions for suspension no longer exist, there is a right to avoid the contract, or the other party gives adequate assurance of performance in accordance with article 71 (3).[4] The Convention's rules on the right to suspend displace domestic sales law rules that permit the suspension of a party's obligation.[5]

2. The right to suspend under article 71 is to be distinguished from the right to avoid the contract under article 72.[6] Unlike avoidance of the contract, which terminates the obligations of the parties (see article 81), the suspension of contractual obligations recognizes that the contract continues and encourages mutual reassurance that both parties will perform. The preconditions for exercise of the right to suspend and the right to avoid differ, as do the obligations with respect to communications between the two parties.

3. The right to suspend under article 71 applies both to contracts of sale calling for a single delivery and to instalment contracts governed by article 73. When the preconditions of both articles are satisfied, the aggrieved party may choose between suspending performance under article 71 and avoiding the contract with respect to future instalments under article 73 (2).[7] If a party chooses to suspend performance with respect to future instalments it must give a notice in accordance with article 71 (3).[8]

4. The parties may agree, pursuant to article 6, to exclude application of article 71 or to derogate from its provisions. One decision found that by agreeing to take back equipment, repair it, and then redeliver it promptly, the seller had implicitly agreed to derogate from article 71, and therefore could not suspend its obligation to redeliver the equipment because of the buyer's failure to pay past debts.[9]

PRECONDITIONS OF SUSPENSION

5. A party is entitled to suspend its obligations under paragraph (1) of article 71[10] if it becomes apparent that the other party will not perform a substantial part of its obligations[11] and if the non-performance is the result of the causes set out in subparagraphs *(a)*[12] or *(b)*.[13] It is not necessary that the failure amount to a fundamental breach.[14]

6. A party was found to be entitled to suspend its obligations when confronted with the following circumstances: seller's refusal to perform with respect to certain items;[15] seller's inability to deliver goods free of restrictions imposed by seller's supplier;[16] buyer's failure to pay for the goods;[17] buyer's non-payment or delayed payment of the price under one or more earlier sales contracts;[18] buyer's failure to open an effective bank guarantee.[19] A buyer's failure to open a letter of credit gives rise to the right to avoid the contract under article 64 and the buyer is not limited to the remedies of articles 71 and 72.[20]

7. A buyer was found not to be entitled to suspend its obligations in the face of the following circumstances:

seller's nonconforming delivery of only 420 kg out of 22,400 kg;[21] partial delivery by the seller;[22] prior nonconforming deliveries where buyer sought to suspend payment for current conforming deliveries.[23] Several decisions observe that buyer's submissions to the court failed to indicate that the seller would not perform a substantial part of its obligations.[24]

8. A seller was found not entitled to suspend its obligations where the buyer had not paid the purchase price for two deliveries and the buyer had cancelled a bank payment order.[25] Suspension was also found unjustified where the seller had not established that the buyer would be unable to take delivery or to pay for the goods, notwithstanding that the goods might not conform with health standards issued by the government in the buyer's place of business.[26]

STOPPAGE IN TRANSIT

9. Paragraph (2) of article 71 authorizes a seller that has already dispatched the goods to stop the handing over of the goods to the buyer. There are no reported cases applying this paragraph.[27]

NOTICE OF SUSPENSION

10. Paragraph (3) of article 71 requires a suspending party to give notice of the suspension immediately[28] to the other party.[29] The paragraph does not specify what constitutes notice. The following statements or acts have been found to be sufficient notice: buyer's refusal to pay the costs of warehousing furniture when it had earlier agreed to contribute to these costs;[30] a letter in which the buyer refused to accept nonconforming items and offered to return them.[31] The following circumstances have been found not to constitute sufficient notice: buyer's failure to pay the price;[32] a letter from the buyer complaining of defective goods delivered under different contracts than the one as to which it claimed to be suspending performance.[33]

11. Paragraph (3) does not expressly state the sanction for failing to give immediate notice of suspension. Decisions uniformly conclude that in the absence of due notice the aggrieved party may not rely on its right to suspend performance.[34] One decision held further that the seller breached the contract by suspending delivery without immediately giving notice of the suspension to the buyer, and that the buyer was therefore entitled to damages.[35]

ADEQUATE ASSURANCE OF PERFORMANCE

12. Paragraph (3) requires a party that has suspended its performance to end its suspension and resume performance if the other party gives adequate assurance that it will perform. The paragraph does not elaborate on the form and manner of this assurance and does not state when the assurance must be given. There are no reported cases addressing adequate assurance under this paragraph.[36]

Notes

[1]CLOUT case No. 432 [Landgericht Stendal, Germany, 12 October 2000] (stating that suspension under art. 71 is not a breach but exercise of a unilateral right to modify time for performance) (see full text of the decision).

[2]CLOUT case No. 51 [Amtsgericht Frankfurt a.M., Germany, 31 January 1991] (buyer entitled to damages because seller failed to give immediate notice that it was suspending delivery).

[3]CLOUT case No. 630 [Court of Arbitration of the International Chamber of Commerce, Zurich, Switzerland, July 1999] (buyer not entitled to suspend obligation to pay after it had taken delivery of goods even though lower quantity of goods were delivered than contracted for).

[4]CLOUT case No. 432 [Landgericht Stendal, Germany, 12 October 2000], also available on the Internet at http://cisgw3.law.pace.edu/cisg/text/001012g1german.html (suspension not breach but exercise of a right to modify time for performance).

[5]CLOUT case No. 238 [Oberster Gerichtshof, Austria, 12 February 1998] (see full text of the decision).

[6]ICC award No. 8786, January 1997, Unilex (buyer did not suspend obligations but avoided contract under art. 72 (1)); ICC award No. 8574, September 1996, Unilex (buyer's purchase of substitute goods not a suspension of its obligations).

[7]CLOUT case No. 238 [Oberster Gerichtshof, Austria, 12 February 1998].

[8]Tribunal of International Commercial Arbitration at the Federation Chamber of Commerce and Industry, Russian Federation, award in case No. 302/1996 of 27 July 1999, published in *Rozenberg, Practika of Mejdunarodnogo Commercheskogo Arbitrajnogo Syda: Haychno-Practicheskiy Commentariy* 1999–2000, No. 27 [141–147].

[9]CLOUT case No. 311 [Oberlandesgericht Köln, Germany, 8 January 1997] (see full text of the decision).

[10]The following decision recognizes the applicability of the Convention and the right to suspend but fails to cite art. 71: *Maglificio Dalmine v. Coveres*, Tribunal Commercial de Bruxelles, Belgium, 13 November 1992, Unilex (seller entitled to suspend delivery because buyer failed to pay price under prior contract).

[11]Oberlandesgericht Dresden, Germany, 27 December 1999, Unilex (noting that there must be a mutual, reciprocal relationship between the obligation suspended and the counter-performance).

[12]The following cases cite subparagraph *(a)*: CLOUT case No. 338 [Oberlandesgericht Hamm, Germany, 23 June 1998]; CLOUT case No. 238 [Oberster Gerichtshof, Austria, 12 February 1998] (remand to consider further allegation of uncreditworthiness); Arbitration award No. 273/95, Zürich Handelskammer, Switzerland, 31 May 1996, Unilex.

[13]The following cases cite subparagraph *(b)*: *Malaysia Dairy Industries v. Dairex Holland*, Rb ‘s-Hertogenbosch, the Netherlands, 2 October 1998, Unilex; CLOUT case No. 164 [Arbitration—Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 5 December 1995] (see full text of the decision); Landgericht Berlin, Germany, 15 September 1994, Unilex.

[14]Landgericht Berlin, Germany, 15 September 1994, Unilex. But see *Shuttle Packaging Systems v. Tsonakis*, see CLOUT case no. 578 [Federal] Western District Court of Michigan, United States, 17 December 2001] also in 2001 Westlaw 34046276, 2001 US Dist. LEXIS 21630 (aggrieved party must show fundamental breach to be entitled to suspend; seller entitled to suspend non-competition clause because buyer’s failure to pay was a fundamental breach).

[15]Landgericht Berlin, Germany, 15 September 1994, Unilex (citing art. 71 (1) *(b)*).

[16]CLOUT case No. 338 [Oberlandesgericht Hamm, Germany, 23 June 1998] (citing art. 71 (1) *(a)*); Oberlandesgericht Linz, Austria, 23 May 1995, available on the Internet at http://cisgw3.law.pace.edu/cases/950523a3.html, affirmed on other grounds, CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996].

[17]CLOUT case No. 164 [Arbitration—Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 5 December 1995] (citing art. 71 (1) *(b)*, court found seller justified in suspending its obligation to repair non-conforming goods) (see full text of the decision). *See also* ICC award No. 8611, 23 January 1997, Unilex (noting that seller’s failure to perform occurred before it would have been entitled to suspend performance under art. 71 (1) *(b)* because of buyer’s non-payment).

[18]*J.P.S. BVBA v. Kabri Mode BV,* Rechtbank van Koophandel Hasselt, Belgium, 1 March 1995, Unilex (seven-month delay in payment); *Maglificio Dalmine v. Coveres*, Tribunal Commercial de Bruxelles, Belgium, 13 November 1992, Unilex (without citing art. 71).

[19]Arbitral award VB/94124, Hungary, 17 November 1995, Unilex (bank guarantee opened with a date that had already expired).

[20]CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (see full text of the decision); but see Arbitral award VB/94124, Hungary, 17 November 1995, Unilex (right to suspend under art. 71 when ineffective bank guarantee opened).

[21]CLOUT case No. 227 [Oberlandesgericht Hamm, Germany, 22 September 1992] (see full text of the decision).

[22]CLOUT case No. 630 [ICC award No. 9448, July 1999], also in Unilex (buyer not entitled to suspend obligation to pay after it had taken delivery of goods even though it did not receive the fully quantity contracted for); CLOUT case No. 275 [Oberlandesgericht Düsseldorf, Germany, 24 April 1997] (buyer not entitled to suspend payment for part of goods not delivered).

[23]*BV BA. J.P. v. S. Ltd.*, Hof van Beroep Gent, Belgium, 26 April 2000, available on the Internet at http://www.law.kuleuven.ac.be/int/tradelaw/WK/2000-04-28.htm.

[24]Oberlandesgericht Dresden, Germany, 27 December 1999, Unilex; Arbitration award No. 273/95, Zurich Handelskammer, Switzerland, 31 May 1996, Unilex.

[25]CLOUT case No. 238 [Oberster Gerichtshof, Austria, 12 February 1998] (art. 71 (1) *(a)* covers cases where a party is subject to an insolvency proceeding or has completely ceased to pay but not where payment is slow).

[26]*Malaysia Dairy Industries v. Dairex Holland*, Rb ’s-Hertogenbosch, the Netherlands, 2 October 1998, Unilex (buyer offered to take delivery of the goods in Free Trade zone).

[27]CLOUT case No. 51 [Amtsgericht Frankfurt a.M., Germany, 31 January 1991] (unnecessary to decide whether seller entitled to stop goods in transit because seller failed to give requirred notice).

[28]*BV BA. J.P. v. S. Ltd.*, Hof van Beroep Gent, Belgium, 26 April 2000, available on the Internet at http://www.law.kuleuven.ac.be/int/tradelaw/WK/2000-04-28.htm (notice not “immediate” when deliveries to which it related were made seven and 14 months earlier).

[29]See ICC award No. 8611, 23 January 1997, Unilex (notice not necessary under circumstances of case).

[30]CLOUT case No. 338 [Oberlandesgericht Hamm, Germany, 23 June 1998].

[31]Landgericht Berlin, Germany, 15 September 1994, Unilex.

[32]CLOUT case No. 432 [Landgericht Stendal, Germany, 12 October 2000], also available on the Internet at http://cisgw3.law.pace.edu/cisg/text/001012g1german.html (suspension not breach but a unilateral right to modify time for performance).

[33]*BV BA. J.P. v. S. Ltd.*, Hof van Beroep Gent, Belgium, 26 April 2000, available on the Internet at (citing art. 73 (1) for implicit affirmation of this point).

[34]CLOUT case No. 432 [Landgericht Stendal, Germany, 12 October 2000], also available on the Internet at http://cisgw3.law.pace.edu/cisg/text/001012g1german.html (party may not rely on para. (1)); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, award in case No. 302/1996 of 27 July 1999, published in *Rozenberg, Practika of Mejdunarodnogo Commercheskogo Arbitrajnogo Syda: Haychno-Practicheskiy Commentariy* 1999–2000, No. 27 [141–147]; CLOUT case No. 51 [Amtsgericht Frankfurt a.M., Germany, 31 January 1991] (seller may not rely on right to stop goods in transit pursuant to para. (2)).

[35]CLOUT case No. 51 [Amtsgericht Frankfurt a.M., Germany, 31 January 1991].

[36]A similar reference to adequate assurance is made in article 72 (2), and cases construing that phrase under article 72 that may be found relevant under article 71. ICC award No. 8786, January 1997, Unilex; CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994] (see full text of the decision).

Article 72

(1) If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.

(2) If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance.

(3) The requirements of the preceding paragraph do not apply if the other party has declared that he will not perform his obligations.

INTRODUCTION

1. Article 72 entitles a seller or a buyer to avoid the contract if it becomes clear before the date for performance that the other party will commit a fundamental breach. However, article 49 rather than article 72 applies if, at or after the date for performance, a party's failure to perform or nonconforming performance amounts to a fundamental breach. Thus a buyer who has not declared the contract avoided before the date for performance may not avoid the contract under article 72 but must act instead under articles 45 and 49.[1]

2. The right of an aggrieved party to avoid the contract under article 72 is to be distinguished from the right to suspend its obligations under article 71.[2] Both articles are concerned with predicting whether there will be a breach but the preconditions for the more drastic remedy of avoidance are more stringent than those for suspension, both as to the seriousness of the predicted breach and the probability that the breach will occur. The notification requirements of the two provisions also differ. Article 72 requires "reasonable" prior notice only if time allows, and excuses the notice if the other party has declared that it will not perform; article 71, in contrast, requires immediate notice of suspension with no exceptions.[3]

3. Article 72 entitles an aggrieved party to avoid a contract before the date for performance if the contract is for (inter alia) a single delivery, while article 73 provides special rules on avoidance with respect to future instalments if the contract is an instalment contract. Several decisions recognize that, in an instalment contract, the aggrieved party might act under either article as to future instalments.[4]

PRECONDITIONS FOR AVOIDANCE

4. Paragraph (1) sets out the principal precondition for a rightful avoidance under article 73: it must be clear prior to the date for performance that the party required to perform will commit a fundamental breach. A very high probability that there will be a fundamental breach rather than complete certainty is required.[5] One decision has stated that a claim of anticipatory repudiation must allege "(1) that the defendant intended to breach the contract before the contract's performance date and (2) that such breach was fundamental".[6]

5. A party that declares that it will not perform its obligations satisfies this precondition.[7] Allegations, if proved, that the seller stated it would "no longer feel obligated" to perform and would "sell the material elsewhere" would entitle the buyer to avoid the contract.[8] Conditioning delivery on new demands beyond those agreed upon is an anticipatory repudiation of the contract.[9]

6. The preconditions of paragraph (1) were also found to have been satisfied in the following circumstances: the buyer failed to pay for prior shipments;[10] the buyer failed to open a letter of credit;[11] the seller failed to reduce the price and to commit to deliver fashion goods on time;[12] the seller deliberately terminated delivery of goods.[13]

7. The preconditions were found not satisfied in the following circumstances: the seller held back the goods because of a dispute between the parties;[14] the seller expressed an interest in stopping deliveries but also agreed to continue negotiations;[15] the buyer failed to pay one instalment.[16]

NOTICE OF INTENT TO AVOID

8. Where the requirements of article 72 (1) have been met, paragraph (2) of article 72 requires the aggrieved party to give the other party prior notice that he intends to avoid the contract, in order to permit the other side a chance to provide adequate assurances that he will perform.[17] This notice is required, however, only "if time allows". This notice is different from the declaration of avoidance governed by article 26, which must also be given if the aggrieved party does not receive adequate assurances and decides to proceed to avoidance.[18] One decision concluded that if the aggrieved party is relying on article 72 it must declare the contract avoided prior to the date for performance.[19]

ADEQUATE ASSURANCE OF PERFORMANCE

9. As was just noted, the purpose of the notice required under article 72 (2) is to allow the recipient an opportunity to provide adequate assurance of performance.[20] The Convention does not prescribe the form assurance must take. There is no requirement that the aggrieved party post a bond.[21]

Notes

[1]CLOUT case No. 171 [Bundesgerichtshof, Germany, 3 April 1996]; CLOUT case No. 124 [Bundesgerichtshof, Germany, 15 February 1995].

[2]ICC award No. 8786, January 1997, Unilex (buyer did not suspend obligations but avoided contract under art. 72 (1)); ICC award No. 8574, September 1996, Unilex (buyer's purchase of substitute goods not a suspension of its obligations).

[3]ICC award No. 8574, September 1996, Unilex (noting differences as to notice).

[4]*EP S.A.v FP Oy*, Helsinki Court of Appeal, Finland, 30 June 1998, Unilex (where two separate orders for skincare ointment were to be filled from the same batch of product and there was a fundamental breach with respect to the quality of the first delivery, the aggrieved buyer could avoid as to the second delivery either under either article 72 or, if the two orders constituted instalments of an instalment contract, under article 73 (2)); Arbitration award No. 273/95, Zürich Handelskammer, Switzerland, 31 May 1996, Unilex (fundamental breach as to future instalments is covered by both arts. 72 and 73).

[5]Landgericht Berlin, Germany, 30 September 1992, Unilex (very high probability rather than complete certainty required). See also Arbitration award No. S2/97, Schiedsgericht der Börse für Landwirtschaftliche Produkte–Wien, Austria, 10 December 1997, Unilex ("good grounds" under art. 73 means high probability, a less severe test than that found in art. 72 (1)).

[6]CLOUT case No. 417 [Federal District Court, Northern District of Illinois, United States, 7 December 1999] (citing arts. 25 and 72) (see full text of the decision).

[7]See art. 72 (3) (excusing the aggrieved party from giving the other side an opportunity to provide adequate assurances of his performance, as normally required under article 72 (2), "if the other party has declared that he will not perform his obligations").

[8]CLOUT case No. 417 [Federal District Court, Northern District of Illinois, United States, 7 December 1999].

[9]CLOUT case No. 293 [Arbitration—Schiedsgericht der Hamburger freundschaftlichen Arbitrage, 29 December 1998] (see full text of the decision).

[10]CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994], *affirming with modifications*, Landgericht Krefeld, 28 April 1993, Unilex; Landgericht Berlin, Germany, 30 September 1992, Unilex.

[11]CLOUT case No. 631 [Supreme Court of Queensland, Australia, 17 November 2000].

[12]ICC award No. 8786, January 1997, Unilex.

[13]Arbitration award No. 273/95, Zürich Handelskammer, Switzerland, 31 May 1996, Unilex.

[14]CLOUT case No. 261 [Bezirksgericht der Sanne, Switzerland, 20 February 1997].

[15]ICC award No. 8574, September 1996, Unilex.

[16]Arbitration award No. 273/95, Zürich Handelskammer, Switzerland, 31 May 1996, Unilex.

[17]*EP S.A.v FP Oy*, Helsinki Court of Appeal, Finland, 30 June 1998, Unilex (timing and content of fax gave prior notice).

[18]ICC award No. 8574, September 1996, Unilex (noting difference between art. 72 notice and declaration of avoidance, and finding that declaration of avoidance was not timely); CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994] (seller gave notice of intent to avoid followed by notice of avoidance when it heard nothing from buyer) (see full text of the decision).

[19]CLOUT case No. 124 [Bundesgerichtshof, Germany, 15 February 1995].

[20]CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994] (buyer failed to respond to demand for adequate assurance) (see full text of the decision).

[21]ICC award No. 8786, January 1997, Unilex.

Article 73

(1) In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach of contract with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.

(2) If one party's failure to perform any of his obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.

(3) A buyer who declares the contract avoided in respect of any delivery may, at the same time, declare it avoided in respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract.

INTRODUCTION

1. This article provides special rules for instalment contracts. These rules set out when a seller or a buyer is entitled to declare the contract avoided with respect to a single instalment, future instalments, or the contract as a whole.[1] In accordance with article 26 a declaration of avoidance is effective only if the aggrieved party gives notice to the other party.

2. Article 73 does not preclude application of other articles of the Convention. When a seller fails to deliver an instalment or a buyer fails to pay for an instalment, the aggrieved party is entitled under article 47 or article 64 to give the breaching party an additional period of time and to avoid the instalment if that party fails to perform within the additional time.[2] When some but not all instalments are delivered, article 51 on partial delivery and article 73 may be applicable.[3] An aggrieved party may have both the right to suspend its performance under article 71 (1) and the right to avoid the contract as to future instalments under article 73 (2).[4] An aggrieved party may also be able to avoid its contractual obligations to make further deliveries under either article 72 or article 73.[5]

WHAT CONSTITUTES AN INSTALMENT CONTRACT

3. An instalment contract is one that provides for delivery of goods in separate lots.[6] The goods do not have to be fungible, so that an instalment contract may cover delivery of different kinds of goods in each instalment (e.g., men's lambskin coats and women's lambskin coats).[7] One decision states that an instalment contract need not determine the quantity of individual instalments under article 73 as precisely as partial deliveries under article 51.[8]

4. Several decisions have characterized separate contracts between parties that have an ongoing relationship as an instalment contract governed by article 73[9] or have concluded that the aggrieved party might act under either article 73 or another article, such as article 71[10] or article 72.[11] One decision also applies article 73 to separate yearly supply contracts for aluminium between the same parties.[12] Another decision, however, distinguishes an instalment contract from a distribution or framework agreement: the latter may provide for non-sales matters such as exclusive representation in a geographical area or an agreement without any determinable quantity.[13]

AVOIDANCE AS TO A SINGLE INSTALMENT

5. Paragraph (1) entitles a party to declare a contract avoided as to a single instalment if the other party commits a fundamental breach (see article 25) with respect to that instalment. The same standards for determining whether a party commits a fundamental breach apply both to a contract that requires a single delivery and to a contract that requires delivery by instalments. The aggrieved party was found to be entitled to avoid as to an instalment in the following cases: when the seller failed to deliver the promised goods;[14] when the seller conditioned delivery of an instalment on satisfaction of new demands.[15] On the other hand, the aggrieved party was found not to be entitled to avoid as to an instalment where the buyer delayed paying the price for the instalment.[16]

AVOIDANCE OF CONTRACT AS TO FUTURE INSTALMENTS

6. Paragraph (2) of article 73 entitles an aggrieved party to avoid the contract as to future instalments if the party has good grounds to conclude that the other party will commit a fundamental breach of contract (see article 25) with respect to the future instalments.

7. An aggrieved buyer was found to have the right to avoid as to future instalments in the following cases: where the seller made no delivery despite accepting payment;[17] where the seller failed to deliver first instalment;[18] where the seller declared that he would not make further deliveries;[19] where the seller refused to make further delivery of cherries because of a dramatic increase in the market price for cherries;[20] where seller's late delivery of three instalments caused disruption of buyer's production;[21] where the seller delivered poor quality goods;[22] where the buyer had good grounds to believe that the seller would be unable to deliver peppers that satisfied food safety regulations.[23]

8. In the following cases it was found that the seller had good grounds to avoid the contract: where the buyer's failure to open a letter of credit gave the seller good grounds to conclude that the buyer would not pay;[24] where the buyer continued to breach a contract term that prohibited the buyer from reselling the goods in specified markets.[25]

9. To avoid as to future instalments under article 73 (2) an aggrieved party must declare avoidance (by notice to the other party—see article 26) within a reasonable time. A buyer who was entitled to avoid the contract as to future instalments effectively avoided the contract when it gave notice to the seller within 48 hours of the third late delivery.[26]

AVOIDANCE OF CONTRACT AS TO INTERDEPENDENT INSTALMENT

10. If a party intends to avoid as to an instalment under article 73 (1), paragraph (3) authorizes additional avoidance as to past or future instalments that are so interdependent with the avoided instalment that they could not serve the purposes contemplated by the parties at the time the contract was concluded. If a party avoids as to instalments under paragraph (3), it must notify the other party at the same time that it declares avoidance of the instalment under article 73 (1). There are no reported cases applying this paragraph.

Notes

[1]See also ICC award No. 8740, 1996, Unilex (buyer duly avoided as to last instalment when total delivery of coal was less than contract amount).

[2]Schiedsgericht der Börse für Landwirtschaftliche Produkte–Wien, Austria, 10 December 1997, Unilex (buyer's failure to take delivery); CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997]; Arbitration award No. 273/95, Zürich Handelskammer, Switzerland, 31 May 1996, Unilex (buyer's failure to pay for instalment); Landgericht Ellwangen, Germany, 21 August 1995, Unilex (seller's failure to deliver to third party as agreed).

[3]CLOUT case No. 630 [Court of Arbitration of the International Chamber of Commerce, Zurich, Switzerland, July 1999] (both articles 51 and 73 applicable but buyer did not establish right to withhold payments); ICC award No. 8128, 1995, Unilex.

[4]See CLOUT Case No. 578 [Federal Western District Court of Michigan, United States, 17 December 2001] (*Shuttle Packaging Systems v. Tsonakis*) (citing arts. 71–73 for remedies available in instalment transaction); CLOUT case No. 630 [ICC award No. 9448, July 1999] see above (buyer not entitled to suspend because he had taken partial delivery of goods); CLOUT case No. 238 [Oberster Gerichtshof, Austria, 12 February 1998] (in addition to right to avoid as to instalments under art. 73, seller has right to suspend under art. 71 (1) but seller failed to establish its right in this case).

[5]*EP S.A.v FP Oy*, Helsinki Court of Appeal, Finland, 30 June 1998, Unilex (where two separate orders for skincare ointment were to be filled from the same batch of product and there was a fundamental breach with respect to the quality of the first delivery, the aggrieved buyer could avoid as to the second delivery either under either article 72 or, if the two orders constituted instalments of an instalment contract, under article 73 (2)); Arbitration award No. 273/95, Zürich Handelskammer, Switzerland, 31 May 1996, Unilex (fundamental breach as to future instalments is covered by both articles 72 and 73).

[6]ICC award No. 9887, August 1999, Unilex (chemical substance); CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998] (lambskin coats); CLOUT case No. 293 [Arbitration—Schiedsgericht der Hamburger freundschaftlichen Arbitrage, 29 December 1998] (cheese); CLOUT case No. 238 [Oberster Gerichtshof, Austria, 12 February 1998] (umbrellas); CLOUT case No. 246 [Audiencia Provincial de Barcelona, Spain, 3 November 1997] (manufactured springs); CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997] (sunflower oil); CLOUT case No. 154 [Cour d'appel, Grenoble, France, 22 February 1995] (jeans); Arbitration award No. Vb 94124, Chamber of Commerce and Industry of Budapest, Hungary, 17 November 1995, Unilex (mushrooms); Chansha Intermediate Peoples' Court Economic Chamber, case No. 89, China, 18 September 1995, Unilex (molybdenum iron alloy), also available on the Internet at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950918c1.html; Landgericht Ellwangen, Germany, 21 August 1995, Unilex (peppers); ICC award No. 8128, 1995, Unilex (chemical fertilizer).

[7]CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998] (see full text of the decision).

[8]CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996] (see full text of the decision).

[9]Schiedsgericht der Börse für Landwirtschaftliche Produkte—Wien, Austria, 10 December 1997, Unilex (from economic perspective two contracts for barley concluded on the same day calling for delivery during the same time period are part of same transaction and therefore governed by art. 73).

[10]CLOUT case No. 238 [Oberster Gerichtshof, Austria, 12 February 1998] (attempted suspension under art. 73 rather than art. 71).

[11]*EP S.A.v FP Oy*, Helsinki Court of Appeal, Finland, 30 June 1998, Unilex (where two separate orders for skincare ointment were to be filled from the same batch of product and there was a fundamental breach with respect to the first delivery, the aggrieved buyer could avoid as to the second delivery either under either article 72 or, if the two orders constituted instalments of an instalment contract, under article 73 (2)); Arbitration award No. 273/95, Zürich Handelskammer, Switzerland, 31 May 1996, Unilex (fundamental breach as to future instalments is covered by both articles 72 and 73).

[12]Arbitration award No. 273/95, Zürich Handelskammer, Switzerland, 31 May 1996, Unilex (fundamental breach as to future instalments is covered by both articles 72 and 73).

[13]CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg 21 March, 21 June 1996] (leaving open whether contract in case before the court was an instalment contract) (see full text of the decision).

[14]CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997].

[15]CLOUT case No. 293 [Arbitration—Schiedsgericht der Hamburger freundschaftlichen Arbitrage, 29 December 1998].

[16]Arbitration award No. 273/95, Zürich Handelskammer, Switzerland, 31 May 1996, Unilex.

[17]CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997].

[18]Arbitration award No. 273/95, Zürich Handelskammer, Switzerland, 31 May 1996, Unilex (failure to deliver first instalment gave the buyer good grounds for concluding that later instalments would not be delivered).

[19]CLOUT case No. 293 [Arbitration—Schiedsgericht der Hamburger freundschaftlichen Arbitrage, 29 December 1998].

[20]CLOUT case No. 265 [Arbitration—Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 25 May 1999].

[21]CLOUT case No. 246 [Audiencia Provincial de Barcelona, Spain, 3 November 1997].

[22]ICC award No. 9887, August 1999, Unilex.

[23]Landgericht Ellwangen, Germany, 21 August 1995, Unilex.

[24]Arbitration award No. Vb 94124, Chamber of Commerce and Industry of Budapest, Hungary, 17 November 1995, Unilex.

[25]CLOUT case No. 154 [Cour d'appel, Grenoble, France, 22 February 1995] (resale of jeans in Africa and South America; also citing art. 64 (1)).

[26]CLOUT case No. 246 [Audiencia Provincial de Barcelona, Spain, 3 November 1997].

Section II of Part III, Chapter V

Damages (articles 74-77)

OVERVIEW

1. Articles 45 (1) *(b)* and 61 (1) *(b)* of the CISG provide that an aggrieved buyer and an aggrieved seller, respectively, may claim damages as provided in articles 74 to 77 if the other party "fails to perform any of his obligations under the contract or this Convention." Articles 74 to 77, which comprise Section II of Chapter V of Part III, set out the damage formulas that apply to the claims of both aggrieved sellers and aggrieved buyers. These damage provisions are exhaustive and exclude recourse to domestic law.[1]

2. Article 74 establishes the general formula applicable in all cases where an aggrieved party is entitled to recover damages. It provides that "damages for breach of contract" comprise all losses, including loss of profits, caused by the breach, to the extent that these losses were foreseeable by the breaching party at the time the contract was concluded. An aggrieved party may claim under article 74 even if entitled to claim under article 75 or 76.[2] The latter articles explicitly provide that an aggrieved party may recover additional damages under article 74.

3. Articles 75 and 76 apply only in cases where the contract has been avoided. Article 75 measures damages concretely by reference to the price in a substitute transaction, while article 76 measures damages abstractly by reference to the current market price. Article 76 (1) provides that an aggrieved party may not calculate damages under article 76 if it has concluded a substitute transaction under article 75.[3] If, however, an aggrieved party concludes a substitute transaction for less than the contract quantity, both articles 75 and 76 may apply.[4]

4. Pursuant to article 77, damages recoverable under articles 74, 75 or 76 are reduced if it is established that the aggrieved party failed to mitigate losses. The reduction is the amount by which the loss should have been mitigated.

5. Several courts have deduced general principles from the provisions of Section II. Decisions assert that full compensation to an aggrieved party is a general principle on which the Convention is based.[5] Another decision states that the Convention prefers "concrete" calculation of damages by reference to actual transactions or losses over abstract calculation by reference to the market price.[6] It has been stated that the purpose of money damages under the Convention is to put the aggrieved party in the economic position he would have been in had the contract been properly performed (protection of indemnity and expectation interests) or, as an alternative, to compensate the aggrieved party for expenses he reasonably incurred in reliance on the contract when the purpose of those expenses is lost because of the breach.[7]

RELATION TO OTHER ARTICLES

6. Article 6 provides that parties may agree to derogate from or vary the provisions of the Convention, including the damage provisions set out in Section II of Chapter V. Several decisions implicitly rely on article 6 when enforcing contract terms limiting[8] or liquidating[9] damages. One decision concluded that where the parties had agreed that an aggrieved party was entitled to a "compensation fee" if the contract was avoided because of the acts of the other party, the aggrieved party was entitled to recover both the compensation fee and damages under article 75.[10] Another decision concluded that a post-breach agreement settling a dispute with respect to a party's non-performance displaces the aggrieved party's right to recover damages under the damage provisions of the Convention.[11] The validity of contract terms that address damages is governed by applicable domestic law rather than the Convention (article 4 *(a)*).

7. A party who fails to perform is exempt from damages if he proves that the requirements of article 79 or article 80 are satisfied. Under article 79, the nonperforming party must show 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". If the exempt party does not give timely notice of the impediment and its effect as required by article 79 (4), however, he will be liable for damages resulting to the other party from such non-receipt (article 79 (4)). Under article 80, an aggrieved party may not rely on a breach by the other party to the extent that the breach was caused by the aggrieved party's act or omission.

8. Article 44 provides that a party who fails to give due notice of non-conformity as required by articles 39 or 43 nevertheless has the option to recover damages "except for loss of profit" if he establishes a reasonable excuse for his failure.

9. Article 50 authorizes an aggrieved buyer to reduce the price according to a stated formula when it receives and keeps non-conforming goods. The buyer may waive its right to damages under articles 74 to 76 by claiming instead reduction of the price under article 50.[12]

10. If the contract is avoided, an aggrieved party who claims damages under article 75 or 76 is also subject to articles 81 to 84 on the effects of avoidance. Although avoidance generally releases the parties from their obligations under the contract, a party's right to damages survives avoidance (article 81 (1)).[13]

11. Other articles of the Convention may require a party to take specific measures to protect against losses. Articles 85 to 88, for example, state when and how a buyer or seller must preserve goods in their possession.[14] The party taking such measures is entitled by these articles to recover reasonable expenses.[15]

BURDEN OF PROOF

12. Although none of the damage formulas in articles 74, 75 and 76 expressly allocates the burden of proof, one court has concluded that the Convention recognizes the general principle that the party who invokes a right bears the burden of establishing that right, and that this principle excludes application of domestic law with respect to burden of proof.[16] Thus, the court opined, an aggrieved party claiming damages under articles 74, 75 and 76, or the breaching party claiming a reduction in damages under article 77,[17] will bear the burden of establishing his entitlement to as well as the amount of damages or a reduction in damages. The same opinion concludes, however, that applicable domestic law rather than the Convention governs how a judge should reach his opinion (e.g. the weight to be given evidence) as this is a matter not governed by the Convention.[18]

SET OFF

13. Although the Convention does not address the issue of whether a counterclaim may be set off against a claim under the Convention,[19] the Convention does determine whether a counterclaim arising from the sales contract exists.[20] If such a counterclaim does exist, then it may be subject to set off against a claim arising under the Convention.[21]

JURISDICTION; PLACE OF PAYMENT OF DAMAGES

14. Several decisions have concluded that, for the purposes of determining jurisdiction, damages for breach of contract are payable at the claimant's place of business.[22] These decisions reason that the Convention includes a general principle that a creditor is to be paid at its domicile unless the parties otherwise agree.

Notes

[1]CLOUT case No. 345 [Landgericht Heilbronn, Germany, 15 September 1997] (recourse to national law on damages excluded).

[2]CLOUT case No. 427 [Oberster Gerichtshof, Austria, 28 April 2000] (aggrieved party may claim under article 74 even if it could also claim under articles 75 or 76).

[3]See ICC award No. 8574, September 1996, Unilex (no recovery under article 76 because the aggrieved party had entered into substitute transactions within the meaning of article 75). See, however, CLOUT case No. 227 [Oberlandesgericht Hamm, Germany, 22 September 1992] (damages calculated under article 76 rather than article 75 where aggrieved seller resold goods for one-fourth of contract price and for less than current market price).

[4]CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994]. See also ICC award No. 8740, October 1996, Unilex (aggrieved buyer who was unable to establish the market price was not entitled to recover under article 76, and was entitled to recover under article 75 only to the extent it had made substitute purchases); but compare CIETAC award, China, 30 October 1991, available on the Internet at http://cisgw3.law.pace.edu/cases/911030c1.html (aggrieved buyer who had made purchases for only part of the contract quantity nevertheless awarded damages under article 75 for contract quantity times the difference between the contract price and the price in the substitute transaction).

[5]CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002] (see full text of the decision); CLOUT case No. 93 [Arbitration—Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft—Wien, Austria, 15 June 1994] (citing article 74 for general principle within meaning of art. 7 (2)).

[6]CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996] (CISG favors concrete calculation of damages over the reference to market price in the article 76 formula) (see full text of the decision). See also CLOUT case No. 348 [Oberlandesgericht Hamburg, Germany, 26 November 1999] (damages not awarded under article 76 because they could be calculated by reference to actual transactions).

[7]CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002] (see full text of the decision).

[8]Hovioikeus [Court of Appeal] Turku, Finland, 12 April 2002, available (in English translation) on the Internet at http://cisgw3.law.pace.edu/cases/020412f5.html (warranty term limiting recovery of damages enforceable).

[9]Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, award in case No. 302/96 of 27 July 1999, published in Rozenberg, *Practika of Mejdunarodnogo Commercheskogo Arbitrajnogo Syda: Haychno-Practicheskiy Commentariy Moscow* (1999–2000) No. 27 [141–147] (liquidated damages substantiated; aggrieved buyer's damages calculated on basis of lost profits); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, award in case No. 251/1993 of 23 November 1994, Unilex (damages for delay granted only to extent of contract clause stipulating penalty for delay).

[10]CLOUT case No. 301 [Arbitration—International Chamber of Commerce No. 7585 1992].

[11]CIETAC award No. 75, China, 1 April 1993, Unilex, also available on the INTERNET at http://www.cisg.law.pace.edu/cgi-bin/isearch.

[12]CLOUT case No. 474 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, award in case No. 54/1999 of 24 January 2000].

[13]CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996] (damage provisions prevail over consequences of avoidance under articles 81–84).

[14]CIETAC award, China, 6 June 1991, available on the Internet at http://www.cietac-sz.org.cn/cietac/index.htm (splitting cost of freight for return of goods between buyer who failed to return goods in a reasonable manner and seller who did not cooperate in return).

[15]See, e.g., CLOUT case No. 304 [Arbitration—International Chamber of Commerce No. 7531 1994] (awarding damages under article 74 for expenses incurred to preserve goods under articles 86, 87 and 88 (1)). See also CLOUT case No. 104 [Arbitration—International Chamber of Commerce No. 7197 1993] (awarding damages for expenses incurred in preserving perishable goods even though not required to do so by articles 85 to 88) (see full text of the decision).

[16]*FCF S.A. v. Adriafil Commerciale S.r.l.*, Bundesgericht, Switzerland, 15 September 2000, available on the Internet at http://www.bger.ch. See also CLOUT case No. 217 [Handelsgericht des Kantons Aargau, Switzerland, 26 September 1997] (aggrieved party has burden of establishing loss); ICC award No. 7645, March 1995, Unilex ("Under general principles of law" the party claiming damages has burden of establishing existence and amount of damages caused by the breach of the other party). See generally CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (deriving from article 79 a general principle that claimant has burden of establishing its claim).

[17]Article 77 of the Convention expressly provides that the party in breach may claim a reduction if the other party fails to take measures to mitigate the loss.

[18]*FCF S.A. v. Adriafil Commerciale S.r.l.*, Bundesgericht, Switzerland, 15 September 2000, available on the Internet at http://www.bger.ch (construing article 8 of Swiss Civil Code). See also CLOUT case No. 261 [Bezirksgericht der Sanne, Switzerland, 20 February 1997] (domestic law, rather than the Convention, determines how damages are to be calculated if the amount cannot be determined); CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997] (domestic law determines whether estimate of damages for future losses is sufficiently definite).

[19]CLOUT case No. 288 [Oberlandesgericht München, Germany 28 January 1998] (applicable law, not the Convention, determines whether set off permitted); CLOUT case No. 281 [Oberlandesgericht Koblenz, Germany, 17 September 1993] (applicable domestic law determines whether set off allowed). But see CLOUT case No. 630 [Court of Arbitration of the International Chamber of Commerce, Zurich, Switzerland, July 1999] (appearing to suggest that, because the Convention itself does not provide set-off as a remedy for aggrieved buyers, buyer was not entitled to set off damages against its liability for the price of delivered goods).

[20]CLOUT case No. 125 [Oberlandesgericht Hamm, Germany, 9 June 1995] (set-off permitted under applicable national law; counterclaim determined by reference to Convention). But see CLOUT case No. 170 [Landgericht Trier, Germany, 12 October 1995] (counterclaim arose under Convention; set off permitted under Convention).

[21]CLOUT case No. 348 [Oberlandesgericht Hamburg, Germany, 26 November 1999] (buyer's counterclaim offset against seller's claim for price); CLOUT case No. 318 [Oberlandesgericht Celle, Germany, 2 September 1998] (buyer damages set off against price); CLOUT case No. 273 [Oberlandesgericht München, Germany, 9 July 1997] (buyer's counterclaim would have been allowable as set off but seller had not breached). See also CLOUT case No. 280 [Oberlandesgericht Jena, Germany, 26 May 1998] (implicitly recognizing the possibility that buyer's tort claim could be raised in order to be set off against seller's claim for the price, but applying CISG notice provisions to bar tort claim). But see CLOUT case No. 630 [Court of Arbitration of the International Chamber of Commerce, Zurich, Switzerland, July 1999] (appearing to suggest that, because the Convention itself does not provide set-off as a remedy for aggrieved buyers, buyer was not entitled to set off damages against its liability for the price of delivered goods).

[22]CLOUT case No. 205 [Cour d'appel, Grenoble, France, 23 October 1996] (deriving from article 57 (1) a general principle that the place of payment is the domicile of creditor); CLOUT case No. 49 [Oberlandesgericht Düsseldorf, Germany, 2 July 1993] (deriving general principle on place of payment from article 57 (1)).

Article 74

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

OVERVIEW

1. Article 74 sets out the Convention's general formula for the calculation of damages. The formula is applicable if a party to the sales contract breaches its obligations under the contract or the Convention.[1] The first sentence of article 74 provides for the recovery of all losses, including loss of profits, suffered by the aggrieved party as a result of the other party's breach. The second sentence limits recovery to those losses that the breaching party foresaw or could have foreseen at the time the contract was concluded. The formula applies to the claims of both aggrieved sellers and aggrieved buyers.

2. The Convention determines the grounds for recovery of damages, but domestic procedural law may apply to the assessment of evidence of loss.[2] Applicable domestic law also determines whether a party may assert a right to set off in a proceeding under the Convention (see paragraph 37 below). Domestic substantive law may also govern issues relevant to the determination of the amount of damages, such as the weighing of evidence.[3]

3. One tribunal has derived from the damage formula in article 74 a general principle of full compensation. Pursuant to article 7 (2), the tribunal used this general principle to fill the gap in article 78, which provides for the recovery of interest in stated circumstances but does not indicate how the rate of interest is to be determined.[4]

4. In accordance with article 6 a seller and buyer may agree to derogate from or vary article 74. Several decisions enforce contract terms limiting[5] or liquidating[6] damages. The validity of these contract terms is, by virtue of article 4 *(a)*, governed by applicable domestic law rather than the Convention.[7]

RELATION TO OTHER ARTICLES

5. An aggrieved party may choose to claim under article 74 even if entitled to claim under articles 75 and 76.[8] The latter provisions explicitly provide that an aggrieved party may recover additional damages under article 74.

6. Damages recoverable under articles 74 are reduced if it is established that the aggrieved party failed to mitigate these damages as required by article 77. The reduction is the amount by which the loss should have been mitigated. See the Digest for article 77.

7. Article 78 expressly provides for the recovery of interest in specified cases but states that its provisions are "without prejudice to any claim for damages recoverable under Article 74". Several decisions have awarded interest under article 74.[9] Interest has been awarded as damages where the circumstances were not covered by article 78 because the interest claim did not relate to sums in arrears.[10]

8. An aggrieved seller may require the buyer to pay the price pursuant to article 62. An abstract of an arbitral opinion suggests that the tribunal awarded the seller the price as damages under article 74.[11]

RIGHT TO DAMAGES

9. Article 74 provides a general formula for the calculation of damages. The right to claim damages is set out in articles 45 (1) *(b)* and 61 (1) *(b)*. These paragraphs provide that the aggrieved buyer and the aggrieved seller, respectively, may claim damages as provided in articles 74 to 77 if the other party "fails to perform any of his obligations under the contract or this Convention". Thus, the article 74 formula may be used for calculating damages for breach of obligations under the Convention as well as breach of provisions of the sales contract.[12]

10. Article 74 states that damages may be awarded for "breach of contract" that causes loss, without any qualification as to the seriousness of the breach or the loss. An abstract of one arbitral award suggests nevertheless that damages may be recovered under article 74 for "fundamental non-performance".[13]

11. Under articles 45 and 61 an aggrieved party is entitled to recover damages without regard to the "fault" of the breaching party. Several decisions consider whether claims based on a party's negligence are covered by the Convention. An arbitral award concluded that an aggrieved buyer failed to notify the seller of non-conformity in a timely manner as required by article 39 of the Convention, and the tribunal applied domestic civil law to divide the loss equally between the seller and the buyer on the ground that the Convention did not govern the issue of joint contribution to harm.[14] A court decision concluded

that the Convention did not cover a claim that the alleged seller had made a negligent misrepresentation inducing the conclusion of the sales contract.[15]

12. When an aggrieved buyer fails, without excuse,[16] to give timely notice to a breaching seller in accordance with articles 39 or 43, the aggrieved buyer loses its right to rely on the seller's breach when making a claim for damages.[17] Under article 44 of the Convention, however, if the buyer has a "reasonable excuse" for failing to give the required notice, the aggrieved buyer may nevertheless recover damages other than lost profits.[18]

13. Article 79 excuses a breaching party from the payment of damages (but not from other remedies for non-performance) if he proves that his non-performance was due to an impediment that satisfies the conditions of paragraph (1) of article 79. Paragraph (4) of article 79 provides, however, that the breaching party will be liable for damages resulting from the other party's non-receipt of a timely notice of the impediment and its effects.

14. Article 80 provides that an aggrieved party may not rely on a breach by the other party to the extent that the breach was caused by the aggrieved party's act or omission.

TYPES OF LOSSES

15. The first sentence of article 74 provides that an aggrieved party's damages consist of a monetary sum to compensate him for "loss, including loss of profit, suffered . . . as a consequence of the breach". Except for the explicit inclusion of lost profits, article 74 does not otherwise classify losses. Decisions sometimes refer to the classification of damages under domestic law.[19] It has been held that a buyer who has received non-conforming goods and has not avoided the contract is entitled to recover damages under article 74 measured by the difference between the value of the goods the buyer contracted for and the value of the non-conforming goods that were actually delivered.[20]

– Losses arising from death or personal injury

16. Article 5 provides that losses arising from death or personal injury are excluded from the Convention's coverage. However, when deciding on its jurisdiction, one court implicitly assumed that the Convention covers claims by a buyer against its seller for indemnification against claims by a sub-buyer for personal injury.[21]

– Losses arising from damage to other property

17. Article 5 does not exclude losses for damage to property other than the goods purchased.[22]

– Losses arising from damage to non-material interests

18. Article 74 does not exclude losses arising from damage to non-material interests, such as the loss of an aggrieved party's reputation because of the other party's breach. Some decisions have implicitly recognized the right to recover damages for loss of reputation or good will,[23] but at least one decision has denied such recovery under the Convention.[24] One court found claims for both loss of turnover and loss of reputation to be inconsistent.[25]

– Losses arising from change in value of money

19. Article 74 provides for recovery of "a sum equal to the loss" but does not expressly state whether this formula covers losses that result from changes in the value of money. Several courts have recognized that an aggrieved party may suffer losses as a result of non-payment or delay in the payment of money. These losses may arise from fluctuations in currency exchange rates or devaluation of the currency of payment. Tribunals differ as to the appropriate solution. Several decisions have awarded damages to reflect currency devaluation[26] or changes in the cost of living.[27] On the other hand, several other decisions refused to award damages for such losses. One decision concluded that a claimant that is to receive payment in its own currency is generally not entitled to recover losses from currency devaluation, but went on to suggest that a claimant might recover damages for currency devaluations if it was to be paid in foreign currency and it had a practice of converting such currency immediately after payment.[28] Another court stated that while devaluation of the currency in which the price was to be paid could give rise to damages recoverable under the Convention, no damages could be awarded in the case before it because future losses could be awarded only when the loss can be estimated.[29]

EXPENDITURES BY AGGRIEVED PARTY

20. Many decisions have recognized the right of an aggrieved party to recover reasonable expenditures incurred in preparation for or as a consequence of a contract that has been breached. The second sentence of article 74 limits recovery to the total amount of losses the breaching party could foresee at the time the contract was concluded (see paragraphs 32-34 below). Although the Convention does not expressly require that expenditures be reasonable several decisions have refused to award damages when the expenditures were unreasonable.[30]

21. Decisions have awarded incidental damages to an aggrieved buyer who had made reasonable expenditures for the following purposes: inspection of non-conforming goods;[31] handling and storing non-conforming goods;[32] preserving goods;[33] shipping and customs costs incurred when returning the goods;[34] expediting shipment of substitute goods under an existing contract with a third party;[35] installing substitute goods;[36] sales and marketing costs;[37] commissions;[38] hiring a third party to process goods;[39] obtaining credit;[40] delivering and taking back the non-conforming goods to and from a sub-buyer;[41] reimbursing sub-buyers on account of non-conforming goods;[42] moving replacement coal from stockpiles;[43] loss incurred in sub-chartering a ship that had been chartered to transport goods under a contract that the seller properly avoided.[44] Several decisions have awarded buyers who took delivery of non-conforming

goods the reasonable costs of repair as damages.[45] At least one decision implicitly recognizes that an aggrieved buyer may recover incidental damages, although in the particular case the buyer failed to establish such damages.[46] Another decision assumed that the Convention governed a buyer's claim for indemnification for expenses incurred in reimbursing a sub-buyer for personal injury caused to an employee.[47]

22. Decisions may recognize that an aggrieved buyer may recover for particular types of expenditure but deny recovery in a particular case. Some decisions explicitly recognize that recovery is possible for the type of expenditure but deny recovery for failure of proof, lack of causation, or their unforeseeability by the breaching party. Thus one decision recognized the potential recovery of a buyer's advertising costs but declined to award damages because the buyer failed to carry its burden of proof.[48] Other decisions may implicitly assume the right to recover particular expenditures. When deciding on its jurisdiction, one court implicitly assumed that the Convention covers claims by a buyer against its seller for indemnification of a sub-buyer's claim for personal injury.[49]

23. Aggrieved sellers have recovered damages for the following incidental expenses: storage of goods at the port of shipment following the buyer's anticipatory breach;[50] storage and preservation of undelivered machinery;[51] the cost of modifying a machine in order to resell it;[52] costs related to the dishonour of the buyer's cheques.[53] A seller who has delivered non-conforming goods and subsequently cures the non-conformity is not entitled to recover the cost of cure.[54]

– Expenditures for debt collection; attorney's fees

24. Decisions are split on whether the cost of using a debt collection agency other than a lawyer may be recovered as damages. One decision awarded the seller the cost,[55] but several other decisions state that an aggrieved party may not recover compensation for the cost of hiring a debt collection agency because the Convention does not cover such expenses.[56]

25. A number of courts and arbitral tribunals have considered whether an aggrieved party may recover the costs of a lawyer hired to collect a debt arising from a sales contract. Several decisions award damages to compensate for legal fees for extra-judicial acts such as the sending of collection letters.[57] One decision distinguished between the extra-judicial fees of a lawyer in the forum and similar fees of a lawyer in another jurisdiction it included the fees of the former in the allocation of litigation costs under the forum's rules and awarded the fees of the latter as damages under article 74 of the Convention.[58]

26. Decisions are split as to whether attorney's fees for litigation may be awarded as damages under article 74.[59] Citing article 74, several arbitral tribunals have awarded recovery of attorney's fees for the arbitration proceedings.[60] In a carefully reasoned award, another arbitral tribunal concluded that a supplemental interpretation of the arbitration clause by reference to both article 74 and local procedural law authorized the award of attorney's fees before a tribunal consisting of lawyers.[61] Another court stated that, in principle, legal costs could be recovered, although the court denied them in the particular case.[62] Many cases award attorney's fees without indicating whether the award is for damages calculated under article 74 or is made pursuant to the tribunal's rules on the allocation of legal fees.[63] Several decisions have limited or denied recovery of the amount of the claimant's attorney's fees on the grounds that the fees incurred were unforeseeable[64] or that the aggrieved party had failed to mitigate these expenses as required by article 77.[65] An appellate court in the United States reversed a decision awarding attorney's fees as damages under article 74 on the ground, *inter alia*, that the Convention did not implicitly overturn the "American rule" that the parties to litigation normally bear their own legal expenses, including attorneys' fees.[66]

LOST PROFITS

27. The first sentence of article 74 expressly states that damages for losses include lost profits. Many decisions have awarded the aggrieved party lost profits[67]. When calculating lost profits, fixed costs (as distinguished from variable costs incurred in connection with fulfilling the specific contract) are not to be deducted from the sales price.[68] One decision awarded a seller who had been unable to resell the goods the difference between the contract price and the current value of those goods.[69]

28. The second sentence of article 74 limits the damages that can be awarded for losses caused by the breach to losses that the breaching party foresaw or should have foreseen at the time the contract was concluded. One decision reduced the recovery of profits because the breaching seller was not aware of the terms of the buyer's contract with its sub-buyer.[70]

29. Damages for lost profits will often require predictions of future prices for the goods or otherwise involve some uncertainty as to actual future losses. Article 74 does not address the certainty with which these losses must be proved. One decision required the claimant to establish the amount of the loss according to the forum's "procedural" standards as to the certainty of the amount of damages.[71]

30. Evidence of loss of profits, according to one decision, might include evidence of orders from customers that the buyer could not fill, evidence that customers had ceased to deal with the buyer, and evidence of loss of reputation as well as evidence that the breaching seller knew or should have known of these losses.[72]

– Damages for "lost volume" sales

31. In principle, an aggrieved seller who resells the goods suffers the loss of a sale when he has the capacity and market to sell similar goods to other persons because, without the buyer's breach, he would have been able to make two sales. Under these circumstances a court has concluded that the seller was entitled to recover the lost profit from the first sale.[73] Another court, however, rejected a claim for

a "lost sale" because it did not appear that that the seller had been planning to make a second sale at the time the breached contract was negotiated.[74] An aggrieved buyer may have a similar claim to damages. A court concluded that a buyer could recover for damages caused by its inability to meet the market demand for its product as a result of the seller's delivery of non-conforming components.[75]

FORESEEABILITY

32. The second sentence of article 74 limits recovery of damages to those losses that the breaching party foresaw or could have foreseen at the time the contract was concluded as a possible consequence of its breach. It has been noted that it is the possible consequences of a breach, not whether a breach would occur or the type of breach, that is subject to the foreseeability requirement of article 74; and it has been suggested that article 74 does not demand that the specific details of the loss or the precise amount of the loss be foreseeable.[76]

33. Decisions have found that the breaching party could not have foreseen the following losses: rental of machinery by buyer's sub-buyer;[77] processing goods in a different country following late delivery;[78] an exceptionally large payments to freight forwarder;[79] attorney's fees in dispute with freight forwarder;[80] the cost of resurfacing a grinding machine where that cost exceeded price of wire to be ground;[81] lost profits where breaching seller did not know terms of contract with sub-buyer;[82] the cost of inspecting the goods in the importing country rather than exporting country.[83]

34. On the other hand, several decisions have explicitly found that claimed damages were foreseeable. One decision states that the seller of goods to a retail buyer should foresee that the buyer would resell the good,[84] while an arbitration tribunal found that a breaching seller could have foreseen the buyer's losses because the parties had corresponded extensively on supply problems.[85] Another decision concluded that a breaching buyer who failed to pay the price in advance, as required by the contract, could foresee that an aggrieved seller of fungible goods would lose its typical profit margin.[86] A majority of another court awarded ten per cent of the price as damages to a seller who had manufactured the goods to the special order of the buyer; the majority noted that a breaching buyer could expect such a seller's profit margin.[87] It has also been held that a buyer could foresee that its failure to establish a letter of credit as required by the sales contract would leave the seller with a chartered vessel, intended to transport the goods, that it could not use; the loss the seller incurred in sub-chartering that vessel was thus recoverable under article 74.[88]

BURDEN AND STANDARD OF PROOF

35. Although none of the damage formulae in articles 74, 75 and 76 expressly allocates the burden of proof, those decisions that address the issue agree, more or less expressly, that the party making the claim bears the burden of establishing its claim.[89] One court gave effect to a national law rule that, if a breaching seller acknowledges defects in the delivered goods, the burden of establishing that the goods conformed to the contract shifts to the seller.[90] Another decision expressly placed the burden of establishing damages on the claimant.[91]

36. Several decisions state that domestic procedural and evidentiary law rather than the Convention governs the standard of proof and the weight to be given evidence when determining damages.[92]

SET OFF

37. Although the Convention does not address the issue of whether a counterclaim may be set off against a claim under the Convention,[93] the Convention does determine whether a counterclaim arising from a sales contract exists[94] and, if it does, the counterclaim may then be subject to set off against a claim arising under the Convention.[95]

JURISDICTION; PLACE OF PAYMENT OF DAMAGES

38. Several decisions have concluded that, for the purpose of determining jurisdiction, damages for breach of contract are payable at the claimant's place of business.[96]

Notes

[1]Articles 45 (1) *(b)* and 61 (1) *(b)* provide that the aggrieved buyer and the aggrieved seller, respectively, may recover damages as provided in articles 74 to 77 if the other party fails to perform as required by the contract or the Convention.

[2]Helsingin hoviokeus [Helsinki Court of Appeals], Finland, 26 October 2000, available in English translation on the Internet at http://cisgw3.law.pace.edu/cases/001026f5.html (grounds for recovery determined under the CISG but calculation of damages made under article 17 of the Finnish Law of Civil Procedure); CLOUT case No. 261 [Bezirksgericht der Sanne, Switzerland, 20 February 1997] (applicable domestic law determines how to calculate damages when amount cannot be determined); CLOUT case No. 85 [Federal District Court, Northern District of New York, United States, 9 September 1994] (referring to "sufficient evidence [under common law and law of New York] to estimate the amount of damages with reasonable certainty"), *affirmed* CLOUT case No. 138 [Federal Court of Appeals for the Second Circuit, United States, 6 December 1993, 3 March 1995].

[3]See, e.g., CLOUT case No. 377 [Landgericht Flensburg, Germany, 24 March 1999] (aggrieved seller recovers damages under article 74 for losses caused by the buyer's delay in payment but applicable domestic law determines whether payment was delayed because Convention is silent on time of payment).

[4]CLOUT case No. 93 [Arbitration—Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft—Wien, 15 June 1994] (deriving general principle from article 74 for purposes of filling gap in article 78, in accordance with article 7 (2)). See also CLOUT case No. 138 [Federal Court of Appeals for the Second Circuit, United States, 6 December 1993, 3 March 1995] (article 74 is "designed to place the aggrieved party in as good a position as if the other party had properly performed the contract") (see full text of the decision).

[5]Hovioikeus Turku, Finland, 12 April 2002, available (in English translation) on the Internet at http://cisgw3.law.pace.edu/cases/020412f5.html (contract term limiting recovery of damages is enforceable).

[6]Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russia, award in case No. 302/1996, 27 July 1999, published in Rozenberg, *Practika of Mejdunarodnogo Commercheskogo Arbitrajnogo Syda: Haychno-Practicheskiy Commentariy Moscow* (1999–2000) No. 27 [141–147] (liquidated damage clause displaces remedy of specific performance; amount of liquidated damages was reasonable and foreseeable under article 74 as measure of expected profit); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russia, award in case No. 251/93 of 23 November 1994, Unilex (damages for delay granted only to extent of contract penalty for delay clause).

[7]See CLOUT case No. 318 [Oberlandesgericht Celle, Germany, 2 September 1998] (term in seller's general conditions limiting damages not validly incorporated into contract) (see full text of the decision); CLOUT case No. 345 [Landgericht Heilbronn, Germany, 15 September 1997] (validity of standard term excluding liability determined by domestic law, but reference in domestic law to non-mandatory rule replaced by reference to equivalent Convention provision).

[8]CLOUT case No. 427 [Oberster Gerichtshof, Austria, 28 April 2000] (aggrieved party may claim under article 74 even if it could also claim under articles 75 or 76). See also CLOUT case No. 140 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russia, award in case No. 155/1994 of 16 March 1995] (citing article 74, the tribunal awarded buyer the difference between contract price and price in substitute purchase) ; CLOUT case No. 93 [Arbitration—Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft—Wien, Austria, 15 June 1994] (awarding seller, without citation of specific Convention article, difference between contract price and price in substitute transaction).

[9]See, e.g., *Van Dongen Waalwijk Leder BV v. Conceria Adige S.p.A.*, Gerechtshof 's-Hertogenbosch, the Netherlands, 20 October 1997, Unilex (interest awarded under both articles 74 and 78); Pretura di Torino, Italy, 30 January 1997, Unilex (aggrieved party entitled to statutory rate of interest plus additional interest it had established as damages under article 74); also available on the Internet at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/970130i3.html; CLOUT case No. 193 [Handelsgericht des Kantons Zürich, Switzerland, 10 July 1996] (seller awarded interest under article 74 in amount charged on bank loan to seller that was needed because of buyer's non-payment); Amtsgericht Koblenz, Germany, 12 November 1996, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/400.htm (bank certificate established that aggrieved seller was paying higher interest rate than official rate under applicable law); Käräjäoikeus of Kuopio, Finland, 5 November 1996, available on the Internet at http://www.utu.fi/oik/tdk/xcisg/tap6.html (breaching party could foresee aggrieved party would incur interest charges, but not the actual rate of interest in Lithuania); CLOUT case No. 195 [Handelsgericht des Kantons Zürich, Switzerland, 21 September 1995] (seller entitled to higher interest under article 74 if he established damages caused by non-payment); CLOUT case No. 281 [Oberlandesgericht Koblenz, Germany, 17 September 1993]; CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994] (damages includes interest paid by aggrieved seller on bank loans); CLOUT case No. 104 [Arbitration—International Chamber of Commerce No. 7197 1993] (interest awarded at commercial bank rate in Austria); Landgericht Berlin, Germany, 6 October 1992, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/173.htm (assignee of aggrieved party's claim entitled to recover 23% interest rate charged by assignee); CLOUT case No. 7 [Amtsgericht Oldenburg in Holstein, Germany, 24 April 1990] (seller recovered price and interest at the statutory rate in Italy plus additional interest as damages under article 74). See also CLOUT case No. 377 [Landgericht Flensburg, Germany, 24 March 1999] (aggrieved party had right to recover damages under the Convention for losses resulting from delay in payment but applicable domestic law determines when delay becomes culpable); CLOUT case No. 409 [Landgericht Kassel, Germany, 15 February 1996] (failure to establish additional damages under article 74); CLOUT case No. 132 [Oberlandesgericht Hamm, Germany, 8 February 1995] (claimant awarded statutory interest rate under article 78 but claimant failed to establish payment of higher interest rate for purposes of recovering damages under article 74).

[10]See, e.g., Stockholm Chamber of Commerce Arbitration Award, Sweden, 1998, Unilex (aggrieved buyer entitled to recover interest on reimbursable costs it incurred following sub-buyer's rightful rejection of goods).

[11]ICC award No. 8716, February 1997, (Fall 2000) *ICC International Court of Arbitration Bulletin*, vol. 11, No. 2, pp. 61-63 (damages awarded in amount of price).

[12]See, e.g., CLOUT case No. 51 [Amtsgericht Frankfurt a.M., Germany, 31 January 1991] (seller's failure to notify the buyer that the seller was suspending performance in accordance with article 71 (3) was itself a breach of the Convention entitling buyer to damages).

[13]ICC award No. 8716, February 1997, (Fall 2000) *ICC International Court of Arbitration Bulletin,* vol. 11, No. 2, pp. 61-63.

[14]Bulgarian Chamber of Commerce and Industry arbitration case No. 56/1995, Bulgaria, 24 April 1996, Unilex (setting a 50/50 division of the 10 percent of price held back by buyer because of non-conformity of goods).

[15]*Geneva Pharmaceuticals Tech. Corp. v. Barr Laboratories, Inc.,* United States, 10 May 2002, Unilex (domestic law "tort" claim of negligent misrepresentation not preempted by Convention). See also CLOUT case No. 420 [Federal District Court, Eastern District of Pennsylvania, United States, 29 August 2000] (Convention does not govern non-contractual claims).

[16]See CISG arts. 40 (buyer's failure is excused when seller could not have been unaware of non-conformity and failed to disclose nonconformity to buyer) and 44 (preserving spedified remedies for the buyer if he has "reasonable excuse" for failure to notify). See also CLOUT case No. 294 [Oberlandesgericht Bamberg, Germany, 13 January 1999] (buyer need not give notice declaring avoidance of contract when seller stated it would not perform); CLOUT case No. 94 [Arbitration—Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft—Wien, Austria, 15 June 1994] (seller estopped from asserting buyer's failure to give timely notice).

[17]See, e.g., CLOUT case No. 364 [Landgericht Köln, Germany, 30 November 1999] (failure to give sufficiently specific notice); CLOUT case No. 344 [Landgericht Erfurt, Germany, 29 July 1998] (failure to give sufficiently specific notice); CLOUT case No. 280

[Oberlandesgericht Jena, Germany, 26 May 1998] (failure to satisfy article 39 bars both CISG and tortious claims for damages); CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997] (failure to give sufficiently specific notice); CLOUT case No. 196 [Handelsgericht des Kantons Zürich, Switzerland, 26 April 1995] (failure to give timely notice); CLOUT case No. 192 [Obergericht des Kantons Luzern, Switzerland, 8 January 1997] (failure to give timely notice); CLOUT case No. 167 [Oberlandesgericht München, Germany, 8 February 1995] (failure to notify); CLOUT case No. 82 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994] (failure to notify); CLOUT case No. 50 [Landgericht Baden-Baden, Germany, 14 August 1991] (failure to give timely notice of non-conformity); CLOUT case No. 4 [Landgericht Stuttgart, Germany, 31 August 1989] (failure to examine and notify of non-conformity of goods).

[18]CLOUT case No. 474 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russia, award in case No. 54/1999 of 24 January 2000].

[19]See, e.g., CLOUT case No. 427 [Oberster Gerichtshof, Austria, 28 April 2000] (loss of profit in case was "positive damage") (see full text of the decision); CLOUT case No. 138 [Federal Court of Appeals for the Second Circuit United States 6 December 1995] ("incidental and consequential" damages) (see full text of the decision) affirming CLOUT case No. 85 [Federal District Court, Northern District of New York, United States, 9 September 1994].

[20]CLOUT case No. 596 [Oberlandesgericht Zweibrücken, Germany, 2 February 2004] (see full text of the decision).

[21]CLOUT case No. 49 [Oberlandesgericht Düsseldorf, Germany, 2 July 1993].

[22]See CLOUT case No. 196 [Handelsgericht des Kantons Zürich, Switzerland 26 April 1995] (recovery for damage to house in which a container for "weightless floating" installed).

[23]Helsingin hoviokeus, Finland, 26 October 2000, available in English translation on the Internet at http://cisgw3.law.pace.edu/cases/001026f5.html (recovery of good will calculated in accordance with national rules of civil procedure); CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999] (stating that article 74 includes recovery for loss of goodwill but aggrieved party did not substantiate claim) (see full text of the decision); CLOUT case No. 313 [Cour d'appel, Grenoble, France, 21 October 1999] (no recovery under CISG for loss of good will unless loss of business proved); CLOUT case No. 210 [Audienca Provincial Barcelona, Spain, 20 June 1997] (aggrieved party did not provide evidence showing loss of clients or loss of reputation) (see full text of the decision).

[24]Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russia, award in case No. 304/93, of 3 March 1995 ("moral harm" not compensable under CISG).

[25]CLOUT case No. 343 [Landgericht Darmstadt, Germany 9 May 2000] (damaged reputation insignificant if there is no loss of turnover and consequent lost profits) (see full text of the decision).

[26]*Gruppo IMAR S.p.A. v. Protech Horst BV*, Arrondissementsrechtbank Roermond, the Netherlands, 6 May 1993, Unilex (damages in amount of devaluation because payment not made when due).

[27]See, e.g., *Maglificio Dalmine s.l.r. v. S.C. Covires* Tribunal commercial de Bruxelles, Belgium, 13 November 1992, Unilex (failure to pay price; court allowed revaluation of receivable under Italian law to reflect change in cost of living in seller's country).

[28]CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994] (seller did not establish its loss from devaluation of currency in which price was to be paid).

[29]CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997] (citing general principle of tort law).

[30]CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002] (see full text of the decision); CLOUT case No. 235 [Bundesgerichtshof, Germany, 25 June 1997] (expense of resurfacing grinding machine not reasonable in relation to price of wire to be ground); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russia, award in case No. 375/93 of 9 September 1994 (recovery of storage expenses shown to be in amounts normally charged).

[31]Stockholm Chamber of Commerce Arbitration Award, Sweden, 1998, Unilex (examination).

[32]Stockholm Chamber of Commerce Arbitration Award, Sweden, 1998, Unilex (storage); CLOUT case No. 138 [Federal Court of Appeals for the Second Circuit, United States, 6 December 1995] (reversing CLOUT case No. 85 decision that denied recovery of storage costs).

[33]CLOUT case No. 304 [Arbitration—International Chamber of Commerce No. 7531 1994].

[34]CLOUT case No. 138 [Federal Court of Appeals for the Second Circuit, United States, 6 December 1995] (reversing CLOUT case No. 85 decision that denied recovery of shipping costs and customs duties).

[35]CLOUT case No. 138 [Federal Court of Appeals for the Second Circuit, United States, 6 December 1995] (affirming CLOUT case No. 85 decision that awarded costs of expediting shipment of goods under existing contract).

[36]CLOUT case No. 125 [Oberlandesgericht Hamm, Germany, 9 June 1995].

[37]Helsingin hoviokeus [Helsinki Court of Appeal], Finland, 26 October 2000, available in English translation on the Internet at http://cisgw3.law.pace.edu/cases/001026f5.html (damages recovered for sales and marketing expenses of aggrieved buyer).

[38]CLOUT case No. 253 [Cantone del Ticino Tribunale d'appello, Switzerland, 15 January 1998] (commissions) (see full text of the decision).

[39]CLOUT case No. 311 [Oberlandesgericht Köln, Germany, 8 January 1997].

[40]CLOUT case No. 304 [Arbitration—International Chamber of Commerce No. 7531 1994].

[41]CLOUT case No. 318 [Oberlandesgericht Celle, Germany, 2 September 1998] (recovery allowed for handling complaints and for costs of unwrapping, loading and unloading returned non-conforming goods from buyer's customers); Stockholm Chamber of Commerce Arbitration Award, Sweden, 1998, Unilex (freight, insurance and duties connected with delivery to sub-buyer; storage with forwarder; freight back to aggrieved buyer; storage before resale by aggrieved buyer; examination).

[42]CLOUT case No. 168 [Oberlandesgericht Köln, Germany, 21 March 1996] (buyer entitled to damages in amount of compensation paid to sub-buyer for non-conforming goods); Landgericht Paderborn, Germany, 25 June 1996, Unilex (damages for reimbursement of

sub-buyer's travel expenses to examine product, costs of examination, cost of hauling defective products, costs of loss on a substitute purchase). See also CLOUT case No. 302 [Arbitration—International Chamber of Commerce No. 7660 1994] (no indemnity awarded because third party's pending claim against buyer was not yet resolved).

[43]ICC award No. 8740, October 1996, Unilex (cost of moving replacement coal from stockpiles recoverable).

[44]CLOUT case No. 631 [Supreme Court of Queensland, Australia, 17 November 2000].

[45]CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002]; CLOUT case No. 138 [Federal Court of Appeals for the Second Circuit, United States, 6 December 1995] (expenses incurred when attempting to remedy the non-conformity) (see full text of the decision), *affirming* CLOUT case No. 85 [Federal District Court, Northern District of New York, United States, 9 September 1994]; *Nova Tool and Mold Inc. v. London Industries Inc.*, Ontario Court-General Division, Canada, 16 December 1998, Unilex (reimbursing expenses of having third party perform regraining that had been overlooked by seller, and of repairing non-conforming goods); CLOUT case No. 49 [Oberlandesgericht Düsseldorf, Germany, 2 July 1993] (cost of repair).

[46]CLOUT case No. 318 [Oberlandesgericht Celle, Germany, 2 September 1998] (advertising costs not sufficiently particularized) (see full text of the decision).

[47]CLOUT case No. 49 [Oberlandesgericht Düsseldorf, Germany, 2 July 1993] (relying on the Convention but without analysis of article 5, court concluded that it had jurisdiction in action by buyer against its supplier to recover cost of its indemnification of sub-buyer for personal injury caused by defective machine sold by supplier) (see full text of the decision).

[48]CLOUT case No. 318 [Oberlandesgericht Celle, Germany, 2 September 1998] (advertising costs not sufficiently particularized) (see full text of the decision).

[49]CLOUT case No. 49 [Oberlandesgericht Düsseldorf, Germany, 2 July 1993].

[50]CLOUT case No. 93 [Arbitration—Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft—Wien, Austria, 15 June 1994] (storage expenses incurred because buyer was late in taking delivery) (see full text of the decision); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russia, award in case No. 375/93 of 9 September 1994 (recovery of storage expenses in amounts normally charged for storage); CLOUT case No. 104 [Arbitration—International Chamber of Commerce No. 7197 1993] (recovery of cost of storage but not for damage to goods because of prolonged storage) (see full text of the decision).

[51]CLOUT case No. 301 [Arbitration—International Chamber of Commerce No. 7585 1992] (storage and preservation of undelivered machinery). See also CISG art. 85 (seller must take steps to preserve goods when buyer fails to take over the goods).

[52]CLOUT case No. 301 [Arbitration—International Chamber of Commerce No. 7585 1992] (cost of modifying machine in order to resell) (see full text of the decision).

[53]CLOUT case No. 288 [Oberlandesgericht München, Germany, 28 January 1998] (dishonoured cheque); CLOUT case No. 376 [Landgericht Bielefeld, Germany, 2 August 1996] (buyer responsible for dishonoured cheques drawn by third party).

[54]CLOUT case No. 125 [Oberlandesgericht Hamm, Germany, 9 June 1995] (citing artsicle 45 and 48 but not article 74, court concluded that breaching seller must bear cost of repair or delivery of replacement goods).

[55]CLOUT case No. 327 [Kantonsgericht des Kantons Zug, Switzerland, 25 February 1999] (recovery of debt collection costs allowed).

[56]CLOUT case No. 296 [Amtsgericht Berlin-Tiergarten, Germany, 13 March 1997] (costs of collection agency and local attorney in debtor's location not recoverable because not reasonable); CLOUT case No. 228 [Oberlandesgericht Rostock, Germany, 27 July 1995] (CISG does not provide recovery for expenses incurred by collection agency).

[57]CLOUT case No. 634 [Landgericht Berlin, Germany 21 March 2003] (reminder letter) (see full text of the decision); CLOUT case No. 254 [Handelsgericht des Kantons Aargau, Switzerland, 19 December 1997] (extra-judicial costs); CLOUT case No. 169 [Oberlandesgericht Düsseldorf, Germany, 11 July 1996] (reminder letter); Landgericht Aachen, Germany, 20 July 1995, Unilex (pre-trial costs recoverable under article 74); Kantonsgericht Zug case No. A-3-1993-84, Switzerland, 1 September 1994, Unilex (expenses for non-judicial requests for payment reimbursable if payment was overdue at time of request). See also CLOUT case No. 410 [Landgericht Alsfeld, Germany, 12 May 1995] (seller failed to mitigate loss in accordance with article 77 when it hired a lawyer in buyer's location rather than a lawyer in seller's location to send a collection letter); CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994] (although in principle legal costs incurred before avoidance of the contract are recoverable under artcile 74, they were not recoverable in this case because the fees were recovered in special proceedings); *De Vos en Zonen v. Reto Recycling,* Gerechtshof 's-Hertogenbosch, the Netherlands, 27 November 1991, Unilex (construing ULIS article 82, predecessor of article 74, court allowed extrajudicial costs). See also *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc.* [Federal] Court of Appeals for the Seventh Circuit, United States, 19 November 2002, Unilex (leaving open whether certain prelitigation expenditures might be recovered as damages when, e.g., expenditures were designed to mitigate the aggrieved party's losses).

[58]CLOUT case No. 254 [Handelsgericht des Kantons Aargau, Switzerland, 19 December 1997] (reasonable prelitigation costs of lawyer in seller's country compensable; prelitigation costs of lawyer in buyer's country [the forum] to be awarded as part of costs).

[59]Many decisions award attorneys' fees but support the award by citation to domestic law on the allocation of litigation costs.

[60]CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996] (supplemental interpretation of arbitration clause provided compensation for attorney's fees when arbitral tribunal was composed exclusively of lawyers) (see full text of the decision); CLOUT case No. 301 [Arbitration—International Chamber of Commerce No. 7585 1992] (damages for expenses for attorneys and arbitration).

[61]CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996] (referring, *inter alia*, to inconclusive survey of local trade practice with respect to attorney's fees in arbitral proceedings) (see full text of the decision).

[62]CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994] (legal costs incurred in actions to enforce claims under two different contracts).

[63]See, e.g., Hovioikeus Turku [Court of Appeals], Turku, Finland, 12 April 2002, available in English translation on the Internet at http://cisgw3.law.pace.edu/cases/020412f5.html (without citing article 74, court provides for recovery of attorneys' fees).

[64]Stockholm Chamber of Commerce Arbitration Award, Sweden, 1998, Unilex (attorney's fees in dispute with freight forwarder about storage not recoverable because unforeseeable).

[65]CLOUT case No. 410 [Landgericht Alsfeld, Germany, 12 May 1995] (seller failed to mitigate loss in accordance with article 77 when it hired a lawyer in buyer's location rather than a lawyer in seller's location to send collection letter).

[66]*Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc.* [Federal] Court of Appeals for the Seventh Circuit, United States, 19 November 2002, Unilex (leaving open whether certain prelitigation expenditures might be recovered as damages). (The United States Supreme Court denied certiorari on this case on 1 December 2003.)

[67]Helsingin hoviokeus [Helsinki Court of Appeals], Finland, 26 October 2000, available in English translation on the Internet at http://cisgw3.law.pace.edu/cases/001026f5.html (lost profit calculated in accordance with national law of civil procedure); CLOUT case No. 476 [Arbitration-Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russia, award in case No. 406/1998 of 6 June 2000] (aggrieved buyer entitled in principle to recover for lost profit from sale to its customer); CLOUT case No. 348 [Oberlandesgericht Hamburg, Germany, 26 November 1999] (aggrieved buyer entitled to recover difference between value that contract would have had if seller had performed and the costs saved by buyer); CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997] (buyer entitled to lost profits); CLOUT case No. 168 [Oberlandesgericht Köln, Germany, 21 March 1996] (breaching seller liable in amount of buyer's lost profits when buyer had to reimburse sub-buyer); CLOUT case No. 138 [Federal Court of Appeals for the Second Circuit, United States, 6 December 1995] (buyer's lost profits), affirming CLOUT case No. 85, 1994; CLOUT case No. 301 [Arbitration—International Chamber of Commerce No. 7585 1992] (seller's lost profits measured by article 75). See also CLOUT case No. 243 [Cour d'appel, Grenoble, France, 4 February 1999] (buyer did not produce evidence of lost profits) (see full text of the decision).

[68]CLOUT case No. 348 [Oberlandesgericht Hamburg, Germany, 26 November 1999] (in calculating lost profits, holding that fixed costs are not costs the aggrieved buyer saved); CLOUT case No. 138 [Federal Court of Appeals for the Second Circuit, United States, 6 December 1993, 3 March 1995] (in absence of specific direction in Convention for calculating lost profits, standard formula employed by most US courts appropriate) (see full text of the decision).

[69]CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994].

[70]CLOUT case No. 476 [Arbitration-Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russia, award in case No. 406/1998 of 6 June 2000] (buyer's damages for lost profit reduced to 10 per cent of price because breaching seller did not know terms of sub-sale; 10 per cent derived from Incoterms definition of CIF term which provides that insurance should be taken out in amount of 110 per cent of price).

[71]CLOUT case No. 85 [Federal District Court, Northern District of New York, United States, 9 September 1994] ("sufficient evidence [under common law and law of New York] to estimate the amount of damages with reasonable certainty"), *affirmed* CLOUT case No. 138 [Federal Court of Appeals for the Second Circuit, United States, 6 December 1993, 3 March 1995].

[72]CLOUT case No. 210 [Audienca Provincial Barcelona, Spain, 20 June 1997] (aggrieved party did not provide any evidence to show his profits in previous years or the loss it suffered; such evidence might have included orders given to him that could not be filled, loss of clients or loss of reputation) (see full text of the decision).

[73]CLOUT case No. 427 [Oberster Gerichtshof, Austria, 28 April 2000] (aggrieved seller may recover profit margin on assumption that it could sell at the market price). See also Stockholm Chamber of Commerce Arbitration Award, Sweden, 1998, Unilex (awarding aggrieved buyer's loss of profits on its sale to first sub-buyer, who rejected, and on resale to second sub-buyer at price below original contract price); CLOUT case No. 217 [Handelsgericht des Kantons Aargau, Switzerland, 26 September 1997] (majority of court awarded seller, who had resold goods, global standard of 10 per cent of price, stating that breaching buyer could expect such an amount of loss; dissenting opinion questioning whether sufficient proof of damages); Xiamen Intermediate People's Court, China, 31 December 1992, Unilex (aggrieved seller's lost profits calculated as difference between contract price and price in contract with its supplier).

[74]*Bielloni Castello v. EGO*, Tribunale di Milano, Italy, 26 January 1995, Unilex (noting that claim of lost sale conflicted with claim for damages under article 75).

[75]CLOUT case No. 85 [Federal District Court, Northern District of New York, United States, 9 September 1994] (distinguishing between lost sales for which there was sufficiently certain evidence of damage and other "indicated orders" for which evidence was too uncertain) (see full text of the decision), *affirmed* by CLOUT case No. 138 [Federal Court of Appeals for the Second Circuit, United States, 6 December 1993, 3 March 1995].

[76]CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002] (see full text of the decision).

[77]CIETAC award No. 1740, China, 20 June 1991, published in *Zhongguo Guoji Jingji Maoyi Zhongcai Caijueshu Xuanbian (1989-1995)* (Beijing 1997), No. 75 [429–438] (rental of machinery by buyer's sub-buyer not foreseeable by breaching seller).

[78]CLOUT case No. 294 [Oberlandesgericht Bamberg, Germany, 13 January 1999] (breaching party could not foresee that late delivery would require processing in Germany rather than Turkey).

[79]Stockholm Chamber of Commerce Arbitration Award, Sweden, 1998, Unilex (aggrieved buyer's payments to freight forwarder exceptionally large and therefore reduced by 50 per cent).

[80]Stockholm Chamber of Commerce Arbitration Award, Sweden, 1998, Unilex (aggrieved buyer's attorney's fees for dispute with freight forwarder).

[81]CLOUT case No. 235 [Bundesgerichtshof, Germany, 25 June 1997] (expense of resurfacing grinding machine not foreseeable because not reasonable in relation to price of wire to be ground).

[82]CLOUT case No. 476 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russia, award in case No. 406/1998 of 6 June 2000] (buyer's damages for lost profit reduced to 10% of price because breaching seller did not know terms of sub-sale).

[83]CLOUT case No. 474 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russia, award in case No. 54/1999 of 24 January 2000] (seller could not foresee inspection abroad which was alleged to lead to a loss of reputation of the goods sold).

[84]CLOUT case No. 168 [Oberlandesgericht Köln, Germany, 21 March 1996] (the seller of goods to a retail buyer should foresee that the buyer will resell the good). See also CLOUT case No. 47 [Landgericht Aachen, Germany, 14 May 1993] (buyer who failed to take delivery of electronic ear devices could foresee the seller's delivery losses) (see full text of the decision).

[85]CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996] (tribunal assumed, in its discretion as provided by domestic law, that the amount of loss caused could be foreseen) (see full text of the decision).

[86]CLOUT case No. 427 [Oberster Gerichtshof, Austria, 28 April 2000] (breaching buyer can foresee that aggrieved seller of fungible goods would lose its typical profit margin).

[87]CLOUT case No. 217 [Handelsgericht des Kantons Aargau, Switzerland, 26 September 1997] (dissent argues that seller had not sufficiently proven the amount of its damages).

[88]CLOUT case No. 631 [Supreme Court of Queensland, Australia, 17 November 2000] (see full text of the decision).

[89]See CLOUT case No. 476 [Arbitration-Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russia, award in case No. 406/1998 of 6 June 2000] (aggrieved buyer had burden); CLOUT case No. 294 [Oberlandesgericht Bamberg, Germany, 13 January 1999] (aggrieved party failed to carry burden); CLOUT case No. 243 [Cour d'appel, Grenoble, France, 4 February 1999] (aggrieved party carried burden of proof) (see full text of the decision); CLOUT case No. 380 [Tribunale di Pavia, Italy, 29 December 1999] (aggrieved party failed to carry burden); CLOUT case No. 318 [Oberlandesgericht Celle, Germany, 2 September 1998] (aggrieved party failed to produce evidence of actual loss under article 74 or current market price under article 76); CLOUT case No. 467 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russia, award in case No. 407/1996 of 11 September 1998] (aggrieved buyer established amount of loss) (see full text of the decision); City of Moscow Arbitration Court case No. 18–40, Russia, 3 April 1995, available on the Internet in English translation at http://cisgw3.law.pace.edu/cases/950403r1.html (aggrieved buyer "substantiated" relevant current price and currency conversion rate).

[90]Bundesgerichtshof, Germany, 9 January 2002, available on the Internet at http://www.rws-verlag.de/bgh-free/volltex5/vo82717.htm (breaching seller failed to show conformity at time risk shifted to buyer).

[91]CLOUT case No. 294 [Oberlandesgericht Bamberg, Germany, 13 January 1999] (aggrieved buyer had burden of establishing damages).

[92]Helsingin hoviokeus [Helsinki Court of Appeals], Finland, 26 October 2000, available in English translation on the Internet at http://cisgw3.law.pace.edu/cases/001026f5.html (grounds for recovery were governed by the CISG, but the calculation of damages was governed by article 17 of the Finnish Law of Civil Procedure); CLOUT case No. 261 [Bezirksgericht der Sanne, Switzerland, 20 February 1997] (applicable domestic law determines how to calculate damages when amount cannot be determined); CLOUT case No. 85 [Federal District Court, Northern District of New York, United States, 9 September 1994] ("sufficient evidence [under common law and law of New York] to estimate the amount of damages with reasonable certainty"), *affirmed* CLOUT case No. 138 [Federal Court of Appeals for the Second Circuit, United States, 6 December 1993, 3 March 1995].

[93]CLOUT case No. 288 [Oberlandesgericht München, Germany, 28 January 1998] (applicable law, not Convention, determines whether set off permitted); CLOUT case No. 281 [Oberlandesgericht Koblenz, Germany, 17 September 1993] (domestic law applicable by virtue of private international law rules determines whether set off allowed).

[94]CLOUT case No. 125 [Oberlandesgericht Hamm, Germany, 9 June 1995] (set-off permitted under applicable national law; counterclaim determined by reference to Convention). But see CLOUT case No. 170 [Landgericht Trier, Germany, 12 October 1995] (counterclaim arose under Convention; set off permitted under Convention).

[95]CLOUT case No. 348 [Oberlandesgericht Hamburg, Germany, 26 November 1999] (buyer's counterclaim set off against seller's claim for price); CLOUT case No. 318 [Oberlandesgericht Celle, Germany, 2 September 1998] (buyer damages set off against price); Stockholm Chamber of Commerce Arbitration Award, Sweden, 1998, Unilex (damages for non-conformity set off against claim for price); CLOUT case No. 273 [Oberlandesgericht München, Germany, 9 July 1997] (buyer's counterclaim would have been allowable as set off had seller breached). See also CLOUT case No. 280 [Oberlandesgericht Jena, Germany, 26 May 1998] (implicitly recognizing the possibility that buyer's tort claim could be raised in order to be set off against seller's claim for the price, but applying CISG notice provisions to bar tort claim).

[96]CLOUT case No. 205 [Cour d'appel, Grenoble, France, 23 October 1996] (deriving general principle from article 57 (1) that place of payment is domicile of creditor); CLOUT case No. 49 [Oberlandesgericht Düsseldorf, Germany, 2 July 1993] (deriving general principle on place of payment from article 57 (1)).

Article 75

If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74.

OVERVIEW

1. Article 75 provides that an aggrieved party may recover damages measured by the difference between the contract price and the price in a substitute transaction if the original contract has been avoided and if the substitute transaction was concluded in a reasonable manner and within a reasonable time after avoidance.[1] The last clause of article 75 provides that an aggrieved party may recover further damages under the general damage formula set out in article 74.[2] The formula in article 75 is a familiar one and can be found in domestic sales laws.[3]

RELATION TO OTHER ARTICLES

2. Article 75 sets out the first of two alternative damage formulas applicable if the contract is avoided. Article 75 measures damages as the difference between the contract price and the price in a substitute transaction, while article 76 measures damages as the difference between the contract price and a current (market) price when the aggrieved party does not enter into a substitute transaction. Article 76 (1) provides that an aggrieved party may not calculate damages under article 76 if it has concluded a substitute transaction.[4] If, however, an aggrieved party concludes a substitute transaction for less than the contract quantity, both articles 75 and 76 may apply. Thus, one decision found that an aggrieved seller who resold only some of the contract goods to a third party may recover damages as to the resold goods under article 75 and damages as to the unsold goods under article 76.[5] Where the aggrieved party failed to satisfy the conditions for applying article 75, one court applied the "abstract" calculation of article 76 instead.[6]

3. The final clause of article 75 provides that an aggrieved party may recover further damages under article 74. In addition, if the aggrieved party fails to satisfy the conditions for application of article 75, the aggrieved party may nevertheless recover damages under article 74.[7] Even when it might recover under article 75, it has been held that an aggrieved party may choose to claim damages under article 74 instead.[8] Some decisions indicate that damages recovered under article 74 may be calculated in much the same way they would be calculated under article 75.[9]

4. Damages recoverable under article 75 are reduced if it is established that the aggrieved party failed to mitigate those damages as provided in article 77. The reduction is the amount by which the loss should have been mitigated. See paragraphs 12-14 below.

5. Pursuant to article 6, the parties may agree to derogate from or vary the formula set out in article 75. Several decisions implicitly rely on article 6 when finding that article 75 is not applicable. One decision held that where the parties had agreed that an aggrieved party was entitled to a "compensation fee" if the contract was avoided because of the acts of the other party, the aggrieved party was entitled to recover both the compensation fee and damages under article 75.[10] Another decision concluded that a post-breach agreement settling a dispute with respect to a party's non-performance displaced the aggrieved party's right to recover damages under the damage provisions of the Convention.[11]

CONDITIONS FOR APPLICATION OF ARTICLE 75

6. Article 75 applies if the contract is avoided and if the aggrieved party concludes a substitute transaction in a reasonable manner and within a reasonable time after avoidance.

– Avoidance of contract

7. Recovery of damages under article 75 is available only if the contract has been effectively avoided[12] by the aggrieved party.[13] Substitute transactions concluded before avoidance do not fall within the coverage of article 75.[14] Notwithstanding the requirement that the contract be avoided, one court has concluded that, with reference to the need to promote observance of good faith in international trade, the aggrieved buyer could recover damages under article 75 without establishing that it had declared the contract avoided when the seller had made it clear that it would not perform.[15] A court has also awarded an aggrieved seller damages equivalent to those provided for in article 75 (the difference between the contract price and the lower price at which the seller resold the goods) even though the seller apparently never avoided the contract,

where the seller complied with the requirements in article 88 for reselling the goods, including the requirement of notice of intention to resell.[16]

– Substitute transaction

8. An aggrieved party seeking damages calculated under article 75 must conclude a substitute transaction. If the seller is the aggrieved party, the substitute transaction involves the sale to some other buyer of the goods identified to the avoided contract.[17] An aggrieved buyer concludes a substitute transaction when it buys goods to replace those promised in the avoided contract.[18]

9. Article 75 requires that the substitute transaction be entered into “in a reasonable manner and within a reasonable time after avoidance”. There is no express requirement that the price in the substitute transaction be reasonable. Nevertheless, one decision concluded that where an aggrieved seller resold the goods for approximately one-fourth of the contract price the resale was not a reasonable substitute and the court calculated damages under article 76 rather than article 75.[19] If there is a significant difference between the contract price and the price in the substitute transaction the damages recoverable under article 75 may be reduced pursuant article 77 because of the aggrieved party’s failure to mitigate damages.[20]

– Substitute transaction—reasonable manner

10. An aggrieved party must conclude the substitute transaction in a reasonable manner. To enter into a “reasonable” substitute transaction, an arbitral tribunal has held, an aggrieved buyer must act as a prudent and careful businessperson who buys goods of the same kind and quality, ignoring unimportant small differences in quality.[21] A sale at market value on approximately the same freight terms was found to be a reasonable substitute sale.[22]

– Substitute transaction—reasonable time

11. An aggrieved party must conclude the substitute transaction within a reasonable time after avoidance of the breached contract.[23] What time is reasonable will depend on the nature of the goods and the circumstances. Noting that a reasonable time begins to run only when the contract is avoided, a court found that the aggrieved seller acted within a reasonable time by reselling shoes made for the winter season within two months where it was established that most potential buyers had already bought winter shoes by the time the contract was avoided.[24] Resale of scrap steel within two months of the time the seller avoided the contract has also been found reasonable.[25] Another court found that an aggrieved seller who resold a printing press within six months after expiration of an additional period given the buyer to perform under article 63 had acted within a reasonable time.[26] These decisions assume that the aggrieved party must conclude the substitute transactions within the reasonable time, but one decision has apparently construed the reasonable time requirement to mean that a reasonable time must elapse after avoidance before the substitute transaction may be concluded.[27]

CALCULATION OF DAMAGES

12. If the conditions for application of article 75 are satisfied, the aggrieved party may recover “the difference between the contract price and the price in the substitute transaction”. This amount may be adjusted by adding further damages recoverable under article 74 or by deducting the loss that could have been avoided if the aggrieved party had mitigated its damages in accordance with article 77. Most courts have had little difficulty applying the damage formula set out in article 75.[28]

13. Several decisions have awarded additional damages under article 74 to compensate for incidental damages arising from the breach.[29] There will, of course, be no additional recovery if further damages are not established.[30]

14. Several decisions have reduced the aggrieved party’s recovery under article 75 because that party failed to mitigate its losses. An aggrieved seller who resold the goods to a third party at a price significantly below not only the original purchase price but also a modified price proposed by the buyer failed to mitigate its damages, and the seller was consequently entitled to recover only the difference between the purchase price and the proposed modified price.[31] There is no reduction if there is no failure to mitigate.[32] In particular, an aggrieved seller who has the capacity and market to sell similar goods may resell the goods intended for the defaulting buyer to a third party and the aggrieved party need not reduce its damages on the ground that the resale was mitigation pursuant to article 77.[33]

BURDEN OF PROOF; CONSIDERATION OF EVIDENCE

15. Although none of the damage formulas in articles 74, 75 and 76 expressly allocates the burden of proof, one court has concluded that the Convention recognizes the general principle that the party who invokes a right bears the burden of establishing that right, and that this principle excludes application of domestic law with respect to burden of proof.[34] The same opinion concluded, however, that domestic law rather than the Convention governs how a judge should reach its opinion (e.g. the weight to be given evidence) as this was a matter not covered by the Convention.[35]

Notes

[1]Articles 45 (1) *(b)* and 61 (1) *(b)* of the Convention provide that an aggrieved buyer and an aggrieved seller, respectively, may recover damages as provided in articles 74 to 77 if the other party fails to perform as required by the contract or the Convention.

[2]See paragraph 13 below.

[3]See, e.g., CLOUT case No. 102 [Arbitration—International Chamber of Commerce No. 6281 1989] (applying Yugoslav law but also analysing article 75).

[4]See ICC award No. 8574, September 1996, Unilex (no recovery under article 76 because the aggrieved party had entered into substitute transactions within the meaning of article 75).

[5]CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994]. See also ICC award No. 8740, October 1996, Unilex (aggrieved buyer who was unable to establish the market price is not entitled to recover under article 76, and entitled to recover under article 75 only to the extent it had made substitute purchases); but compare CIETAC award, China, 30 October 1991, available on the Internet at http://cisgw3.law.pace.edu/cases/911030c1.html (aggrieved buyer who had made purchases for only part of the contract quantity nevertheless awarded damages under article 75 for the contract quantity multiplied by the difference between the contract price and the price in the substitute transaction).

[6]CLOUT case No. 227 [Oberlandesgericht Hamm, Germany, 22 September 1992] (damages calculated under article 76 rather than article 75 where the aggrieved seller resold goods for one-fourth of contract price).

[7]ICC award No. 8574, September 1996, Unilex (recovery allowed under article 74 where the aggrieved party was not entitled to recover under article 75 because it had concluded substitute transactions without having effectively avoided contract).

[8]CLOUT case No. 427 [Oberster Gerichtshof, Austria, 28 April 2000] (aggrieved party may claim damages under article 74 even if he could also claim damages under artsicles 75 or 76).

[9]CLOUT case No. 427 [Oberster Gerichtshof, Austria, 28 April 2000] (under article 74 seller can recover difference between cost of acquisition and contract price); CLOUT case No. 243 [Cour d'appel, Grenoble, France, 4 February 1999] (citing article 74 but quoting from article 75) (see full text of the decision); CLOUT case No. 140 [Arbitration—Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry,Russian Federation, award in case No. 155/1994 of 16 March 1995] (citing article 74 but determining damages as difference between contract price and price in substitute transaction). See also CLOUT case No. 304 [Arbitration—International Chamber of Commerce No. 7531 1994] (citing article 75 in support of an award of damages to aggrieved buyer for preserving and selling goods pursuant to articles 86, 87 and 88 (1); buyer did not purchase substitute goods).

[10]CLOUT case No. 301 [Arbitration—International Chamber of Commerce No. 7585 1992].

[11]CIETAC award No. 75, China, 1 April 1993, Unilex, also available on the Internet at http://www.cisg.law.pace.edu/cgi-bin/isearch.

[12]CLOUT case No. 424 [Oberster Gerichtshof, Austria, 9 March 2000] (no declaration of avoidance); CLOUT case No. 474 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, award in case No. 54/1999 of 24 January 2000] (no avoidance); CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997]; CLOUT case No. 294 [Oberlandesgericht Bamberg, Germany, 13 January 1999]; CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (equivocal declaration of avoidance not effective) (see full text of the decision).

[13]See CLOUT case No. 362 [Oberlandesgericht Naumburg, Germany, 27 April 1999] (a seller who resold goods after the aggrieved buyer had declared the contract avoided was not entitled to recover damages under article 75).

[14]ICC award No. 8574, September 1996, Unilex (purchases by aggrieved buyer before it had avoided contract did not constitute substitute transactions under article 75); CLOUT case No. 85 [Federal District Court, Northern District of New York, United States, 9 September 1994], *affirmed* CLOUT case No. 138 [Federal Court of Appeals for the Second Circuit, United States, 6 December 1995] (substitute compressors had been ordered before breach).

[15]CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997].

[16]CLOUT case No. 540 [Oberlandesgericht Graz, Austria, 16 September 2002.

[17]CLOUT case No. 631 [Supreme Court of Queensland, Australia, 17 November 2000] (see full text of the decision).

[18]CLOUT case No. 85 [Federal District Court, Northern District of New York, United States, 9 September 1994], *affirmed* CLOUT case No. 138 [Federal Court of Appeals for the Second Circuit, United States, 6 December 1995] (compressors ordered from another supplier before seller breached were not substitute goods under article 75).

[19]CLOUT case No. 227 [Oberlandesgericht Hamm, Germany, 22 September 1992].

[20]ICC award No. 8128, 1995, Unilex (higher price paid by aggrieved buyer in substitute transaction justified because of buyer's obligation to deliver goods promptly to sub-buyer).

[21]ICC award No. 8128, 1995, Unilex.

[22]CLOUT case No. 631 [Supreme Court of Queensland, Australia, 17 November 2000].

[23]But see CLOUT case No. 308 [Federal Court of Australia, 28 April 1995] (where a seller is unable to resell goods until the breaching buyer returns them the seller has a reasonable time to resell from the time they are returned and damages should be calculated as of the date of the return) (see full text of the decision).

[24]CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994] (avoidance on 7 August; resale on 6 and 15 October).

[25]CLOUT case No. 631 [Supreme Court of Queensland, Australia, 17 November 2000] (see full text of the decision).

[26]CLOUT case No. 645 [*Bielloni Castello S.p.A. v. EGO S.A.*, Corte di Appello di Milano, Italy, 11 December 1998], also in Unilex.

[27]ICC award No. 8574, September 1996, Unilex (reasonable time must pass after avoidance before an aggrieved buyer may purchase substitute goods). But see *FCF S.A. v. Adriafil Commerciale S.r.l.*, Bundesgericht, Switzerland, 15 September 2000, available on the Internet at http://www.bger.ch (aggrieved buyer made reasonable substitute purchase even though it concluded the purchase promptly after avoidance).

[28]See, e.g., CLOUT case No. 631 [Supreme Court of Queensland, Australia, 17 November 2000] (see full text of the decision); CLOUT case No. 140 [Arbitration-Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, award in case No. 155/1994 of 16 March 1995]; CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994]; CLOUT case No. 301 [Arbitration—International Chamber of Commerce No. 7585 1992]. But see CLOUT case No. 217 [Handelsgericht des Kantons Aargau, Switzerland, 26 September 1997] (majority of judges awarded seller of custom-made cutlery ten percent of purchase price as damages, a sum which included losses incurred on the resale of the cutlery).

[29]CLOUT case No. 631 [Supreme Court of Queensland, Australia, 17 November 2000]; CLOUT case No. 217 [Handelsgericht des Kantons Aargau, Switzerland, 26 September 1997] (recovery of transportation costs) (see full text of the decision); CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994] (recovery of interest on bank loan); Landgericht Berlin, Germany, 30 September 1992, Unilex (recovery of legal fees but not of sales commission that would have been paid if the buyer had performed).

[30]CLOUT case No. 294 [Oberlandesgericht Bamberg, Germany, 13 January 1999] (aggrieved buyer failed to prove additional costs were foreseeable under article 74).

[31]CLOUT case No. 395 [Tribunal Supremo, Spain, 28 January 2000].

[32]CLOUT case No. 427 [Oberster Gerichtshof, Austria, 28 April 2000] (see full text of the decision); CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994].

[33]CLOUT case No. 427 [Oberster Gerichtshof, Austria, 28 April 2000] (damages recovered under article 74). See also CLOUT case No. 645 [*Bielloni Castello S.p.A. v. EGO S.A.*, Corte di Appello di Milano Italy, 11 December 1998], also in Unilex (evidence did not establish that aggrieved seller had lost a sale by its resale to a third party).

[34]*FCF S.A. v. Adriafil Commerciale S.r.l.*, Bundesgericht, Switzerland, 15 September 2000, available on the Internet at http://www.bger.ch (breaching party failed to indicate measures aggrieved party should have taken in mitigation). See also CLOUT case No. 217 [Handelsgericht des Kantons Aargau, Switzerland, 26 September 1997] (aggrieved party has the burden of establishing loss) (see full text of the decision); ICC award No. 7645, March 1995, Unilex ("Under general principles of law" the party claiming damages has the burden of establishing existence and amount of damages caused by the breach of the other party).

[35]*FCF S.A. v. Adriafil Commerciale S.r.l.*, Bundesgericht, Switzerland, 15 September 2000, available on the Internet at http://www.bger.ch (construing article 8 of Swiss Civil Code). See also CLOUT case No. 261 [Bezirksgericht der Sanne, Switzerland, 20 February 1997] (domestic law, rather than the Convention, determines how damages are to be calculated if the amount cannot be determined).

Article 76

(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under article 74. If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance.

(2) For the purposes of the preceding paragraph, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

OVERVIEW

1. Article 76 provides that an aggrieved party may recover damages measured by the difference between the contract price and the current price for the goods if the contract has been avoided, if there is a current price for the goods, and if the aggrieved party has not entered into a substitute transaction.[1] The article designates when and where the current price is to be determined. The last clause of the first sentence of paragraph (1) also provides that an aggrieved party may recover further damages under the general damage formula set out in article 74. The article 76 formula is a familiar one.[2]

RELATION TO OTHER ARTICLES

2. Article 76 is the second of two damage formulas applicable if the contract is avoided. Whereas article 75 calculates damages concretely by reference to the price in an actual substitute transaction, article 76 calculates damages abstractly by reference to the current market price. Under the Convention, a concrete calculation of damages is preferred.[3] Paragraph (1) of article 76 provides that its damage formula is not available if an aggrieved party has concluded a substitute transaction.[4] Where an aggrieved seller resold fewer goods than the contract quantity, one court calculated damages as to the resold goods under article 75 and damages as to the unsold goods under article 76.[5] Another court calculated damages under article 76 rather than article 75 where an aggrieved seller resold the goods to a third party at significantly less than both the contract and market price.[6]

3. The final clause of the first sentence of article 76 (1) provides that an aggrieved party may recover additional damages under the general damage formula set out in article 74. It has been held that an aggrieved party may choose to recover damages under article 74 even when it might recover under article 76.[7] If the conditions for recovery under article 76 are not satisfied, damages may nevertheless be recovered under article 74.

4. Damages recoverable under article 76 are reduced if it is established that the aggrieved party failed to mitigate these damages as provided in article 77. The reduction is the amount by which the loss should have been mitigated. See paragraphs 10-11 below.

5. Pursuant to article 6, the seller and buyer may agree to derogate from or vary the formula set out in article 76. One tribunal has stated that a post-breach agreement settling a dispute with respect to a party's non-performance displaces the aggrieved party's right to recover damages under the damage provisions of the Convention.[8]

CONDITIONS FOR APPLICATION OF ARTICLE 76

6. Article 76 applies if the contract is avoided (see paragraph 7 below), if there is a current price for the goods (see paragraph 8 below), and if the aggrieved party has not concluded a substitute transaction (see paragraph 9 below).

7. Article 76 is not applicable if the contract has not been avoided.[9] Thus, the article will not apply if the aggrieved party has not declared the contract avoided when entitled to do so[10] or if the aggrieved party has not made an effective declaration of avoidance.[11]

8. The formula of article 76 can only be applied if there is a current price. The current price is the price generally charged in the market for goods of the same kind under comparable circumstances.[12] One tribunal declined to use published quotations in a trade magazine because the reported quotations were for a different market from that where the goods were to be delivered under the contract and adjustment of that price was not possible.[13] The same tribunal accepted as the current price a price negotiated

by the aggrieved seller in a substitute contract that was not ultimately concluded.[14] Another tribunal found that the aggrieved party was unable to establish the current price for coal generally or for coal of a particular quality because the requirements of buyers vary and there is no commodity exchange.[15] Another court suggested that the "auction realisation" value of goods held by an insolvent buyer might be relevant if the aggrieved seller were to seek to recover under article 76.[16] Stating that the seller's lost profit was to be established under article 76, a court affirmed an award of damages to an aggrieved seller in the amount of 10 per cent of the contract price because the market for the goods (frozen venison) was declining and the seller set its profit margin at 10 per cent, which was the lowest possible rate.[17] It has also been held that a current price for purposes of Article 76 can be established using the methodology in article 55 for determining the price under a contract that does not expressly or implicitly fix or make provision for determining the price.[18]

9. Damages may not be recovered under article 76 if the aggrieved party has purchased substitute goods. Where a seller failed to deliver the goods and the aggrieved buyer bought no substitute goods, the buyer's damages were to be calculated under article 76.[19]

CALCULATION OF DAMAGES

10. An aggrieved party is entitled to recover the difference between the contract price and the current price at the time and place indicated by article 76.[20] The time at which the current price is to be determined is the date of effective avoidance of the contract; if the aggrieved party has taken over the goods before avoidance, however, the relevant time is this earlier date.[21] It has been held that, if notice of avoidance is unnecessary because a seller has "unambiguously and definitely" declared that it will not perform its obligations, the time of avoidance for purposes of article 76 is determined by the date of the obligor's declaration of the intention not to perform.[22] For cases determining what constitutes evidence of a current price, see paragraph 8 above.

11. Paragraph (2) of article 76 indicates the relevant place for determining the current price. There are no reported cases construing this provision.

BURDEN OF PROOF

12. Although article 76 is silent on which party has the burden of establishing the elements of that provision, decisions have placed this burden on the party claiming damages.[23]

Notes

[1]Articles 45 (1) *(b)* and 61 (1) *(b)* provide that an aggrieved buyer and an aggrieved seller, respectively, may recover damages as provided in articles 74 to 77 if the other party fails to perform as required by the contract or the Convention.

[2]ICC award No. 8502, November 1996, Unilex (reference to both article 76 of the Convention and article 7.4.6 of Unidroit Principles of International Commercial Contracts).

[3]CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996] (Convention favor concrete calculation of damages) (see full text of the decision).

[4]See ICC award No. 8574, September 1996, Unilex (no recovery under article 76 because aggrieved party concluded substitute transactions, although it did so before it avoided the contract and hence the substitute transactions could not be used to measure damages under aricle 75). See also CLOUT case No. 348 [Oberlandesgericht Hamburg, Germany, 26 November 1999] (damages not calculated under article 76 because damages could be calculated by reference to actual transactions).

[5]CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994] (see full text of the decision). See also ICC award No. 8740, October 1996, Unilex (aggrieved buyer unable to establish market price was not entitled to recover under article 76, and only entitled to recover under article 75 to the extent it had made substitute purchases); but compare CIETAC award, China, 30 October 1991, available on the Internet at http://cisgw3.law.pace.edu/cases/911030c1.html (aggrieved buyer who had made purchases for only part of the contract quantity nevertheless awarded damages under article 75 for contract quantity times the difference between the unit contract price and the unit price in the substitute transaction).

[6]CLOUT case No. 227 [Oberlandesgericht Hamm, Germany, 22 September 1992].

[7]CLOUT case No. 427 [Oberster Gerichtshof, Austria, 28 April 2000] (aggrieved party may claim under article 74 unless party regularly concludes similar transactions and has designated one as a substitute within article 75); CLOUT case No. 140 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, award in case No. 155/1994 of 16 March 1995] (citing article 74 but determining damages as difference between contract price and price in substitute transaction).

[8]CIETAC award No. 75, China, 1 April 1993, Unilex also available on the INTERNET at http://www.cisg.law.pace.edu/cgi-bin/isearch.

[9]CLOUT case No. 474 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, award in case No. 54/1999 of 24 January 2000] (article 76 not applicable when the contract had not been avoided).

[10]CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (no avoidance) (see full text of the decision).

[11]CLOUT case No. 238 [Oberster Gerichtshof, Austria, 12 February 1998] (declaration of avoidance too early) (see full text of the decision).

[12]CLOUT case No. 318 [Oberlandesgericht Celle, Germany, 2 September 1998] (evidence did not establish current price). But see Oberlandesgericht Braunschweig, Germany, 28 October 1999, Unilex (calculation by reference not to market price but to seller's profit margin, which was lowest possible rate).

[13]CIETAC award, China, 18 April 1991, available on the Internet at http://www.cietac-sz.org.cn/cietac/alfx/Case/My_03.htm (evidence did not reflect contract delivery terms).

[14]Id.

[15]ICC award No. 8740, October 1996, Unilex (value of coal was subjective because it depends on buyer's needs and shipping terms; aggrieved party, who made no claim under article 74, could recover under article 75 only to the extent it had entered into substitute transactions).

[16]CLOUT case No. 308 [Federal Court of Australia, 28 April 1995] (valuation arranged by insolvency administrator) (see full text of the decision).

[17]Oberlandesgericht Braunschweig, Germany, 28 October 1999, Unilex.

[18]CLOUT case No. 595 [Oberlandesgericht München, Germany, 15 September 2004].

[19]CLOUT case No. 328 [Kantonsgericht des Kantons Zug, Switzerland, 21 October 1999].

[20]Oberlandesgericht Hamburg, Germany, 4 July 1997, Unilex.

[21]CIETAC award, China, 18 April 1991, available on the Internet at http://www.cietac-sz.org.cn/cietac/alfx/Case/My_03.htm (disagreeing with date claimed by aggrieved party).

[22]CLOUT case No. 595 [Oberlandesgericht München, Germany, 15 September 2004].

[23]See, e.g., CLOUT case No. 318 [Oberlandesgericht Celle, Germany, 2 September 1998] (aggrieved buyer failed to establish current price).

Article 77

A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

INTRODUCTION

1. Article 77 requires an aggrieved party claiming damages to take reasonable steps to mitigate losses; if he fails to do so, the breaching party may claim a reduction in the damages recoverable in the amount by which the loss should have been mitigated. If an aggrieved party does not request damages, whether by way of an affirmative claim or by way of set-off, article 77 does not apply.[1]

RELATION TO OTHER ARTICLES

2. Article 77 appears in Section II (Damages) of Chapter V of Part III, and therefore does not expressly apply to remedies other than damages that are available under the Convention.

3. Other articles of the Convention may require parties to take specific measures to protect against losses. Articles 85 to 88 provide, for example, that buyers and sellers must take reasonable steps to preserve goods in their possession following breach.[2]

4. Pursuant to article 6, the seller and buyer may agree to derogate from or vary the formula set out in article 77. One decision concluded that if an aggrieved party seeks to enforce a penalty clause in the contract, article 77 does not require the aggrieved party to reduce the penalty in order to mitigate the loss.[3]

5. Article 77 does not state at what point in a legal proceeding the issue of mitigation must be considered by a court or tribunal. One decision concluded that the question of whether mitigation should be considered in a proceeding on the merits or in a separate proceeding to determine damages is a procedural issue governed by domestic law rather than by the Convention.[4]

MEASURES TO MITIGATE

6. An aggrieved party claiming damages must mitigate them by taking those steps that a reasonable creditor acting in good faith would take under the circumstances.[5] If a contract has already been avoided, an aggrieved party's notice to the breaching party of a proposed act to mitigate does not revoke the earlier avoidance.[6] In some circumstances the aggrieved party may be excused from taking such measures (see paragraphs 11 and 14 below).

7. Article 77 does not expressly state when the aggrieved party must take measures to mitigate. Several decisions state that an aggrieved party is not obligated to mitigate in the period before the contract is avoided (i.e. at a time when each party may still require the other to perform).[7] If an aggrieved party does take mitigation measures, however, he must do so within a reasonable time under the circumstances. One decision found that the seller's resale of goods to a third party two months after they had been rejected was reasonable within the context of the fashion industry.[8] Another decision found that the buyer's purchase of substitute goods approximately two weeks after the seller declared that it would not perform was not a failure to mitigate even though the price in a volatile market had risen sharply.[9]

– Measures by aggrieved buyers

8. Decisions have found the following measures by aggrieved buyers to be reasonable: paying another supplier to expedite delivery of already-ordered compressors that could be substituted for defective compressors;[10] contracting with a third-party supplier because of the inability of the breaching party to deliver moulds in time;[11] contracting with a third party to treat leather goods when the seller refused to return tanning machines that it had sold to the buyer and then taken back for adjustments;[12] continuing to print on purchased fabric notwithstanding the discovery of problems with the fabric;[13] requesting special permission from a Government authority to permit re-exportation if the goods proved nonconforming, and proposing to test milk powder in the Free Trade Zone prior to import;[14] using the buyer's own buffer stocks of coal when the seller made late deliveries;[15] proposing to a sub-buyer that the goods the seller delivered late should be accepted with a 10 per cent reduction in price;[16] selling perishable goods even though not required to do so by articles 85 to 88.[17]

9. The aggrieved buyer was found to have failed to mitigate damages in the following circumstances: buyer failed to inspect goods properly and to give documents setting out its claims of nonconformity;[18] buyer failed to examine shipments of aluminium hydroxide before mixing the shipments together;[19] buyer failed to stop the use of vine wax after

discovering the wax to be defective;[20] buyer failed to look for replacement goods in markets other than the local region;[21] buyer failed to cancel its contract of sale with sub-buyer or to conclude a substitute purchase;[22] buyer failed to provide evidence of the price it received on its sale of non-conforming goods to a sub-buyer;[23] buyer failed to provide evidence as to whether the her could buy the same product from the wholesaler newly-designated by the seller.[24]

10. Several decisions have denied an aggrieved buyer's claim for reimbursement of expenditures because the expenditures did not have the effect of limiting the buyer's loss. One decision declined to award the buyer damages to compensate for the expenses of adapting a machine to process defective wire delivered by the seller because the cost of the adaptation was disproportionate to the purchase price of the wire.[25] An aggrieved buyer was also denied recovery for the costs of translating a manual to accompany the goods when the buyer resold them because the buyer failed to notify the seller, which was a multinational company that would already have had manuals in the language into which the manual was translated.[26] A few decisions have denied the aggrieved party's claim for the cost of enforcing its claim through a collection agent or lawyer.[27]

11. Several decisions have found that the buyer's failure to act did not violate the mitigation principle. One tribunal found that an aggrieved buyer's failure to buy substitute goods from another supplier was justified by the short delivery time in the contract and the alleged difficulty in finding another supplier.[28] A court has also concluded that a buyer did not violate the mitigation principle by its failure to inform the seller that the buyer's sub-buyer needed the goods without delay because it was not established that the buyer knew of the sub-buyer's production plans.[29]

– Measures by aggrieved sellers

12. Decisions have found the following measures by aggrieved sellers to be reasonable: incurring expenses to transport, store, and maintain the undelivered machinery;[30] reselling goods to a third party.[31]

13. An aggrieved seller was found to have failed to mitigate damages in the following circumstances: seller drew on a guaranty before avoiding the contract;[32] seller resold the goods at a price below the price offered by the breaching buyer when the latter sought unsuccessfully to amend the contract.[33] Where a buyer breached by refusing to take delivery of goods, a court has reserved decision on the amount of damages, pending receipt of an expert opinion, where the seller's claim for lost profit and the cost of raw materials used to produce the goods might have been reduced if the seller had been able to resell or reuse the goods, or if the investments seller had made to produce the goods were valued or depreciated in a different fashion.[34]

14. An aggrieved seller was excused from taking steps to mitigate in the following circumstances: the seller did not resell the goods during the period when the breaching party was entitled to demand performance, but was excused on the ground that resale during that period would have make it impossible for the seller to perform the contract;[35] the seller did not resell stockings made to the buyer's particular specifications.[36]

15. One court has stated that an aggrieved seller's damages are not to be reduced under article 77 by the price received in a resale of the goods where the seller had the capacity and market to make multiple sales. The court reasoned that to treat the resale as a substitute transaction under article 75 meant that the seller would lose the profit from a sale that it would have made even if the buyer had not breached.[37]

REDUCTION OF DAMAGES

16. A breaching party may claim a reduction in the damages to be awarded to the aggrieved party in the amount by which reasonable mitigation measures would have reduced the loss to the aggrieved party. Several decisions have calculated the reduction without specific reference to the loss that could have been avoided. One decision found that the aggrieved buyer who failed to mitigate should be entitled only to 50 per cent of the difference between the contract price and the price the buyer received when it resold the nonconforming goods to its customers.[38] An arbitral tribunal divided the loss caused by the buyer's failure to mitigate damages between the aggrieved buyer and the breaching seller who was claiming payment for partial delivery.[39]

NOTICE OF STEPS TO MITIGATE

17. Article 77 does not explicitly require an aggrieved party to notify the other party of proposed steps to mitigate losses. One decision, however, denied a buyer compensation for the cost of translating a manual where the buyer failed to notify the seller that it intended to take this step, reasoning that if the buyer had provided such notice the seller could have supplied existing translations.[40]

PLEADING; BURDEN OF PROOF

18. The second sentence of article 77 states that the breaching party may claim a reduction in damages for failure to mitigate losses. Decisions divide on which party bears the burden of pleading the failure to mitigate. An arbitral tribunal has stated that the tribunal should review *ex officio* whether the aggrieved party had complied with the mitigation principle, but that the breaching party had the burden of establishing failure to comply.[41] A court decision, on the other hand, stated that no adjustment to damages will be made if the breaching party fails to indicate what steps the other party should have taken to mitigate.[42] Another decision, however, requires the aggrieved party to indicate the offers for substitute transactions it had solicited before putting the breaching party to the burden of establishing the loss due to failure to mitigate.[43]

19. Decisions on who has the ultimate burden of establishing failure to mitigate consistently place the burden on the breaching party to establish such failure as well as the amount of consequent loss.[44]

Notes

[1]CLOUT case No. 424 [Oberster Gerichtshof, Austria, 9 March 2000] (see full text of the decision).

[2]CIETAC award, China, 6 June 1991, available on the Internet at http://www.cietac-sz.org.cn/cietac/index.htm (cost of freight for return of goods split between buyer who failed to return goods in a reasonable manner and seller who did not cooperate in return).

[3]Hof Arnhem, the Netherlands, 22 August 1995, Unilex (validity of penalty clause determined under national law).

[4]CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999] (applying German law).

[5]CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (see full text of the decision).

[6]Landgericht Berlin, Germany, 15 September 1994, Unilex.

[7]CLOUT case No. 361 [Oberlandesgericht Braunschweig, Germany, 28 October 1999] (requiring seller to resell would make it impossible for seller to perform the original contract during period when breaching party was entitled to demand performance); CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994].

[8]CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994] (finding that, in August most retailers in Italian market have filled their stock for the coming season and have no reason to buy more goods for the winter season).

[9]CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997] (transaction characterized as highly speculative).

[10]CLOUT case No. 85 [Federal District Court, Northern District of New York, United States, 9 September 1994], *affirmed*, CLOUT case No. 138 [Federal Court of Appeals for the Second Circuit, United States, 6 December 1993, 3 March 1995].

[11]*Nova Tool & Mold Inc. v. London Industries Inc.*, Ontario Court of Appeal, Canada, 26 January 2000, available on the Internet at http://is.dal.ca/~cisg/cases/nova2.htm.

[12]CLOUT case No. 311 [Oberlandesgericht Köln, Germany, 8 January 1997].

[13]*Schmitz-Werke v. Rockland*, [Federal] Fourth Circuit Court of Appeals, United States, 21 June 2002, 2002 US App. LEXIS 12336, 2002 WL 1357095 (buyer continued to attempt to print on the fabric both at the urging of seller and to mitigate damages; article 77 not cited).

[14]*Malaysia Dairy Industries v. Dairex Holland*, Rb 's-Hertogenbosch, the Netherlands, 2 October 1998, Unilex.

[15]ICC award No. 8740, October 1996, Unilex (seller bore risk that buyer's buffers were insufficient in light of the unreliability of suppliers).

[16]ICC award No. 8786, January 1997, Unilex.

[17]CLOUT case No. 104 [Arbitration—International Chamber of Commerce No. 7197 1993] (see full text of the decision).

[18]CLOUT case No. 474 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, award in case No. 54/1999 of 24 January 2000].

[19]CLOUT case No. 284 [Oberlandesgericht Köln, Germany, 21 August 1997].

[20]CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999].

[21]CLOUT case No. 318 [Oberlandesgericht Celle, Germany, 2 September 1998].

[22]CLOUT case No. 476 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, award in case No. 406/1998 of 6 June 2000].

[23]CLOUT case No. 303 [Arbitration—International Chamber of Commerce No. 7331 1994].

[24]Helsingin hoviokeus [Helsinki Court of Appeal], Finland, 26 October 2000, found on the Internet at http://cisgw3.law.pace.edu/cases/001026f5.html.

[25]CLOUT case No. 235 [Bundesgerichtshof, Germany, 25 June 1997].

[26]CLOUT case No. 343 [Landgericht Darmstadt, Germany, 9 May 2000] (see full text of the decision).

[27]CLOUT case No. 296 [Amtsgericht Berlin-Tiergarten, Germany, 13 March 1997] (refusing to permit recover when the aggrieved party employed a debt collection agency in breaching party's jurisdiction rather than bringing suit in aggrieved party's jurisdiction and enforcing this judgment in breaching party's jurisdiction); CLOUT case No. 410 [Landgericht Alsfeld, Germany, 12 May 1995] (denying recover when the aggrieved party hired collection lawyer in the aggrieved party's jurisdiction rather than the breaching party's jurisdiction); Landgericht Düsseldorf, Germany, 25 August 1994, Unilex (holding that employment of agent was reasonable only if it was established that the agent had more effective means of recovery than the aggrieved party itself); Landgericht Berlin, Germany, 6 October 1992, available on the Internet at http://www.cisg-online.ch/cisg/urteile/173.htm (hiring collection agency deemed contrary to mitigatation principle because it was foreseeable that buyer would refuse to pay and the additional expenses of hiring an attorney would have been included in trial costs recoverable from defaulting buyer).

[28]CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996] (no "manifest violation" of mitigatation principle) (see full text of the decision).

[29]Amtsgericht München, Germany, 23 June 1995, Unilex.

[30]CLOUT case No. 301 [Arbitration—International Chamber of Commerce No. 7585 1992] (need to mitigate because of size and specifications of machinery) (see full text of the decision).

[31]CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994]; CLOUT case No. 93 [Arbitration—Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft, Wien–Austria, 15 June 1994] (resale by seller not only justified but may have been obligatory under article 77); CLOUT case No. 227 [Oberlandesgericht Hamm, Germany, 22 September 1992]; *Watkins-Johnson Co. v. Islamic Republic of Iran*, Iran-US Claims Tribunal, 28 July 1989, Unilex (seller's right to sell undelivered equipment in mitigation of its damages is consistent with recognized international law of commercial contracts).

[32]CLOUT case No. 133 [Oberlandesgericht München, Germany, 8 February 1995] (aggrieved seller drew on guaranty following breach without taking steps to mitigate).

[33]CLOUT case No. 395 [Tribunal Supremo, Spain, 28 January 2000].

[34]CLOUT case No. 480 [Cour d'appel Colmar, France, 12 June 2001].

[35]CLOUT case No. 361 [Oberlandesgericht Braunschweig, Germany, 28 October 1999].

[36]CIETAC award (Contract #QFD890011), China, post-1989, available in English translation on the Internet at http://cisgw3.law.pace.edu/cases/900000c1.html.

[37]CLOUT case No. 427 [Oberster Gerichtshof, Austria, 28 April 2000] (see full text of the decision).

[38]CLOUT case No. 474 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, award in case No. 54/1999 of 24 January 2000].

[39]CLOUT case No. 265 [Arbitration—Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 25 May 1999].

[40]CLOUT case No. 343 [Landgericht Darmstadt, Germany, 9 May 2000].

[41]ICC award No. 9187, June 1999, Unilex.

[42]*FCF S.A. v. Adriafil Commerciale S.r.l.*, Bundesgericht, Switzerland, 15 September 2000, available on the Internet at http://www.bger.ch/fr/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm.

[43]CLOUT case No. 318 [Oberlandesgericht Celle, Germany, 2 September 1998] (although burden of establishing failure to mitigate is on breaching party, that was irrelevant in case because buyer was obliged to indicate which offers for a substitute transaction she obtained and from which companies) (see full text of the decision).

[44]CLOUT case No. 318 [Oberlandesgericht Celle, Germany, 2 September 1998] (see full text of the decision); CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (breaching party had to establish how other party had violated the mitigation principle, the possible alternative courses of action, and the loss that would have been prevented; issue was raised on appeal without specific reference to facts that might be relevant) (see full text of the decision).

Section III of Part III, Chapter V

Interest (article 78)

OVERVIEW

1. Section III of Chapter V of Part III of the Convention, entitled "Interest", encompasses a single provision, article 78, which provides for the recovery of interest on the unpaid price (if overdue) and "any other sum that is in arrears". Despite the title of this section, a provision in another section of the Convention – article 84 (1) (located in Part III, Chapter 5, Section V—"Effects of avoidance") also provides for the recovery of interest in certain situations. Interest has also been awarded as damages under article 74, one of the damages provisions on in Part III, Chapter V, Part II.[1]

Notes

[1]See the Digest for art. 74, para. 7.

Article 78

If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74.

INTRODUCTION

1. Article 78 deals with the right to interest on "the price or any other sum that is in arrears". The provision does not, however, apply where the seller has to refund the purchase price after the contract has been avoided, in which case article 84 of the Convention governs as *lex specialis*.

2. Article 78 entitles a party to interest on "the price and any other sum that is in arrears". According to case law, Article 78 entitles a party to interest on damages.[1]

PREREQUISITES FOR ENTITLEMENT TO INTEREST

3. Entitlement to interest requires only[2] that the sum for which interest is sought is due[3], and that the debtor has failed to comply with its obligation to pay the sum by the time specified either in the contract[4] or, absent such specification, by the Convention.[5] According to several decisions, entitlement to interest under article 78 of the Convention—unlike under some domestic legal regimes—does not depend on giving formal notice to the debtor.[6] As a consequence, interest starts to accrue as soon as the debtor is in arrears. A court has stated that interest on damages accrues from the time damages are due.[7]

4. Both an arbitral tribunal[8] and a court[9], however, have stated that interest does not accrue unless the creditor has sent to the debtor in default a formal notice requiring payment.

5. Entitlement to interest under article 78 does not depend on the creditor proving that he suffered a loss. Interest can therefore be claimed independently from the damage caused by the fact that a sum is in arrears.[10]

6. As stated in article 78, the entitlement to interest on sums in arrears is without prejudice to any claim by the creditor for damages recoverable under article 74.[11] Such damages might include finance charges incurred because, without access to the funds in arrears, the debtor was forced to a bank loan[12]; or lost investment income that would have been earned from the sum in arrears.[13] This has led one arbitral tribunal to state that the purpose of article 78 is to introduce the distinction between interest and damages.[14] It must be noted that, in order for a party successfully to claim damages in addition to interest on sums in arrears, all requirements set forth in article 74 must be met[15] and the burden of proving those elements carried by the creditor,[16] i.e. the damaged party.

INTEREST RATE

7. Several courts have pointed out that article 78 merely sets forth a general entitlement to interest;[17] it does not specify the interest rate to be applied,[18] which is why one court considered article 78 a "compromise".[19] According to a court[20] and an arbitral tribunal,[21] the compromise resulted from irreconcilable differences that emerged during the Vienna Diplomatic Conference at which the text of the Convention was approved.

8. The lack of a specific formula in article 78 to calculate the rate of interest has led some courts to consider this to be a matter governed by, but not expressly settled in, the Convention.[22] Other courts treat this issue as one that is not governed by the Convention. This difference in the characterization of the issue has led to diverging solutions concerning the applicable interest rate. Matters governed by but not expressly settled in the Convention have to be dealt with differently than questions falling outside the Convention's scope. According to article 7 (2) of the CISG, the former must be settled, first, in conformity with the general principles on which the Convention is based; only in the absence of such principles is the law applicable by virtue of the rules of private international law to be consulted. An issue outside the Convention's scope, in contrast, must be settled in conformity with the law applicable by virtue of the rules of private international law, without recourse to the "general principles" of the Convention.

9. Several decisions have sought a solution to the interest rate question on the basis of general principles on which the Convention is based. Some courts and arbitral tribunals[23] have invoked article 9 of the Convention and determined the rate of interest by reference to relevant trade usages. According to two arbitral awards[24] "the applicable interest rate is to be determined autonomously on the basis of the general principles underlying the Convention". These decisions reason that recourse to domestic law would lead to results contrary to the goals of the Convention. In these cases, the interest rate was determined by resorting to a general principle of full compensation; this led to the application of the law of the creditor because it is the creditor who must borrow money to replace sums in arrears.[25] Other tribunals simply refer to a "commercially reasonable" rate,[26] such as the London Interbank Offered Rate (LIBOR).[27]

10. The majority of courts consider the interest rate issue to be a matter outside the scope of the Convention and

therefore subject to domestic law.[28] Most such courts have resolved the question by applying the domestic law of a specific country, determined by employing the rules of private international law of the forum[29]; others have applied the domestic law of the creditor without reference to whether it was the law applicable by virtue of the rules of private international law.[30] There also are a few cases in which the interest rate was determined by reference to the law of the country in whose currency the sum in arrears was to be paid (*lex monetae*);[31] in other cases, the courts applied the interest rate of the country in which the price was to be paid,[32] the rate applied in the debtor's country[33], or even the rate of the *lex fori*.[34]

11. A few decisions have applied the interest rate specified by article 7.4.9 of the UNIDROIT Principles of International Commercial Contracts.[35]

12. Despite the variety of solutions described above, tribunals evince a clear tendency to apply the rate provided for by the domestic law applicable to the contract under the rules of private international law,[36] that is, the law that would be applicable to the sales contract if it were not subject to the Convention.[37]

13. Where, however, the parties have agreed upon an interest rate, that rate is to be applied.[38]

Notes

[1]CLOUT case No. 328 [Kantonsgericht des Kantons Zug, Switzerland, 21 October 1999] (see full text of the decision); CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997] (see full text of the decision).

[2]See CLOUT case No. 252 [Handelsgericht des Kantons Zürich, Switzerland, 21 September 1998] (see full text of the decision); Bezirksgericht Arbon, Switzerland, 9 December 1994, published on the Internet at http://www.Unilex.info/case.cfm?pid=1&do=case&id=172&step=FullText.

[3]CLOUT case No. 217 [Handelsgericht des Kantons Aargau, Switzerland, 26 September 1997] (see full text of the decision); Amtsgericht Nordhorn, Germany, 14 June 1996, published on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/259.htm.

[4]CLOUT case No. 254 [Handelsgericht des Kantons Aargau, Switzerland, 19 December 1997] (see full text of the decision).

[5]For cases where courts had to resort to the rules of the Convention—specifically, article 58—to determine when the payment was due because the parties had not agreed upon a specific time for payment, see Landgericht Stendal, Germany, 10 December 2000, *Internationales Handelsrecht*, 2001, 30 ff.; CLOUT case No. 79 [Oberlandesgericht Frankfurt a.M., Germany, 18 January 1994] (see full text of the decision); CLOUT case No. 1 [Oberlandesgericht Frankfurt a.M., Germany, 13 June 1991] (see full text of the decision).

[6]See Tribunal commercial Namur, Belgium, 15 January 2002, published on the Internet at http://www.law.kuleuven.ac.be/int/tradelaw/WK/2002-01-15.htm; Rechtbank van koophandel Kortrijk, Belgium, 3 October 2001, published on the Internet at http://www.law.kuleuven.ac.be/int/tradelaw/WK/2001-10-03.htm; Rechtbank van koophandel Kortrijk, Belgium, 4 April 2001, published on the Internet at http://www.law.kuleuven.ac.be/int/tradelaw/WK/2001-04-05.htm; Landgericht Stendal, 10 December 2000, *Internationales Handelsrecht*, 2001, 30 ff.; CLOUT case No. 217 [Handelsgericht des Kantons Aargau, Switzerland, 26 September 1997] (see full text of the decision); Kantonsgericht Waadt, Switzerland, 11 March 1996, published on the Internet at http://www.Unilex.info/case.cfm?pid=1&do=case&id=320&step=FullText; Landgericht Aachen, Germany, 20 July 1995, published on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/169.htm; CLOUT case No. 301 [Arbitration—International Chamber of Commerce No. 7585 1992], *Journal du droit international*, 1995, 1015 ff.; CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996]; CLOUT case No. 152 [Cour d'appel, Grenoble, France, 26 April 1995]; CLOUT case No. 303 [Arbitration—International Chamber of Commerce No. 7331 1994] (see full text of the decision); Amtsgericht Nordhorn, Germany, 14 June 1994, published on the Internet at http://www.jura.uni-freiburg.de/ipr1/Convention/; CLOUT case No. 55 [Canton del Ticino, Pretore di Locarno Campagna, Switzerland, 16 December 1991, cited as 15 December in CLOUT case No. 55].

[7]CLOUT case No. 328 [Kantonsgericht des Kantons Zug, Switzerland, 21 October 1999] (see full text of the decision); CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997] (see full text of the decision).

[8]Arbitral Tribunal at the Bulgarian Chamber of Commerce and Industry, award No. 11/1996, published on the Internet at http://www.Unilex.info/case.cfm?pid=1&do=case&id=420&step=FullText.

[9]See Landgericht Zwickau, Germany, 19 March 1999, published on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/519.htm.

[10]See CLOUT case No. 79 [Oberlandesgericht Frankfurt a.M., Germany, 18 January 1994] (see full text of the decision); CLOUT case No. 5 [Landgericht Hamburg, Germany, 26 September 1990] (see full text of the decision); CLOUT case No. 7 [Amtsgericht Oldenburg in Holstein, Germany, 24 April 1990] (see full text of the decision).

[11]This has often been emphasized in case law. See*, e.g.*, Rechtbank van koophandel Hasselt, Belgium, 17 June 1998, published on the Internet at http://www.law.kuleuven.ac.be/int/tradelaw/WK/1998-06-17.htm; CLOUT case No. 248 [Schweizerisches Bundesgericht, Switzerland, 28 October 1998] (see full text of the decision); ICC Court of Arbitration, award No. 8962, published on the Internet at http://www.Unilex.info/case.cfm?pid=1&do=case&id=464&step=FullText; CLOUT case No. 195 [Handelsgericht des Kantons Zürich, Switzerland, 21 September 1995]; CLOUT case No. 79 [Oberlandesgericht Frankfurt a.M,. Germany, 18 January 1994] (see full text of the decision); CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994] (see full text of the decision); CLOUT case No. 281 [Oberlandesgericht Koblenz, Germany, 17 September 1993] (see full text of the decision); CLOUT case No. 104 [Arbitration—International Chamber of Commerce No. 7197 1993]; CLOUT case No. 7 [Amtsgericht Oldenburg in Holstein, Germany, 24 April 1990] (see full text of the decision).

[12]See CLOUT case No. 248 [Schweizerisches Bundesgericht, Switzerland, 28 October 1998] (see full text of the decision); Amtsgericht Koblenz, 12 November 1996, published on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/400.htm; CLOUT case No. 195 [Handelsgericht des Kantons Zürich, Switzerland, 21 September 1995]; Landgericht Kassel, Germany, 14 July 1994, published

on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/194.htm; CLOUT case No. 79 [Oberlandesgericht Frankfurt a.M., Germany, 18 January 1994] (see full text of the decision).

[13]CLOUT case No. 7 [Amtsgericht Oldenburg in Holstein, Germany, 24 April 1990] (see full text of the decision).

[14]CLOUT case No. 301 [Arbitration—International Chamber of Commerce No. 7585 1992] (see full text of the decision).

[15]See CLOUT case No. 327 [Kantonsgericht des Kantons Zug, Switzerland, 25 February 1999]; Landgericht Oldenburg, Germany, 9 November 1994, *Recht der internationalen Wirtschaft*, 1996, 65 f., where the creditor's claim for damages caused by the debtor's failure to pay was dismissed on the grounds that the creditor did not prove that it had suffered any additional loss.

[16]It has often been stated that the damages referred to in the final clause of article 78 must be proved by the damaged party; see CLOUT case No. 343 [Landgericht Darmstadt, Germany, 9 May 2000] (see full text of the decision); CLOUT case No. 275 [Oberlandesgericht Düsseldorf, Germany, 24 April 1997] (see full text of the decision); Amtsgericht Koblenz, 12 November 1996, published on the Internet http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/400.htm; Amtsgericht Bottrop, 25 June 1996, published on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/534.htm; CLOUT case No. 132 [Oberlandesgericht Hamm, Germany, 8 February 1995]; Landgericht Kassel, 14 July 1994, published on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/194.htm; CLOUT case No. 79 [Oberlandesgericht Frankfurt a.M., Germany, 18 January 1994] (see full text of the decision).

[17]See CLOUT case No. 248 [Schweizerisches Bundesgericht, Switzerland, 28 October 1998] (see full text of the decision); CLOUT case No. 301 [Arbitration—International Chamber of Commerce No. 7585 1992], *Journal du droit international*, 1995, 1015 ff.; Landgericht Aachen, 20 July 1995, published on the Internet at http://www.Unilex.info/case.cfm?pid=1&do=case&id=125&step=FullText; CLOUT case No. 83 [Oberlandesgericht München, Germany, 2 March 1994] (see full text of the decision); CLOUT case No. 79 [Oberlandesgericht Frankfurt a.M., Germany, 18 January 1994] (see full text of the decision); CLOUT case No. 281 [Oberlandesgericht Koblenz, Germany, 17 September 1993] (see full text of the decision); CLOUT case No. 1 [Oberlandesgericht Frankfurt a.M., Germany, 13 June 1991] (see full text of the decision).

[18]CLOUT case No. 634 [Landgericht Berlin, Germany 21 March 2003]; CLOUT case No. 380 [Tribunale di Pavia, Italy, 29 December 1999]; Arbitral Tribunal at the Bulgarian Chamber of Commerce and Industry, award No. 11/1996, published on the Internet at http://www.Unilex.info/case.cfm?pid=1&do=case&id=420&step=FullText.

[19]CLOUT case No. 55 [Canton del Ticino, Pretore di Locarno Campagna, Switzerland, 16 December 1991, cited as 15 December in CLOUT case No. 55]. (see full text of the decision).

[20]CLOUT case No. 97 [Handelsgericht des Kantons Zürich, Switzerland, 9 September 1993] (see full text of the decision).

[21]ICC Court of Arbitration, award No. 8128, published on the Internet at http://www.Unilex.info/case.cfm?pid=1&do=case&id=207&step=FullText.

[22]For a case listing various criteria employed in case law to determine the rate of interest, see CLOUT case No. 301 [Arbitration—International Chamber of Commerce No. 7585 1992], *Journal du droit international*, 1995, 1015 ff.

[23]See Rechtbank van koophandel Ieper, 29 January 2001, published on the Internet at http://www.law.kuleuven.ac.be/int/tradelaw/WK/2001-01-29.htm; CLOUT case No. 103 [Arbitration—International Chamber of Commerce No. 6653 1993]; Juzgado Nacional de Primera Instancia en lo Comercial n. 10, Buenos Aires, Argentina, 6 October 1994, published on the Internet at http://www.Unilex.info/case.cfm?pid=1&do=case&id=178&step=FullText; Juzgado Nacional de Primera Instancia en lo Comercial n. 10, Buenos Aires, Argentina, 23 October 1991, published on the Internet at http://www.Unilex.info/case.cfm?pid=1&do=case&id=184&step=FullText.

[24]See CLOUT cases Nos. 93 [Arbitration—Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft–Wien, 15 June 1994] and 94 [Arbitration-Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft–Wien, 15 June 1994] (see full text of the decisions).

[25]For another arbitral award applying the interest rate of the country in which the damage occurred (i.e., the country in which the creditor has its place of business), see CLOUT case no. 303 [Arbitration—International Chamber of Commerce No. 7331 1994].

[26]See ICC Court of Arbitration, award No. 8769, published on the Internet at http://www.Unilex.info/case.cfm?pid=1&do=case&id=397&step=FullText.

[27]See ICC Court of Arbitration, France, award No. 8908, published on the Internet at http://www.Unilex.info/case.cfm?pid=1&do=case&id=401&step=FullText; see *also* CLOUT case No. 103 [Arbitration—International Chamber of Commerce No. 6653 1993]; this arbitral award was later annulled on the grounds that international trade usages do not provide appropriate rules to determine the applicable interest rate; see Cour d'appel de Paris, France, 6 April 1995, *Journal du droit international*, 1995, 971 ff

[28]Some decision not specify which law was applicable because all the countries involved in the particular dispute provided for either the same rate of interest (see, for example, CLOUT case No. 84 [Oberlandesgericht Frankfurt a.M., Germany, 20 April 1994]; CLOUT case No. 56 [Canton del Ticino, Pretore di Locarno Campagna, Switzerland, 27 April 1992] (see full text of the decision)) or an interest rate higher than the one claimed by the plaintiff (see Oberlandesgericht Dresden, Germany, 27 December 1999, *Transportrecht-Internationales Handelsrecht*, 2000, 20 ff.).

[29]See CLOUT case No. 432 [Landgericht Stendal, Germany, 12 October 2000], also in *Internationales Handelsrecht*, 2001, 31; Oberlandesgericht Stuttgart, Germany, 28 February 2000, *OLG-Report Stuttgart*, 2000, 407 f.; CLOUT case No. 630 [Court of Arbitration of the International Chamber of Commerce, Zurich, Switzerland, July 1999]; CLOUT case No. 380 [Tribunale di Pavia, Italy, 29 December 1999]; ICC Court of Arbitration, Award No. 9187, published on the internet at http://www.Unilex.info/case.cfm?pid=1&do=case&id=466&step=FullText; CLOUT case No. 328 [Kantonsgericht des Kantons Zug, Switzerland, 21 October 1999] (see full text of the decision); CLOUT case No. 327 [Kantonsgericht des Kantons Zug, Switzerland, 25 February 1999]; CLOUT case No. 377 [Landgericht Flensburg, Germany, 24 March 1999]; CLOUT case No. 248 [Schweizerisches Bundesgericht, Switzerland, 28 October 1998] (see full text of the decision); CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997]; ICC International Court of Arbitration, France, award No. 8611, UNILEX (stating that the relevant interest rate is either that of the *lex contractus* or, in exceptional cases, that of the *lex monetae*); CLOUT case No. 376 [Landgericht Bielefeld, Germany, 2 August 1996]; Tribunal de la Glane, Switzerland, 20 May 1996, *Schweizerische Zeitschrift für Internationales und Europäisches Recht*, 1997, 136; CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996] (see full text of the decision); CLOUT case No. 335 [Canton del Ticino

Tribunale d'appello, Switzerland, 12 February 1996] (see full text of the decision); Amtsgericht Augsburg, Germany, 29 January 1996, UNILEX; CLOUT case No. 330 [Handelsgericht des Kantons St. Gallen, Switzerland, 5 December 1995] (see full text of the decision); Amtsgericht Kehl, Germany, 6 October 1995, *Recht der internationalen Wirtschaft*, 1996, 957 f.; CLOUT case No. 195 [Handelsgericht des Kantons Zürich, Switzerland, 21 September 1995]; CLOUT case No. 228 [Oberlandesgericht Rostock, Germany, 27 July 1995]; Landgericht Aachen, Germany, 20 July 1995, UNILEX; Landgericht Kassel, Germany, 22 June 1995, published on the Internet at http://www.jura.uni-freiburg.de/ipr1/Convention/; CLOUT case No. 136 [Oberlandesgericht Celle, Germany, 24 May 1995]; CLOUT case No. 410 [Landgericht Alsfeld, Germany, 12 May 1995]; Landgericht Landshut, Germany, 5 April 1995, published on the Internet at http://www.jura.uni-freiburg.de/ipr1/Convention/; Landgericht München, Germany, 20 March 1995, *Praxis des internationalen Privat- und Verfahrensrechts*, 1996, 31 ff.; Landgericht Oldenburg, Germany, 15 February 1995, published on the Internet at http://www.jura.uni-freiburg.de/ipr1/Convention/; CLOUT case No. 132 [Oberlandesgericht Hamm, Germany, 8 February 1995]; CLOUT case No. 300 [Arbitration—International Chamber of Commerce No. 7565 1994]; Kantonsgericht Zug, Switzerland, 15 December 1994, *Schweizerische Zeitschrift für Internationales und Europäisches Recht*, 1997, 134; Landgericht Oldenburg, Germany, 9 November 1994, *Neue Juristische Wochenschrift Rechtsprechungs-Report*, 1995, 438; Kantonsgericht Zug, Switzerland, 1 September 1994, *Schweizerische Zeitschrift für Internationales und Europäisches Recht*, 1997, 134 f.; Landgericht Düsseldorf, Germany, 25 August 1994, published on the Internet at http://www.jura.uni-freiburg.de/ipr1/Convention/; Landgericht Giessen, Germany, 5 July 1994, *Neue Juristische Wochenschrift Rechtsprechungs-Report*, 1995, 438 f.; Rechtbank Amsterdam, the Netherlands, 15 June 1994, *Nederlands Internationaal Privaatrecht*, 1995, 194 f.; Amtsgericht Nordhorn, Germany, 14 June 1994, published on the Internet at http://www.jura.uni-freiburg.de/ipr1/Convention/; CLOUT case No. 83 [Oberlandesgericht München, Germany, 2 March 1994]; CLOUT case No. 82 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994]; CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994]; CLOUT case No. 80 [Kammergericht Berlin, Germany, 24 January 1994] (see full text of the decision); CLOUT case No. 79 [Oberlandesgericht Frankfurt a.M., Germany, 18 January 1994]; CLOUT case No. 100 [Rechtbank Arnhem, the Netherlands, 30 December 1993]; Tribunal Cantonal Vaud, Switzerland, 6 December 1993, UNILEX; CLOUT case No. 281 [Oberlandesgericht Koblenz, Germany, 17 September 1993]; CLOUT case No. 97 [Handelsgericht des Kantons Zürich, Switzerland, 9 September 1993]; Rechtbank Roermond, the Netherlands, 6 May 1993, UNILEX; Landgericht Verden, Germany, 8 February 1993, UNILEX; CLOUT case No. 95 [Zivilgericht Basel-Stadt, Switzerland, 21 December 1992]; Amtsgericht Zweibrücken, Germany, 14 October 1992, published on the Internet at http://www.jura.uni-freiburg.de/ipr1/Convention/; CLOUT case No. 227 [Oberlandesgericht Hamm, Germany, 22 September 1992] (see full text of the decision); Landgericht Heidelberg, Germany, 3 July 1992, UNILEX; CLOUT case No. 55 [Canton of Ticino, Pretore di Locarno Campagna, Switzerland, 16 December 1991, cited as 15 December in CLOUT case No. 55].

CLOUT case No. 1 [Oberlandesgericht Frankfurt a.M., Germany, 13 June 1991]; CLOUT case No. 5 [Landgericht Hamburg, Germany, 26 September 1990]; CLOUT case No. 7 [Amtsgericht Oldenburg in Holstein, Germany, 24 April 1990].

[30]Several court decisions have referred to the domestic law of the creditor as the applicable law, independently of whether the rules of private international law designated that law; see Bezirksgericht Arbon, Switzerland, 9 December 1994, published on the Internet at http://www.Unilex.info/case.cfm?pid=1&do=case&id=172&step=FullText; CLOUT case No. 6 [Landgericht Frankfurt a.M., Germany, 16 September 1991] (see full text of the decision); CLOUT case No. 4 [Landgericht Stuttgart, Germany, 31 August 1989]; for criticism of the latter decision, see Landgericht Kassel, Germany, 22 June 1995, published on the Internet http://www.Unilex.info/case.cfm?pid=1&do=case&id=143&step=FullText.

[31]See Rechtbank van koophandel Ieper, 18 February 2002, published on the Internet at http://www.law.kuleuven.ac.be/int/tradelaw/WK/2002-02-18.htm; Rechtbank van koophandel Veurne, 25 April 2001, published on the Internet at http://www.law.kuleuven.ac.be/int/tradelaw/WK/2001-04-25.htm; CLOUT case No. 164 [Arbitration—Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 5 December 1995]; Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 17 November 1995, published on the Internet at http://www.Unilex.info/case.cfm?pid=1&do=case&id=217&step=FullText.

[32]See CLOUT case No. 220 [Kantonsgericht Nidwalden, Switzerland, 3 December 1997]; Rechtbank Almelo, the Netherlands, 9 August 1995, *Nederlands Internationaal Privaatrecht*, 1995, 686; CLOUT case No. 26 [Arbitration—International Chamber of Commerce No. 7153 1992].

[33]See CLOUT case No. 634 [Landgericht Berlin, Germany 21 March 2003] (see full text of the decision); CLOUT case No. 211 [Kantonsgericht Waadt, Switzerland, 11 March 1996] also published on the Internet at http://www.Unilex.info/case.cfm?pid=1&do=case&id=320&step=FullText.

[34]CLOUT case No. 85 [Federal District Court, Northern District of New York, United States, 9 September 1994].

[35]See ICC Court of Arbitration, France, award No. 8769, published on the Internet at http://www.Unilex.info/case.cfm?pid=1&do=case&id=397&step=FullText; ICC Court of Arbitration, France, award No. 8128, *Journal du droit international*, 1996, 1024 ff.; CLOUT cases Nos. 93 [Arbitration—Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft–Wien, 15 June 1994] and 94 [Arbitration—Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft–Wien, 15 June 1994].

[36]Some courts have characterized this approach as a unanimous one; see CLOUT case No. 132 [Oberlandesgericht Hamm, Germany, 8 February 1995]; CLOUT case No. 97 [Handelsgericht des Kantons Zürich, Switzerland, 9 September 1993]. As the foregoing discussion demonstrates, however, this solution, although the prevailing one, has not been unanimously accepted.

[37]See Landgericht Aachen, Germany, 20 July 1995, published on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/169.htm; Amtsgericht Riedlingen, Germany, 21 October 1994, published on the Internet at http://www.Unilex.info/case.cfm?pid=1&do=case&id=116&step=FullText; Amtsgericht Nordhorn, Germany, 14 June 1994, published on the Internet at http://www.Unilex.info/case.cfm?pid=1&do=case&id=114&step=FullText.

[38]See Hof Antwerp, Belgium, 4 November 1998, published on the Internet at http://www.law.kuleuven.ac.be/int/tradelaw/WK/1998-11-04.htm; Landgericht Kassel, Germany, 22 June 1995, published on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/370.htm.

Section IV of Part III, Chapter V

Exemption (articles 79-80)

OVERVIEW

1. Section IV of Part III, Chapter V of the Convention includes two provisions that, in specified circumstances, may exempt a party from some or all of the legal consequences of a failure to perform its obligations under the contract or the Convention. Article 79, which is in the nature of a *force majeure* provision,[1] may relieve a non-performing party from liability for damages if the failure to perform was due to an "impediment" that meets certain requirements. Article 80 provides that a party may not rely on the other party's failure to perform to the extent that the failure resulted from the first party's "act or omission"; thus this provision may also operate to relieve a party from the consequences of its failure to perform.[2]

RELATION TO OTHER PARTS OF THE CONVENTION

2. The possibility that a party can claim exemption under article 79 for a failure to perform, or that the other party cannot rely on the failure to perform under article 80, are in effect implied limitations on the performance obligations provided for in the Convention. Thus the obligations described in Chapter II ("Obligations of the seller") and Chapter III ("Obligations of the buyer") of Part III of the Convention must be read in light of the provisions in the current section.[3] By the express terms of article 79 (5) an exemption under article 79 only relieves the exempt party from liability for damages.[4] Thus the provisions of the Convention on damages (articles 45 (1) *(b)*, 61 (1) *(b)*, and the provision in Part III, Chapter V, Section II (articles 74-77)) have a particular connection to Article 79.

Notes

[1]See the Digest foir art. 79, para. 23.

[2]See the Digest for art. 80, para. 1.

[3]It has been questioned whether article 79 is applicable to a seller's failure to deliver conforming goods as provided in Section II of Part IIII, Chapter II. See the Digest for art. 79, para. 8.

[4]See the Digest for art. 79, para. 22.

Article 79

(1) A party is not liable for a failure to perform any of its obligations if he proves 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 provisions 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.

(5) Nothing in this article prevents either party from exercising any right other then to claim damages under this Convention.

OVERVIEW

1. Article 79 specifies the circumstances in which a party "is not liable" for failing to perform its obligations, as well as the remedial consequences if the exemption from liability applies. Paragraph (1) relieves a party of liability for "a failure to perform any of his obligations" if the following requirements are fulfilled: the party's non-performance was "due to an impediment"; the impediment was "beyond his control"; the impediment is one that the party "could not reasonably be expected to have taken into account at the time of the conclusion of the contract"; the party could not reasonably have "avoided" the impediment; and the party could not reasonably have "overcome" the impediment "or its consequences".

2. Article 79 (2) applies where a party engages a third person "to perform the whole or a part of the contract" and the third person fails to perform.

3. Article 79 (3), which has not been the subject of significant attention in case law, limits the duration of an exemption to the time during which an impediment continues to exist. Article 79 (4) requires a party that wishes to claim an exemption for non-performance "to give notice to the other party of the impediment and its effect on his ability to perform". The second sentence of article 79 (4) specifies that failure to give such notice "within a reasonable time after the party who fails to perform knew or ought to have known of the impediment" will make the party who failed to give proper notice "liable for damages resulting from such non-receipt". Article 79 (4) also appears not to have attracted significant attention in case law, although one decision did note that the party claiming exemption in that case had satisfied the notice requirement.[1]

4. Paragraph (5) makes it clear that article 79 has only a limited effect on the remedies available to a party aggrieved by a failure of performance for which the non-performing party enjoys an exemption. Specifically, article 79 (5) declares that an exemption precludes only the aggrieved party's right to claim damages, and not any other rights of either party under the Convention.

ARTICLE 79 IN GENERAL

5. Several decisions have suggested that exemption under article 79 requires satisfaction of something in the nature of an "impossibility" standard.[2] One decision has compared the standard for exemption under article 79 to those for excuse under national legal doctrines of *force majeure*, economic impossibility, and excessive onerousness[3]—although another decision asserted that article 79 was of a different nature than the domestic Italian hardship doctrine of *eccessiva onerosità sopravvenuta.*[4] It has also been stated that,

where the CISG governs a transaction, article 79 pre-empts and displaces similar national doctrines such as *Wegfall der Geschäftsgrundlage* in German law[5] and *eccesiva onerosità sopravvenuta*.[6] Another decision has emphasized that article 79 should be interpreted in a fashion that does not undermine the Convention's basic approach of imposing liability for a seller's delivery of non-conforming goods without regard to whether the failure to perform resulted from the seller's fault.[7] And a court has linked a party's right to claim exemption under article 79 to the absence of bad faith conduct by that party.[8]

6. Many decisions have suggested that the application of article 79 focuses on an assessment of the risks that a party claiming exemption assumed when it concluded the contract.[9] The decisions suggest, in other words, that the essential issue is to determine whether the party claiming an exemption assumed the risk of the event that caused the party to fail to perform. In one case, a seller had failed to make a delivery because the seller's supplier could not supply the goods without an immediate infusion of substantial cash, and the seller did not have the funds because the buyer had justifiably (but unexpectedly) refused to pay for earlier deliveries. The seller's claim of exemption under article 79 was denied because the buyer, as per the contract, had pre-paid for the missing delivery and the tribunal found that this arrangement clearly allocated to the seller risks relating to the procurement of goods.[10] The risk analysis approach to exemption under article 79 is also evident in cases raising issues concerning the relationship between article 79 and risk of loss rules. Thus where the seller delivered caviar and risk of loss had passed to the buyer, but international sanctions against the seller's State prevented the buyer from taking immediate possession and control of the caviar so that it had to be destroyed, an arbitral tribunal held that the buyer was not entitled to an exemption when it failed to pay the price: the tribunal emphasized that the loss had to be sustained by the party who bore the risk at the moment the *force majeure* occurred.[11] And where a seller complied with its obligations under CISG article 31 by timely delivering goods to the carrier (so that, presumably, risk of loss had passed to the buyer), a court found that the seller was exempt under article 79 from liability for damages caused when the carrier delayed delivering the goods.[12]

7. Article 79 has been invoked with some frequency in litigation, but with limited success. In two cases, a seller successfully claimed exemption for a failure to perform[13], but in at least nine other cases a seller's claim of exemption was denied.[14] Buyers have also twice been granted an exemption under article 79[15] but have been rebuffed in at least six other cases.[16]

BREACHES FOR WHICH AN EXEMPTION IS AVAILABLE: EXEMPTION FOR DELIVERY OF NON-CONFORMING GOODS

8. It has been questioned whether a seller that has delivered non-conforming goods is eligible to claim an exemption under article 79. On appeal of a decision expressly asserting that such a seller could claim an exemption (although it denied the exemption on the particular facts of the case),[17] a court recognized that the situation raised an issue concerning the scope of article 79.[18] The court, however, reserved decision on the issue because the particular appeal could be disposed of on other grounds. More recently, that court again noted that it had not yet resolved this issue, although its discussion suggests that article 79 might well apply when a seller delivers non-conforming goods.[19] Nevertheless, at least one case has in fact granted an article 79 exemption to a seller that delivered non-conforming goods.[20]

9. Decisions have granted exemptions for the following breaches: a seller's late delivery of goods;[21] a seller's delivery of non-conforming goods,[22] a buyer's late payment of the price;[23] and a buyer's failure to take delivery after paying the price.[24] Parties have also claimed exemption for the following breaches, although the claim was denied on the particular facts of the case: a buyer's failure to pay the price;[25] a buyer's failure to open a letter of credit;[26] a seller's failure to deliver goods;[27] and a seller's delivery of non-conforming goods.[28]

ARTICLE 79 (1): "IMPEDIMENT" REQUIREMENT

10. As a prerequisite to exemption, article 79 (1) requires that a party's failure to perform be due to an "impediment" that meets certain additional requirements (e.g., that it was beyond the control of the party, that the party could not reasonably be expected to have taken it into account at the time of the conclusion of the contract, etc.). One decision has used language suggesting that an "impediment" must be "an unmanageable risk or a totally exceptional event, such as *force majeure*, economic impossibility or excessive onerousness".[29] Another decision asserted that conditions leading to the delivery of defective goods can constitute an impediment under article 79;[30] on appeal to a higher court, however, the exemption was denied on other grounds and the lower court's discussion of the impediment requirement was declared moot.[31] More recently, a court appeared to suggest that the non-existence of means to prevent or detect a lack of conformity in the goods may well constitute a sufficient impediment for exemption of the seller under article 79.[32] Yet another decision indicated that a prohibition on exports by the seller's country constituted an "impediment" within the meaning of article 79 for a seller who failed to deliver the full quantity of goods, although the tribunal denied the exemption because the impediment was foreseeable when the contract was concluded.[33]

11. Other available decisions apparently have not focused on the question of what constitutes an "impediment" within the meaning of article 79 (1). Where a party was deemed exempt under article 79, however, the tribunal presumably was satisfied that the impediment requirement had been met. The impediments to performance in those cases were: refusal by state officials to permit importation of the goods into the buyer's country (found to exempt the buyer, who had paid for the goods, from liability for damages for failure to take delivery);[34] the manufacture of defective goods by the seller's supplier (found to exempt the seller from damages for delivery of non-conforming goods where there was no evidence the seller acted in bad faith);[35] the failure

of a carrier to meet a guarantee that the goods would be delivered on time (found, as an alternative ground for denying the buyer's claim to damages, to exempt the seller from damages for late delivery where the seller had completed its performance by duly arranging for carriage and turning the goods over to the carrier);[36] seller's delivery of non-conforming goods (found to exempt the buyer from liability for interest for a delay in paying the price).[37]

12. In certain other cases, tribunals that refused to find an exemption use language suggesting that there was not an impediment within the meaning of article 79 (1), although it is often not clear whether the result was actually based on failure of the impediment requirement or on one of the additional elements going to the character of the required impediment (e.g., that it be beyond the control of the party claiming an exemption). Decisions dealing with the following situations fall into this category: a buyer who claimed exemption for failing to pay the price because of inadequate reserves of any currency that was freely convertible into the currency of payment, where this situation did not appear in the exhaustive list of excusing circumstances catalogued in the written contract's *force majeure* clause;[38] a seller who claimed exemption for failing to deliver based on an emergency halt to production at the plant of the supplier who manufactured the goods;[39] a buyer who claimed exemption for refusing to pay for delivered goods because of negative market developments, problems with storing the goods, revaluation of the currency of payment, and decreased trade in the buyer's industry;[40] a seller who claimed exemption for failing to deliver because its supplier had run into extreme financial difficulty, causing it to discontinue producing the goods unless the seller provided it a "considerable amount" of financing.[41]

13. Most decisions that have denied a claimed exemption do so on the basis of requirements other than the impediment requirement, and without making clear whether the tribunal judged that the impediment requirement had been satisfied. The claimed impediments in such cases include the following: theft of the buyer's payment from a foreign bank to which it had been transferred;[42] import regulations on radioactivity in food that the seller could not satisfy;[43] increased market prices for tomatoes caused by adverse weather in the seller's country;[44] significantly decreased market prices for the goods occurring after conclusion of the contract but before the buyer opened a letter of credit;[45] an international embargo against the seller's country that prevented the buyer from clearing the goods (caviar) through customs or making any other use of the goods until after their expiration date had passed and they had to be destroyed;[46] a remarkable and unforeseen rise in international market prices for the goods that upset the equilibrium of the contract but did not render the seller's performance impossible;[47] failure of the seller's supplier to deliver the goods to seller and a tripling of the market price for the goods after the conclusion of the contract;[48] failure of the seller's supplier to deliver the goods because the shipping bags supplied by the buyer (made to specifications provided by the seller) did not comply with regulatory requirements of the supplier's government;[49] failure of a third party to whom buyer had paid the price (but who was not an authorized collection agent of the seller) to transmit the payment to the seller;[50] an order by the buyer's government suspending payment of foreign debts;[51] chemical contamination of the goods (paprika) from an unknown source;[52] a substantial lowering of the price that the buyer's customer was willing to pay for products in which the goods were incorporated as a component.[53]

TREATMENT OF PARTICULAR IMPEDIMENTS: BREACH BY SUPPLIERS

14. Certain claimed impediments appear with some frequency in the available decisions. One such impediment is failure to perform by a third-party supplier on whom the seller relied to provide the goods.[54] In a number of cases sellers have invoked their supplier's default as an impediment that, they argued, should exempt the seller from liability for its own resulting failure to deliver the goods[55] or for its delivery of non-conforming goods.[56] Several decisions have suggested that the seller normally bears the risk that its supplier will breach, and that the seller will not generally receive an exemption when its failure to perform was caused by its supplier's default.[57] In a detailed discussion of the issue, a court explicitly stated that under the CISG the seller bears the "acquisition risk"—the risk that its supplier will not timely deliver the goods or will deliver non-conforming goods—unless the parties agreed to a different allocation of risk in their contract, and that a seller therefore cannot normally invoke its supplier's default as a basis for an exemption under article 79.[58] The court, which linked its analysis to the Convention's no-fault approach to liability for damages for breach of contract, therefore held that the seller in the case before it could not claim an exemption for delivering non-conforming goods furnished by a third-party supplier. It disapproved of a lower court's reasoning which had suggested that the only reason the seller did not qualify for an exemption was because a proper inspection of the goods would have revealed the defect.[59] Nevertheless, another court has granted a seller an exemption from damages for delivery of non-conforming goods on the basis that the defective merchandise was manufactured by a third party, which the court found was an exempting impediment as long as the seller had acted in good faith.[60]

TREATMENT OF PARTICULAR IMPEDIMENTS: CHANGE IN THE COST OF PERFORMANCE OR THE VALUE OF THE GOODS

15. Claims that a change in the financial aspects of a contract should exempt a breaching party from liability for damages have also appeared repeatedly in the available decisions. Thus sellers have argued that an increase in the cost of performing the contract should excuse them from damages for failing to deliver the goods,[61] and buyers have asserted that a decrease in the value of the goods being sold should exempt them from damages for refusing to take delivery of and pay for the goods.[62] These arguments have not been successful, and several courts have expressly commented that a party is deemed to assume the risk of market fluctuations and other cost factors affecting the financial consequences of the contract.[63] Thus in denying a buyer's claim to an exemption after the market price for the goods dropped significantly, one court asserted the such price

fluctuations are foreseeable aspects of international trade, and the losses they produce are part of the "normal risk of commercial activities".[64] Another court denied a seller an exemption after the market price for the goods tripled, commenting that "it was incumbent upon the seller to bear the risk of increasing market prices ...".[65] Another decision indicated that article 79 did not provide for an exemption for hardship as defined in the domestic Italian doctrine of *eccesiva onerosità sopravvenuta*, and thus under the CISG a seller could not have claimed exemption from liability for non-delivery where the market price of the goods rose "remarkably and unforeseeably" after the contract was concluded.[66] Other reasons advanced for denying exemptions because of a change in financial circumstances are that the consequences of the change could have been overcome,[67] and that the possibility of the change should have been taken into account when the contract was concluded.[68]

REQUIREMENT THAT THE IMPEDIMENT BE BEYOND THE CONTROL OF THE PARTY CLAIMING EXEMPTION

16. In order for a non-performing party to qualify for an exemption, article 79 (1) requires that the non-performance be due to an impediment that was "beyond his control". It has been held that this requirement was not satisfied, and thus it was proper to deny an exemption, where a buyer paid the price of the goods to a foreign bank from which the funds were stolen, and as a consequence were never transmitted to the seller.[69] On the other hand, some decisions have found an impediment beyond the control of a party where governmental regulations or the actions of governmental officials prevented a party's performance. Thus a buyer that had paid for the goods was held exempt from liability for damages for failing to take delivery where the goods could not be imported into the buyer's country because officials would not certify their safety.[70] Similarly, an arbitral tribunal found that a prohibition on the export of coal implemented by the seller's State constituted an impediment beyond the control of the seller, although it denied the seller an exemption on other grounds.[71] Several decisions have focused on the question whether a failure of performance by a third party who was to supply the goods to the seller constituted an impediment beyond the seller's control.[72] One court found that this requirement was satisfied where defective goods had been manufactured by the seller's third-party supplier, provided the seller had not acted in bad faith.[73] Where the seller's supplier could not continue production of the goods unless the seller advanced it "a considerable amount of cash", however, an arbitral tribunal found that the impediment to the seller's performance was not beyond its control, stating that a seller must guarantee its financial ability to perform even in the face of subsequent, unforeseeable events, and that this principle also applied to the seller's relationship with its suppliers.[74] And where the seller's supplier shipped directly to the buyer, on the seller's behalf, a newly-developed type of vine wax that proved to be defective, the situation was found not to involve an impediment beyond the seller's control: a lower court held that the requirements for exemption were not satisfied because the seller would have discovered the problem had it fulfilled it obligation to test the wax before it was shipped to its buyer;[75] on appeal, a higher court affirmed the result but rejected the lower court's reasoning, stating that the seller would not qualify for an exemption regardless of whether it breached an obligation to examine the goods.[76]

REQUIREMENT THAT THE PARTY CLAIMING EXEMPTION COULD NOT REASONABLY BE EXPECTED TO HAVE TAKEN THE IMPEDIMENT INTO ACCOUNT AT THE TIME OF THE CONCLUSION OF THE CONTRACT

17. To satisfy the requirements for exemption under article 79, a party's failure to perform must be due to an impediment that the party "could not reasonably be expected to have taken . . . into account at the time of the conclusion of the contract". Failure to satisfy this requirement was one reason cited by an arbitral tribunal for denying an exemption to a seller that had failed to deliver the goods because of an emergency production stoppage at the plant of a supplier that was manufacturing the goods for the seller.[77] Several decisions have denied an exemption when the impediment was in existence and should have been known to the party at the time the contract was concluded. Thus where a seller claimed an exemption because it was unable to procure milk powder that complied with import regulations of the buyer's state, the court held that the seller was aware of such regulations when it entered into the contract and thus took the risk of locating suitable goods.[78] Similarly, a seller's claim of exemption based on regulations prohibiting the export of coal[79] and a buyer's claim of exemption based on regulations suspending payment of foreign debts[80] were both denied because, in each case, the regulations were in existence (and thus should have been taken into account) at the time of the conclusion of the contract. Parties have been charged with responsibility for taking into account the possibility of changes in the market value of goods because such developments were foreseeable when the contract was formed, and claims that such changes constitute impediments that should exempt the adversely-affected party have been denied.[81]

REQUIREMENT THAT THE PARTY CLAIMING EXEMPTION COULD NOT REASONABLY BE EXPECTED TO AVOID OR OVERCOME THE IMPEDIMENT

18. In order for a non-performing party to satisfy the prerequisites for exemption under article 79 (1), the failure to perform must be due to an impediment that the party could not reasonably be expected to have avoided. In addition, it must not reasonably have been expected that the party would overcome the impediment or its consequences. Failure to satisfy these requirements were cited by several tribunals in denying exemptions to sellers whose non-performance was allegedly caused by the default of their suppliers. Thus it has been held that a seller whose supplier shipped defective vine wax (on the seller's behalf) directly to the buyer,[82] as well as a seller whose supplier failed to produce the goods due to an emergency shut-down of its plant,[83] should reasonably have been expected to have avoided or surmounted these impediments, and thus to have fulfilled their contractual

obligations.[84] Similarly, it has been held that a seller of tomatoes was not exempt for its failure to deliver when heavy rainfalls damaged the tomato crop in the seller's country, causing an increase in market prices: because the entire tomato crop had not been destroyed, the court ruled, the seller's performance was still possible, and the reduction of tomato supplies as well as their increased cost were impediments that seller could overcome.[85] Where a seller claimed exemption because the used equipment the contract called for had not been manufactured with the components that the contract specified, the court denied exemption because the seller regularly overhauled and refurbished used equipment and thus was capable of supplying goods equipped with components not offered by the original manufacturer.[86]

REQUIREMENT THAT FAILURE TO PERFORM BE "DUE TO" THE IMPEDIMENT

19. In order for a non-performing party to qualify for an exemption under article 79 (1), the failure to perform must be "due to" an impediment meeting the requirements discussed in the preceding paragraphs. This causation requirement has been invoked as a reason to deny a party's claim to exemption, as where a buyer failed to prove that its default (failure to open a documentary credit) was caused by its government's suspension of payment of foreign debt.[87] The operation of the causation requirement may also be illustrated by an appeal in litigation involving a seller's claim of exemption under article 79 from liability for damages for delivering defective vine wax. The seller argued it was exempt because the wax was produced by a third party supplier that had shipped the goods directly to the buyer. A lower court denied the seller's claim because it found that the seller should have tested the wax, which was a new product, in which event it would have discovered the problem;[88] hence, the court reasoned, the supplier's faulty production was not an impediment beyond its control. On appeal to a higher court, the seller argued that all vine wax produced by its supplier was defective that year, so that even if it had sold a traditional type (which it presumably would not have had to examine) the buyer would have suffered the same loss.[89] The court dismissed the argument because it rejected the lower court's reasoning: according to the higher court, the seller's responsibility for defective goods supplied by a third party did not depend on its failure to fulfil an obligation to examine the goods; rather, the seller's liability arose from the fact that, unless agreed otherwise, sellers bear the "risk of acquisition", and the seller would have been liable for the non-conforming goods even if it was not obliged to examine them before delivery. Thus even if the seller had sold defective vine wax that it was not obliged to examine, the default would still not have been caused by an impediment that met the requirements of article 79.

BURDEN OF PROOF

20. Several decisions assert that article 79 (1)—in particular the language indicating that a party is exempt "if he proves that the failure [to perform] was due to an impediment beyond his control . . ."—expressly allocates the burden of proving the requirements for exemption to the party claiming the exemption,[90] and that this also establishes that the burden of proof is generally a matter within the scope of the Convention.[91] In addition, such decisions maintain that article 79 (1) evidences a general principle of the Convention allocating the burden of proof to the party who asserts a claim or who invokes a rule, exception or objection, and that this general principle can be used, pursuant to CISG article 7 (2), to resolve burden of proof issues that are not expressly dealt with in the Convention.[92] The approach or language of several other decisions strongly imply that the burden of proving the elements of an exemption falls to the party claiming the exemption.[93]

ARTICLE 79 (2)

21. Article 79 (2) imposes special requirements if a party claims exemption because its own failure to perform was "due to the failure by a third person whom he has engaged to perform the whole or a part of the contract". Where it applies, article 79 (2) demands that the requirements for exemption under article 79 (1) be satisfied with respect to both the party claiming exemption *and* the third party before an exemption should be granted. This is so even though the third party may not be involved in the dispute between the seller and the buyer (and hence the third party is not claiming an exemption), and even though the third party's obligations may not be governed by the Sales Convention. The special requirements imposed by article 79 (2) increase the obstacles confronting a party claiming exemption, so that it is important to know when it applies. A key issue, in this regard, is the meaning of the phrase "a third person whom he [i.e., the party claiming exemption] has engaged to perform the whole or a part of the contract". Several cases have addressed the question whether a supplier to whom the seller looks to procure or produce the goods is covered by the phrase, so that a seller who claims exemption because of a default by such a supplier would have to satisfy article 79 (2).[94] In one decision, a regional appeals court held that a manufacturer from whom the seller ordered vine wax to be shipped directly to the buyer was not within the scope of article 79 (2), and the seller's exemption claim was governed exclusively by article 79 (1).[95] On appeal, a higher court avoided the issue, suggesting that the seller did not qualify for exemption under either article 79 (1) or 79 (2).[96] An arbitral tribunal has suggested that article 79 (2) applies when the seller claims exemption because of a default by a "sub-contractor" or the seller's "own staff", but not when the third party is a "manufacturer or sub-supplier".[97] On the other hand, an arbitral tribunal has assumed that a fertilizer manufacturer with whom a seller contracted to supply the goods and to whom the buyer was instructed to send specified types of bags for shipping the goods was covered by article 79 (2).[98] It has also been suggested that a carrier whom the seller engaged to transport the goods is the kind of third party that falls within the scope of article 79 (2).[99]

ARTICLE 79 (5): CONSEQUENCES OF EXEMPTION

22. Article 79 (5) of the Convention specifies that a successful claim to exemption shields a party from liability for damages, but it does not preclude the other party from "exercising any right other than to claim damages". Claims against a party for damages have been denied in those cases in which the party qualified for an exemption under article 79.[100] A seller's claim to interest on the unpaid part of the contract price has also been denied on the basis that the buyer had an exemption for its failure to pay.[101] In one decision it appears that both the buyer's claim to damages and its right to avoid the contract were rejected because the seller's delivery of non-conforming goods "was due to an impediment beyond its control", although the court permitted the buyer to reduce the price in order to account for the lack of conformity.[102]

DEROGATION FROM ARTICLE 79: RELATIONSHIP BETWEEN ARTICLE 79 AND *FORCE MAJEURE* CLAUSES

23. Article 79 is not excepted from the rule in article 6 empowering the parties to "derogate from or vary the effect of" provisions of the Convention. Decisions have construed article 79 in tandem with *force majeure* clauses in the parties' contract. One decision found that a seller was not exempt for failing to deliver the goods under either article 79 or under a contractual *force majeure* clause, thus suggesting that the parties had not pre-empted article 79 by agreeing to the contractual provision.[103] Another decision denied a buyer's claim to exemption where the circumstances that the buyer argued constituted a *force majeure* were not found in an exhaustive listing of *force majeure* situations included in the parties' contract.[104]

Notes

[1]Amtsgericht Charlottenburg, Germany, 4 May 1994, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/386.htm. For further discussion of article 79 (4), see para 7 of the Digest for Section II of Part III, Chapter V, and the Digest for article 74, para 13.

[2]Oberlandesgericht Hamburg, Germany, 4 July 1997, Unilex; Rechtbank van Koophandel, Hasselt, Belgium, 2 May 1995, Unilex; CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997] (suggesting that a seller can be exempt from liability for failure to deliver only if suitable goods were no longer available in the market); CLOUT case No. 54 [Tribunale Civile di Monza, Italy, 14 January 1993]. But see Amtsgericht Charlottenburg, Germany, 4 May 1994, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/386.htm, where the court implied that the standard for claiming exemption under article 79 is more lenient than "impossibility": it held that the buyer was exempt from interest for a delayed payment of the price, even though timely payment was clearly possible—although not reasonably to be expected in the circumstances, according to the court.

[3]CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996].

[4]CLOUT case No. 54 [Tribunale Civile di Monza, Italy, 14 January 1993] (see full text of the decision).

[5]CLOUT case No. 47 [Landgericht Aachen, Germany, 14 May 1993] (see full text of the decision).

[6]CLOUT case No. 54 [Tribunale Civile di Monza, Italy, 14 January 1993].

[7]CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999].

[8]Tribunal de Commerce de Besançon, France, 19 January 1998, Unilex.

[9]See CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996] (discussing application of article 79, the tribunal asserts "[o]nly the apportionment of the risk in the contract is relevant here") (see full text of the decision); CLOUT case No. 271 [Bundesgerichtshof, Germany 24 March 1999] ("The possibility of exemption under CISG article 79 does not change the allocation of the contractual risk"). For other cases suggesting or implying that the question of exemption under article 79 is fundamentally an inquiry into the allocation of risk under the contract, see Arrondissementsrechtsbank 's-Hertogenbosch, the Netherlands, 2 October 1998, Unilex; Rechtbank van Koophandel, Hasselt, Belgium, 2 May 1995, Unilex; Arbitration before the Bulgarian Chamber of Commerce and Industry, Bulgaria, 12 February 1998, Unilex; CLOUT case No. 102 [Arbitration—International Chamber of Commerce No. 6281 1989]; CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997]; ICC Court of Arbitration, award No. 8128, 1995, Unilex; CLOUT case No. 410 [Landgericht Alsfeld, Germany, 12 May 1995]; CLOUT case No. 480 [Cour d'appel Colmar, France, 12 June 2001] (denying buyer an exemption when buyer's customer significantly reduced the price it would pay for products that incorporated the goods in question as a component; the court noted that in a long term contract like the one between the buyer and the seller such a development was foreseeable, and it concluded that it was thus "up to the [buyer], a professional experienced in international market practice, to lay down guarantees of performance of obligations to the [seller] or to stipulate arrangements for revising those obligations. As it failed to do so, it has to bear the risk associated with non-compliance.").

[10]See CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996] (see full text of the decision).

[11]CLOUT case No. 163 [Arbitration—Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 10 December 1996].

[12]CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999].

[13]Tribunal de Commerce de Besançon, France, 19 January 1998, Unilex (seller was granted exemption from damages for delivery of non-conforming goods, although the court ordered the seller to give the buyer a partial refund); CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999] (seller found exempt from damages for late delivery of goods).

[14]CLOUT case No. 140 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, award in case No. 155/1994 of 16 March 1995]; Arrondissementsrechtsbank 's-Hertogenbosch, the Netherlands, 2 October 1998, Unilex; Oberlandesgericht Hamburg, Germany, 4 July 1997, Unilex; CLOUT case No. 271 [Bundesgerichtshof,

Germany, 24 March 1999], *affirming* (on somewhat different reasoning) CLOUT case No. 272 [Oberlandesgericht Zweibrücken, Germany, 31 March 1998]; Arbitration Case 56/1995, Bulgarian Chamber of Commerce and Industry, 24 April 1996, Unilex; CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997]; ICC Court of Arbitration, award No. 8128, 1995, Unilex; CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996]; Landgericht Ellwangen, Germany, 21 August 1995, Unilex. See *also* CLOUT case No. 102 [Arbitration—International Chamber of Commerce No. 6281 1989] (tribunal applies Yugoslav national doctrines, but also indicates that exemption would have been denied under article 79).

[15]Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russian Federation, award in case No. 155/1996 of 22 January 1997, Unilex (buyer that had paid price for goods granted exemption for damages caused by its failure to take delivery); Amtsgericht Charlottenburg, Germany, 4 May 1994, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/386.htm (buyer granted exemption from liability for interest and damages due to late payment).

[16]CLOUT case No. 142 [Arbitration-Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, award in case No. 123/1992 of 17 October 1995]; Information Letter No. 29 of the High Arbitration Court of the Russian Federation, Russia, 16 February 1998, Unilex; Rechtbank van Koophandel, Hasselt, Belgium, 2 May 1995, Unilex; Arbitration before the Bulgarian Chamber of Commerce and Industry, Bulgaria, 12 February 1998, Unilex; CLOUT case No. 410 [Landgericht Alsfeld, Germany, 12 May 1995]; CLOUT case No. 104 [Arbitration—International Chamber of Commerce No. 7197 1993]; CLOUT case No. 480 [Cour d'appel Colmar, France, 12 June 2001].

[17]CLOUT case No. 272 [Oberlandesgericht Zweibrücken, Germany, 31 March 1998].

[18]CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999].

[19]Bundesgerichtshof, Germany, 9 January 2002, available on the Internet at http://www.cisg.law.pace.edu/cisg/text/020109g1german.html.

[20]Tribunal de Commerce de Besançon, France, 19 January 1998, Unilex.

[21]CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999].

[22]Tribunal de Commerce de Besançon, France, 19 January 1998, Unilex.

[23]Amtsgericht Charlottenburg, Germany, 4 May 1994, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/386.htm.

[24]Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russian Federation, award in case No. 155/1996 of 22 January 1997, Unilex.

[25]CLOUT case No. 142 [Arbitration-Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, award in case No. 123/1992 of 17 October 1995]; Information Letter No. 29 of the High Arbitration Court of the Russian Federation, Russia, 16 February 1998, Unilex; CLOUT case No. 163 [Arbitration—Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 10 December 1996]; Arbitration before the Bulgarian Chamber of Commerce and Industry, Bulgaria, 12 February 1998, Unilex; CLOUT case No. 410 [Landgericht Alsfeld, Germany, 12 May 1995].

[26]CLOUT case No. 104 [Arbitration—International Chamber of Commerce No. 7197 1993]; Rechtbank van Koophandel, Hasselt, Belgium, 2 May 1995, Unilex.

[27]CLOUT case No. 140 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, award in case No. 155/1994 of 16 March 1995]; Arrondissementsrechtsbank 's-Hertogenbosch, the Netherlands, 2 October 1998, Unilex; Oberlandesgericht Hamburg, Germany, 4 July 1997, Unilex; CLOUT case No. 102 [Arbitration—International Chamber of Commerce No. 6281 1989]; Arbitration Case 56/1995 before the Bulgarian Chamber of Commerce and Industry, 24 April 1996, Unilex; CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997]; ICC Court of Arbitration, award No. 8128, 1995, Unilex; CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996].

[28]CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999]; Landgericht Ellwangen, Germany, 21 August 1995, Unilex. See *also* Arrondissementsrechtsbank 's-Hertogenbosch, the Netherlands, 2 October 1998, Unilex (denying exemption for seller who could not acquire conforming goods and for this reason failed to deliver).

[29]CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996] (see full text of the decision).

[30]CLOUT case No. 272 [Oberlandesgericht Zweibrücken, Germany, 31 March 1998]. The court nevertheless denied the seller's claim of exemption on the facts of the particular case.

[31]CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999]. For further discussion of the question whether a seller can claim exemption under article 79 for delivery of non-conforming goods, see *supra* para. 8.

[32]Bundesgerichtshof, Germany, 9 January 2002, available on the Internet at http://www.cisg.law.pace.edu/cisg/text/020109g1german.html.

[33]Arbitration Case 56/1995 before the Bulgarian Chamber of Commerce and Industry, 24 April 1996, Unilex. The seller also claimed exemption for failing to deliver the goods (coal) because of a strike by coal miners, but the court denied the claim because the seller was already in default when the strike occurred.

[34]Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russian Federation, award in case No. 155/1996 of 22 January 1997, Unilex.

[35]Tribunal de Commerce de Besançon, France, 19 January 1998, Unilex.

[36]CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999] (see full text of the decision).

[37]Amtsgericht Charlottenburg, Germany, 4 May 1994, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/386.htm.

[38]CLOUT case No. 142 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, award in case No. 123/1992 of 17 October 1995].

[39]CLOUT case No. 140 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, award in case No. 155/1994 of 16 March 1995].

[40]Arbitration before the Bulgarian Chamber of Commerce and Industry, Bulgaria, 12 February 1998, Unilex.

[41]CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996].

[42]Information Letter No. 29 of the High Arbitration Court of the Russian Federation, Russia, 16 February 1998, Unilex.

[43]Arrondissementsrechtsbank 's-Hertogenbosch, the Netherlands, 2 October 1998, Unilex.

[44]Oberlandesgericht Hamburg, Germany, 4 July 1997, Unilex.

[45]Rechtbank van Koophandel, Hasselt, Belgium, 2 May 1995, Unilex.

[46]CLOUT case No. 163 [Arbitration—Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 10 December 1996] (see full text of the decision).

[47]CLOUT case No. 54 [Tribunale Civile di Monza, Italy, 14 January 1993].

[48]CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997].

[49]ICC Court of Arbitration, award No. 8128, 1995, Unilex.

[50]CLOUT case No. 410 [Landgericht Alsfeld, Germany, 12 May 1995].

[51]CLOUT case No. 104 [Arbitration—International Chamber of Commerce No. 7197 1993] (see full text of the decision).

[52]Landgericht Ellwangen, Germany, 21 August 1995, Unilex. An arbitral panel has noted that, under domestic Yugoslavian law, a 13.16 per cent rise in the cost of steel—which the tribunal found was a predictable development—would not exempt the seller from liability for failing to deliver the steel, and suggested that the domestic Yugoslavian law was consistent with article 79. See CLOUT case No. 102 [Arbitration—International Chamber of Commerce No. 6281 1989] (see full text of the decision).

[53]CLOUT case No. 480 [Cour d'appel Colmar, France, 12 June 2001].

[54]This situation also raises issues concerning the applicability of article 79 (2)—a topic that is discussed *infra*, para. 21.

[55]CLOUT case No. 140 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, award in case No. 155/1994 of 16 March 1995]; CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996]; ICC Court of Arbitration, award No. 8128, 1995, Unilex; CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997].

[56]CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999]; Tribunal de Commerce de Besançon, France, 19 January 1998, Unilex.

[57]CLOUT case No. 140 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, award in case No. 155/1994 of 16 March 1995]; CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997]; ICC Court of Arbitration, award No. 8128, 1995; CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996]. In another case, the seller claimed that chemical contamination of the goods was not the result of the seller's own processing of the goods, but the court declared that the source of the contamination was irrelevant for purposes of article 79. See Landgericht Ellwangen, Germany, 21 August 1995, Unilex.

[58]CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999] (see full text of the decision).

[59]The lower court opinion is CLOUT case No. 272 [Oberlandesgericht Zweibrücken, Germany, 31 March 1998]. Another case also suggested that a seller's opportunity to discover a lack of conformity by pre-delivery inspection was relevant in determining the seller's entitlement to exemption under article 79. See Landgericht Ellwangen, Germany, 21 August 1995, Unilex.

[60]Tribunal de Commerce de Besançon, France, 19 January 1998, Unilex. For discussion of the requirement that an impediment be beyond a party's control as applied to situations in which a seller's failure of performance is due to a default by its supplier, see para. 16 *infra*.

[61]Oberlandesgericht Hamburg, Germany, 4 July 1997, Unilex; CLOUT case No. 102 [Arbitration—International Chamber of Commerce No. 6281 1989]; CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997]; CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996]. See also CLOUT case No. 54 [Tribunale Civile di Monza, Italy, 14 January 1993] (seller argued that article 79 exempted it from liability for non-delivery where the market price of the goods rose "remarkably and unforeseeably" after the contract was concluded).

[62]Rechtbank van Koophandel, Hasselt, Belgium, 2 May 1995, Unilex; Arbitration before the Bulgarian Chamber of Commerce and Industry, Bulgaria, 12 February 1998, Unilex.

[63]See Arbitration before the Bulgarian Chamber of Commerce and Industry, Bulgaria, 12 February 1998, Unilex; CLOUT case No. 102 [Arbitration—International Chamber of Commerce No. 6281 1989]; CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997]; CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996].

[64]Rechtbank van Koophandel, Hasselt, Belgium, 2 May 1995.

[65]CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997].

[66]CLOUT case No. 54 [Tribunale Civile di Monza, Italy, 14 January 1993] (see full text of the decision).

[67]Oberlandesgericht Hamburg, Germany, 4 July 1997, Unilex.

[68]Arbitration before the Bulgarian Chamber of Commerce and Industry, Bulgaria, 12 February 1998, Unilex; CLOUT case No. 102 [Arbitration—International Chamber of Commerce No. 6281 1989]. See also CLOUT case No. 480 [Cour d'appel Colmar, France,

12 June 2001] (denying buyer an exemption when buyer's customer significantly reduced the price it would pay for products that incorporated the goods in question as a component; the court noted that in a long term contract like the one between the buyer and the seller such a development was foreseeable, and it concluded that it was thus "up to the [buyer], a professional experienced in international market practice, to lay down guarantees of performance of obligations to the [seller] or to stipulate arrangements for revising those obligations. As it failed to do so, it has to bear the risk associated with non-compliance.").

[69]Information Letter No. 29 of the High Arbitration Court of the Russian Federation, Russia, 16 February 1998, Unilex (abstract).

[70]Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, award No. 155/1996, 22 January 1997, Unilex.

[71]Arbitration Case 56/1995 of the Bulgarian Chamber of Commerce and Industry, 24 April 1996, Unilex (denying an exemption because the impediment was foreseeable at the time of the conclusion of the contract).

[72]For further discussion of the application of article 79 to situations in which the seller's failure of performance was caused by a supplier's default, see *supra* para. 14*,* and *infra* paras. 17, 18 and 21.

[73]Tribunal de Commerce de Besançon, France, 19 January 1998, Unilex.

[74]CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996].

[75]CLOUT case No. 272 [Oberlandesgericht Zweibrücken, Germany, 31 March 1998].

[76]CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999]. A tribunal that finds a party exempt under article 79 presumably is satisfied that there was an impediment beyond the control of the party, even if the tribunal does not expressly discuss this requirement. The following decisions fall into this category: CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999] (seller found exempt from damages for late delivery of goods); Amtsgericht Charlottenburg, Germany, 4 May 1994, Unilex (buyer granted exemption from liability for interest and damages due to late payment).

[77]CLOUT case No. 140 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, award in case No. 155/1994 of 16 March 1995]. For further discussion of the application of article 79 to situations in which the seller's failure of performance was caused by a supplier's default, see *supra* paras. 14 and 16, and *infra* paras. 18 and 21.

[78]Arrondissementsrechtsbank 's-Hertogenbosch, the Netherlands, 2 October 1998, Unilex.

[79]Arbitration Case 56/1995 of the Bulgarian Chamber of Commerce and Industry, 24 April 1996, Unilex.

[80]CLOUT case No. 104 [Arbitration—International Chamber of Commerce No. 7197 1993] (see full text of the decision).

[81]Rechtbank van Koophandel, Hasselt, Belgium, 2 May 1995, Unilex (a significant drop in the world market price of frozen raspberries was "foreseeable in international trade" and the resulting losses were "included in the normal risk of commercial activities"; thus buyer's claim of exemption was denied); Arbitration before the Bulgarian Chamber of Commerce and Industry, Bulgaria, 12 February 1998, Unilex (negative developments in the market for the goods "were to be considered part of the buyer's commercial risk" and "were to be reasonably expected by the buyer upon conclusion of the contract"); CLOUT case No. 102 [Arbitration—International Chamber of Commerce No. 6281 1989] (when the contract was concluded a 13.16 per cent rise in steel prices in approximately three months was predictable because market prices were known to fluctuate and had begun to rise at the time the contract was formed; although decided on the basis of domestic law, the court indicated that the seller would also have been denied an exemption under article 79) (see full text of the decision); CLOUT case No. 480 [Cour d'appel Colmar, France, 12 June 2001] (denying buyer an exemption when buyer's customer significantly reduced the price it would pay for products that incorporated the goods in question as a component; the court noted that in a long term contract like the one between the buyer and the seller such a development was foreseeable, and it concluded that it was thus "up to the [buyer], a professional experienced in international market practice, to lay down guarantees of performance of obligations to the [seller] or to stipulate arrangements for revising those obligations. As it failed to do so, it has to bear the risk associated with non-compliance.").

A tribunal that finds a party is exempt under article 79 presumably believes that the party could not reasonably have taken the impediment at issue into account when entering into the contract, whether or not the tribunal expressly discusses that requirement. The following decisions fall into this category: CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999] (seller found exempt from liability for damages for late delivery of goods); Amtsgericht Charlottenburg, Germany, 4 May 1994, Unilex (buyer granted exemption from liability for interest and damages due to late payment); Tribunal de Commerce de Besançon, France, 19 January 1998, Unilex (seller granted exemption from liability for damages for delivery of non-conforming goods, although the court ordered the seller to give the buyer a partial refund); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, award in case No. 155/1996 of 22 January 1997, Unilex (abstract) (buyer that had paid price for goods granted exemption from liability for damages caused by its failure to take delivery).

[82]CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999], *affirming* (on somewhat different reasoning) CLOUT case No. 272 [Oberlandesgericht Zweibrücken, Germany, 31 March 1998]. In CLOUT case No. 271, the court generalized that a supplier's breach is normally something that, for purposes of article 79, the seller must avoid or overcome.

[83]CLOUT case No. 140 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, award in case No. 155/1994 of 16 March 1995].

[84]For further discussion of the application of article 79 to situations in which the seller's failure of performance was caused by a supplier's default, see *supra* paras. 14, 16 and 17, and *infra* para. 21.

[85]Oberlandesgericht Hamburg, Germany, 4 July 1997, Unilex. A tribunal that finds a party exempt under article 79 presumably believes that the party could not reasonably be expected to have avoided an impediment or to have overcome it or its consequences, whether or not the tribunal expressly discusses these requirements. The following decisions fall into this category: CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999] (seller found exempt from liability for damages for late delivery of goods); Amtsgericht Charlottenburg, Germany, 4 May 1994, Unilex (buyer granted exemption from liability for interest and damages due to late payment); Tribunal de Commerce de Besançon, France, 19 January 1998, Unilex (seller granted exemption from liability for damages for delivery of non-conforming goods, although the court ordered the seller to give the buyer a partial refund); Tribunal of

International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russian Federation, award in case No. 155/1996 of 22 January 1997, Unilex (buyer that had paid price for goods granted exemption from liability for damages caused by its failure to take delivery).

[86]CLOUT case No. 596 [Oberlandesgericht Zweibrücken, Germany, 2 February 2004] (see full text of the decision).

[87]CLOUT case No. 104 [Arbitration—International Chamber of Commerce No. 7197 1993] (see full text of the decision). See also Arbitration Case 56/1995 before the Bulgarian Chamber of Commerce and Industry, 24 April 1996, Unilex (seller's argument that a miners' strike should exempt it from liability for damages for failure to deliver coal rejected because at the time of the strike seller was already in default).

[88]CLOUT case No. 272 [Oberlandesgericht Zweibrücken, Germany, 31 March 1998].

[89]CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999].

[90]CLOUT case No. 596 [Oberlandesgericht Zweibrücken, Germany, 2 February 2004] (see full text of the decision).

[91]CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000]; Bundesgerichtshof, Germany, 9 January 2002, Unilex. The latter case, however, distinguishes the question of the effect on the burden of proof of an extra-judicial admission of liability, viewing this matter as beyond the scope of the Convention and subject to the forum's procedural law.

[92]CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000]; Bundesgerichtshof, Germany, 9 January 2002, Unilex; CLOUT case No. 380 [Tribunale di Pavia, Italy, 29 December 1999] (see full text of the decision).

[93]CLOUT case No. 140 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, award in case No. 155/1994 of 16 March 1995] (denying the seller's claim to exemption because seller was unable to prove the required facts); CLOUT case No. 104 [Arbitration—International Chamber of Commerce No. 7197 1993] (denying the buyer's exemption claim because buyer did not prove that its failure to perform was caused by the impediment); CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996] (employing language suggesting that the seller, who claimed exemption, had to submit facts to substantiate the claim).

[94]The application of the requirements of article 79 (1) to situations in which a seller claims exemption because its supplier defaulted on its own obligations to the seller is discussed *supra* paras. 14, 16, 17 and 18.

[95]CLOUT case No. 272 [Oberlandesgericht Zweibrücken, Germany, 31 March 1998].

[96]CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999].

[97]CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996] (see full text of the decision).

[98]ICC Court of Arbitration, award No. 8128, 1995, Unilex.

[99]CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999].

[100]CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999] (see full text of the decision); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russian Federation, award in case No. 155/1996 of 22 January 1997, Unilex.

[101]Amtsgericht Charlottenburg, Germany, 4 May 1994, Unilex.

[102]Tribunal de Commerce de Besançon, France, 19 January 1998, Unilex.

[103]CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997].

[104]CLOUT case No. 142 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, award in case No. 123/1992 of 17 October 1995]; Information Letter No. 29 of the High Arbitration Court of the Russian Federation, Russia, 16 February 1998, Unilex (abstract).

Article 80

A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission.

INTRODUCTION

1. Article 80 strips a party of its right to rely on the other side's failure to perform to the extent that the second party's failure was caused by an "act or omission" of the first party. Thus article 80 may relieve a party of at least some of the legal consequences of a failure to perform. The broad equitable rule of article 80 that a party cannot claim legal redress for the other party's breach to the extent its own actions caused the breach has been cited as evidence that principles of good faith apply under the CISG.[1]

PURPOSES FOR WHICH ARTICLE 80 HAS BEEN APPLIED

2. Article 80 has frequently been used as a tool for sorting out the parties' rights when both sides have allegedly failed to perform their obligations. Several decisions have involved attempts by the seller to cure non-conforming goods. In one such case, the seller had not fulfilled a promise to cure a delivery of non-conforming goods, and the buyer had set-off the costs of remedying the defects from the price. The seller argued that article 80 should block the buyer's right to claim (and then set off) damages for the non-conformity because the buyer's own failure to ship the goods back to the seller prevented the seller from curing. The court rejected this argument, however, ruling that the failure to cure was attributable to the carrier designated to return the goods to the seller, and that the seller was responsible for the carrier's performance.[2] In another case, however, a seller successfully argued that the buyer had forfeited its rights to a remedy for a lack of conformity because it had unjustifiably rejected the seller's offer of cure.[3] Another decision involving a seller's agreement to take back and cure delivered goods illustrates the use of article 80 to determine the effect of a buyer's non-payment of debts that arose from other dealings with the seller. The buyer returned machinery to the seller, who promised to adjust the equipment and ship it back to the buyer in a short time. Thereafter, however, the seller refused to return the goods to the buyer until the buyer paid some other debts that the buyer owed. The trial court held that article 80 prevented the buyer from claiming damages for the late re-delivery because the buyer's own action of failing to pay the past debts caused the seller to withhold the goods. An appeals court reversed, holding that the seller had no right to insist on payment of the other debts before returning the goods as no such condition had been included in the re-delivery agreement.[4] Similarly, a court rejected a seller's article 80 defence that the buyer's failure to pay prior debts disabled the seller from financially supporting a troubled supplier, leading to the seller's inability to deliver the goods: the court found that an agreement under which the buyer prepaid for the delivery in question meant that the seller had assumed all risks relating to the supply of the goods.[5]

3. In a significant number of decisions article 80 has been applied to deny a remedy to a party whose own breach caused the other side to refuse to perform.[6] For example, a seller involved in a long term contract to supply aluminium ore announced that it would make no future deliveries. The seller's defence in the resulting lawsuit was that, after it announced it was stopping future deliveries, the buyer withheld payment for deliveries that had already been made. An arbitral panel rejected seller's defence on the basis of article 80, holding that the buyer's non-payment was caused by the seller's repudiation of its future delivery obligations.[7] Decisions applying article 80 to determine which party should be deemed in breach of contract can involve unusual or complex facts. In one such case, a seller contracted to sell a machine produced by a manufacturer with whom the seller had a distribution agreement, with title to the goods to be transferred to the buyer after payment of the final instalment of the purchase price (which was due upon buyer's acceptance of the machine). Before the machine was delivered, however, the manufacturer terminated its distribution agreement with the seller and refused to ship the seller any more machines. Instead, the manufacturer shipped the goods directly to the buyer, who made no further payments to the seller (paying the manufacturer instead) and who tried to avoid the contract with the seller on the grounds that the seller could not fulfil its obligation to convey title to the machine. The trial court denied the buyer's right to avoid on the basis of article 80, ruling that the buyer's action of accepting the goods while it was still bound to a contract with the seller led the seller to believe that it had fulfilled its obligations; thus, the trial court reasoned, any subsequent non-performance by the seller was caused by the buyer's actions.[8] An intermediate appeals court affirmed this part of the decision, holding that the seller was not obliged to transfer title until the buyer had paid the price; thus article 80 prevented the buyer from avoiding because the seller's non-performance was caused by the buyer's own actions of withholding payment and failing to set an additional period of time under article 47 (1) for the seller to transfer title after the price had been paid.[9] A higher appeals court affirmed the denial of the buyer's right to avoid on grounds that did not involve article 80.[10]

REQUIREMENT THAT THE OTHER PARTY'S FAILURE TO PERFORM BE DUE TO AN "ACT OR OMISSION" OF THE FIRST PARTY

4. Article 80 requires that a party's "act or omission" cause the other side's failure to perform. In cases involving the following acts or omissions, tribunals have found that the requirements of article 80 were satisfied: a buyer's breach of its obligation to pay the price and its failure to set a deadline for seller to perform under article 47 (1);[11] a buyer's failure to pay the price for delivered goods;[12] a buyer's failure to take delivery;[13] a seller's failure to perform its obligation to designate the port from which the goods would be shipped;[14] a seller's repudiation of future delivery obligations;[15] a buyer's unjustified refusal to accept the seller's offer to cure a lack of conformity in the goods.[16] In cases involving the following acts or omissions, tribunals have refused to apply article 80, although not necessarily because the act or omission requirement was not satisfied: a buyer's failure to ship goods back to the seller to permit cure (where the failure to ship was attributable to the carrier);[17] a buyer's failure to pay debts arising from other dealings with the seller (where such payment had not been made a condition to the seller's duty to redeliver the goods to the buyer);[18] a buyer's failure to pay for prior deliveries of goods (where the buyer had prepaid for the delivery in question and the seller bore all risks relating to the supply of the goods).[19]

REQUIREMENT THAT THE OTHER PARTY'S FAILURE TO PERFORM BE "CAUSED BY" THE FIRST PARTY

5. Article 80 requires that a party's failure to perform be "caused by" the other side's act or omission. In one case, application of article 80 focused on whether it was the actions of the buyer or a third party that caused the seller not to fulfil its obligations. The seller had agreed to take back non-conforming chemicals and reprocess them in order to remedy their defects, and it told the buyer which carrier should be used to return the goods. When the buyer discovered that the carrier had delayed forwarding the goods to the seller, the buyer arranged for the chemicals to be reprocessed in its own country in order to meet the time demands of its customers. The buyer set-off the costs of the reprocessing against the purchase price. The seller complained that it could have performed the remedial work much more cheaply itself, and that article 80 should prevent the buyer from recovering its higher reprocessing expenses because the buyer's own failure to ship the goods back to the seller prevented the seller from curing the defects. The court disagreed, holding that the delay of the carrier ultimately caused the buyer's higher reprocessing costs, and that on these facts the carrier's performance was the seller's responsibility.[20] In other decisions involving allegations of the following causal sequences, tribunals have refused to apply article 80, although this result was not necessarily due to failure to satisfy the causation requirement: a buyer's failure to pay debts arising from other dealings with the seller, causing the seller to refuse to redeliver the goods to the buyer;[21] a buyer's failure to pay for prior deliveries of goods, causing the seller to be unable to deliver because it could not financially support a distressed supplier.[22]

6. In cases involving allegations of the following causal sequences, tribunals have found that the requirements of article 80 were satisfied: a buyer's breach of its obligation to pay the price and its failure to set a deadline for seller to perform under article 47 (1), causing the seller to be unable to arrange for the buyer to receive title to the goods;[23] a buyer's failure to pay the price for delivered goods, causing the seller to fail to deliver other goods;[24] a buyer's failure to take delivery of the goods, causing the seller's failure to make delivery;[25] a seller's failure to perform its obligation to designate the port from which the goods would be shipped, causing the buyer's failure to open a letter of credit;[26] a seller's repudiation of future delivery obligations, causing the buyer's failure to pay for some prior deliveries;[27] a buyer's unjustified refusal to accept the seller's offer to cure a non-conformity, causing the seller's failure to cure.[28]

CONSEQUENCES IF ARTICLE 80 APPLIES

7. Unlike article 79, which only prevents an aggrieved party from claiming damages for a failure to perform, article 80 by its terms strips an aggrieved party of its right to "rely" on the other party's non-performance. Thus article 80 has been invoked not only to prevent a party from recovering damages,[29] but also to block a party from avoiding the contract[30] and from using the other side's non-performance as a defence.[31]

DECISIONS THAT APPEAR TO APPLY THE PRINCIPLE UNDERLYING ARTICLE 80

8. Some decisions appear to apply the principle of article 80, although it is not clear if the tribunal actually invoked the provision. For example, where a buyer supplied the design for boots that the seller manufactured for the buyer, and after delivery it was determined that a symbol on the boot violated another company's trademark, the buyer was barred from recovering damages from the seller: as an alternative rationale for this holding, the court found that the buyer itself had caused the infringement by specifying a design that included the offending symbol.[32] This fact, it would appear, should have prevented the buyer from relying on the infringement under article 80, although the court apparently did not cite the provision. In another decision, the parties' agreement included a clause allowing the seller to terminate the contract if there was a substantial change in the management of the buyer. The buyer dismissed its general manager, and the seller invoked this as grounds for terminating the contract. The arbitral tribunal held that seller did not have the right to terminate because it had been involved in the activities that led to the general manager's dismissal, and in fact had become an "accomplice" of the general manager.[33] The tribunal appears to have invoked the principle of article 80 when, in support of its holding that the seller did not have the right to exercise the termination clause, it asserted that "[a]s is the case with all sanctions, its application may not be requested by those who are even partially responsible for the modification on which they rely in order to terminate the contract".

Notes

[1]CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997] (see full text of the decision). This decision was reversed on other grounds in CLOUT case No. 270 [Bundesgerichtshof, Germany, 25 November 1998].

[2]Amtsgericht München, Germany, 23 June 1995, Unilex.

[3]CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997].

[4]CLOUT case No. 311 [Oberlandesgericht Köln, Germany, 8 January 1997] (see full text of the decision).

[5]CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996].

[6]See, in addition to the decisions discussed in the text, CLOUT case No. 273 [Oberlandesgericht München, Germany, 9 July 1997] (buyer who had unjustifiably withheld payments for certain prior deliveries was denied damages, pursuant to article 80, for seller's refusal to make further deliveries: the court held that the buyer's own failure to pay caused the seller to withhold delivery); CLOUT case No. 133 [Oberlandesgericht München, Germany, 8 February 1995] (buyer denied damages under article 80 because seller's non-delivery was caused by buyer's failure to take delivery) (see full text of the decision); CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (buyer's failure to open a letter of credit, which would normally be a breach precluding it from recovering for seller's failure to deliver, was caused in this case by seller's failure to fulfil its obligation to designate a port for shipping the goods; therefore article 80 precluded the seller from invoking buyer's failure as a defence in buyer's suit for damages) (see full text of the decision).

[7]Arbitral Panel of the Zurich Chamber of Commerce, award No. ZHK 273/95, 31 May 1996, Unilex.

[8]Landgericht Düsseldorf, Germany, 9 July 1992, Unilex.

[9]Oberlandgericht Düsseldorf, Germany, 18 November 1993, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/92.htm.

[10]CLOUT case No. 124 [Bundesgerichtshof, Germany, 15 February 1995].

[11]Oberlandesgericht Düsseldorf, Germany, 18 November 1993, available on the Internet at http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/92.htm. A lower court decision in this case had found that the buyer's act of accepting delivery of the goods from the manufacturer while still under contract with the seller (thus misleading the seller into thinking that its obligations had been fulfilled) constituted an "act or omission" that met the requirements of article 80. See Landgericht Düsseldorf, Germany, 9 July 1992, Unilex. On appeal of the intermediate appellate court decision that is described in the text accompanying this note, the Supreme Court affirmed without invoking article 80. CLOUT case No. 124 [Bundesgerichtshof, Germany, 15 February 1995].

[12]CLOUT case No. 273 [Oberlandesgericht München, Germany, 9 July 1997].

[13]CLOUT case No. 133 [Oberlandesgericht München, Germany, 8 February 1995] (see full text of the decision).

[14]CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (see full text of the decision).

[15]Arbitral Panel of the Zurich Chamber of Commerce, award No. ZHK 273/95, 31 May 1996, Unilex.

[16]CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997].

[17]Amtsgericht München, Germany, 23 June 1995, Unilex.

[18]CLOUT case No. 311 [Oberlandesgericht Köln, Germany, 8 January 1997] (see full text of the decision).

[19]CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996].

[20]Amtsgericht München, Germany, 23 June 1995, Unilex.

[21]CLOUT case No. 311 [Oberlandesgericht Köln, Germany, 8 January 1997] (see full text of the decision).

[22]CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996].

[23]Oberlandgericht Düsseldorf, Germany, 18 November 1993, Unilex. A lower court decision in this case had found that the buyer's act of accepting delivery of the goods from the manufacturer while still under contract with the seller (thus misleading the seller into thinking that its obligations had been fulfilled) had caused the seller's non-performance. Landgericht Düsseldorf, Germany, 9 July 1992, Unilex. On appeal of the intermediate appellate court decision described in the text accompanying this note, the Supreme Court affirmed without invoking article 80. CLOUT case No. 124 [Bundesgerichtshof, Germany, 15 February 1995].

[24]CLOUT case No. 273 [Oberlandesgericht München, Germany, 9 July 1997].

[25]CLOUT case No. 133 [Oberlandesgericht München, Germany, 8 February 1995].

[26]CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (see full text of the decision).

[27]Arbitral Panel of the Zurich Chamber of Commerce, award No. ZHK 273/95, 31 May 1996, Unilex.

[28]CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997].

[29]CLOUT case No. 273 [Oberlandesgericht München, Germany, 9 July 1997]; CLOUT case No. 133 [Oberlandesgericht München, Germany, 8 February 1995] (see full text of the decision); CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997].

[30]Landgericht Düsseldorf, Germany, 9 July 1992, Unilex, affirmed in relevant part by the Oberlandgericht Düsseldorf, Germany, 18 November 1993, Unilex, affirmed in relevant part without invoking article 80 in CLOUT case No. 124 [Bundesgerichtshof, Germany, 15 February 1995].

[31]CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (see full text of the decision); Arbitral Panel of the Zurich Chamber of Commerce, award No. ZHK 273/95, 31 May 1996, Unilex.

[32]Supreme Court of Israel, 22 August 1993, Unilex. In denying the buyer damages the court relied primarily on the fact that the buyer could not have been unaware of the infringement when the contract was concluded, which under article 42 (2) *(a)* barred the buyer's claim. The transaction in this decision was actually governed by the Hague Sales Convention (ULIS), but the court referred to the CISG by analogy.

[33]ICC Court of Arbitration, award No. 8817, December 1997, Unilex.

Section V of Part III, Chapter V

Effects of avoidance (articles 81-84)

OVERVIEW

1. Although Section V of Part III, Chapter V is entitled "Effects of avoidance", only the first of its provisions, article 81, is devoted exclusively to this topic. Another provision of the section, article 84, also provides for certain consequences of avoidance of contract (specifically, a seller's liability for interest on payments that it received, and a buyer's liability for benefits derived from goods), but at least some of those consequences also apply when the contract is not avoided and the buyer demands delivery of substitute goods under article 46 (2). The other two provisions of the section, article 82 and 83, are a matched pair that do not at all address the effects of avoidance: article 82 imposes a limit on an aggrieved buyer's right to avoid (buyer loses the right to avoid the contract, or to demand substitute goods, unless it either can return delivered goods substantially in the condition in which they were received, or can invoke an exception from this requirement in article 82 (2)); article 83 preserves other remedies for an aggrieved buyer that has, under article 82, lost the right to avoid or demand substitute goods. Section V has been cited in support of the proposition that avoidance of contract is "a constitutive right of the buyer, which changes the contractual relationship into a restitutional relationship."[1]

RELATION TO OTHER PARTS OF THE CONVENTION

2. The provisions of Section V, which all address some aspect of avoidance of contract, work in tandem with other Convention provisions on avoidance, including those governing an aggrieved party's right to avoid (articles 49 and 64). When a contract has been avoided, the rules of Section V have also been found to address risk of loss issues that otherwise are governed by Chapter IV of Part III ("Passing of risk"—articles 66-70): in a decision holding that a buyer was not responsible for damage to goods that occurred while they were being transported by carrier back to the seller following the buyer's avoidance of the contract, the court asserted that "Articles 81-84 CISG contain at their core a risk distribution mechanism, which within the framework of the reversal of the contract (restitution), overrides the general provisions on the bearing of risk contained in Art. 66 et. seq. CISG".[2] Some provisions in Section V—specifically, article 82, 83 and 84(2)—address matters related to an aggrieved buyer's right under article 46 (2) to demand goods in substitution for non-conforming goods delivered by the seller.

Notes

[1]Landgericht Düsseldorf, Germany, 11 October 1995, Unilex.

[2]CLOUT case No. 422 [Oberster Gerichtshof, Austria, 29 June 1999], Unilex.

Article 81

1. Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due. Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract.

2. A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently.

INTRODUCTION

1. Article 81 governs the general consequences that follow if one of the parties avoids the contract or some part thereof.

2. Article 81 and the other provisions in Chapter V, Section V, dealing with the "Effects of avoidance" have been described as creating a "framework for reversal of the contract" that, at its core, contains a "risk distribution mechanism" overriding other risk allocation provisions of the CISG when the contract is avoided.[1] It has also been stated that, under article 81, an avoided contract "is not entirely annulled by the avoidance, but rather it is 'changed' into a winding-up relationship."[2] Several decisions have held that article 81 does not apply to "consensual avoidance"—i.e. termination of the contract that occurs where the parties have, by mutual consent, agreed to cancel the contract and to release each other from contractual obligations—but rather is properly limited to cases where one party "unilaterally" avoids the contract because of a breach by the other party.[3] In such cases of "consensual avoidance", it has been asserted, the rights and obligations of the parties are governed by the parties' termination agreement.[4] Thus, where the parties agreed to cancel their contract and permit the seller to deduct its out-of-pocket expenses before refunding the buyer's advance payment, the seller was allowed to make such deductions but was denied a deduction for its lost profit because that was not part of the parties' agreement.[lm] Where an issue arises that is not expressly addressed in the parties' termination agreement, however, a court has asserted that, pursuant to article 7 (2), the gap should be filled not by recourse to national law but by reference to the principles of article 81 and related provisions of the CISG.[6]

CONSEQUENCES OF AVOIDANCE UNDER ARTICLE 81 (1): RELEASE FROM OBLIGATIONS; INEFFECTIVE AVOIDANCE

3. Several decisions have recognized that valid avoidance of the contract releases the parties from their executory obligations under the contract.[7] Thus it has been held that buyers who avoid the contract are released from their obligation to pay the price for the goods.[8] It has also been held that avoidance by the seller releases the buyer from its obligation to pay[9] and releases the seller from its obligation to deliver the goods.[10] On the other hand, failure to effectively avoid the contract means that the parties remain bound to perform their contractual obligations.[11] Courts have found a failure of effective avoidance where a party failed to follow proper procedures for avoidance (i.e., lack of proper notice)[12] and where a party lacked substantive grounds for avoiding (e.g., lack of fundamental breach).[13]

PRESERVATION OF RIGHT TO DAMAGES AND OF PROVISIONS GOVERNING THE SETTLEMENT OF DISPUTES AND THE CONSEQUENCES OF AVOIDANCE

4. As one decision has noted, under article 81 an avoided contract "is not entirely annulled by the avoidance,"[14] and certain contractual obligations remain viable even after avoidance. Thus, the first sentence of article 81 (1) states that avoidance releases the parties from their contractual obligations "subject to any damages which may be due". Many decisions have recognized that liability for damages for breach survives avoidance, and have awarded damages to the avoiding party against the party whose breach triggered the avoidance.[15] One court commented, "[w]here ... the contract is terminated and damages for failure to perform are claimed under Art. 74 CISG et seq., one uniform right to damages comes into existence ... and prevails over the consequences of the termination of a contract provided for in Arts. 81-84 CISG".[16] The second sentence of article 81 (1) provides that "[a]voidance does not affect any provision of the contract for the settlement of disputes". This has been applied to an arbitration clause contained in a written contract, and the result has been described as making the arbitration clause "severable" from the rest of the contract.[17] The same sentence of article 81 (2) also provides that avoidance does not affect "any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract". This has been applied to preserve, despite avoidance of the contract, the legal efficacy of a "penalty" clause requiring

payments from a seller who failed to deliver.[18] It has also been asserted that article 81 (1) preserves other contractual provisions connected with the undoing of the contract, such as clauses requiring the return of delivered goods or other items received under the contract.[19]

RESTITUTION UNDER ARTICLE 81 (2)

5. For parties that have wholly or partially performed their contractual obligations, the first sentence of article 81 (2) creates a right to claim restitution from the other side of whatever the party has "supplied or paid under the contract". It has been suggested that the restitutionary obligation imposed on a buyer by article 81 is not intended to put the seller into the position he would have been in had the contract been fully performed or had not been concluded, but instead requires the restitution of the actual goods delivered, even if those goods are damaged during that return.[20] Other provisions of the Convention elaborate on the obligation to give restitution following avoidance of the contract. Under article 82 of the Convention, a buyer's inability to make restitution of delivered goods "substantially in the condition in which he received them" will, subject to important exceptions, block the buyer's right to avoid the contract (or to require the seller to deliver substitute goods).[21] Under article 84 (2), a buyer who must make restitution of goods to a seller must also "account to the seller" for all benefits it derived from the goods before making such restitution.[22] Similarly, a seller who must refund the price to the buyer must, under article 84 (1), pay interest on the funds until they are restored,[23] although it has been held that a seller was not liable in damages for losses caused when it refused to give restitution of the price to the buyer.[24] It has been almost universally recognized that avoidance of the contract is a precondition for claiming restitution under article 81 (2).[25] One decision stated that a seller is obligated to repay the purchase price under article 81 (2) CISG only after an avoidance of the sales contract by the buyer, and that avoidance is thus a constitutive right of the buyer which changes the contractual relationship into a restitutionary relationship.[26]

6. In many cases where the buyer has properly avoided the contract, tribunals have awarded the aggrieved buyer restitution of the price (or part thereof) that it had paid to the seller.[27] A breaching seller is entitled to the restitution of the goods it delivered to a buyer who thereafter avoided the contract,[28] and it has been held that an avoiding buyer has a right, under article 81 (2), to force the seller to take back goods it delivered.[29] A seller who properly avoided the contract has also been awarded restitution of the goods it delivered,[30] and it has been recognized that breaching buyers are entitled to restitution of the portion of the price actually paid if the seller subsequently avoids.[31] It has been held, however, that not all restitution claims arising out of a terminated sales contract are governed by the CISG. In one decision[32] the parties had mutually agreed to cancel their contract and the seller had given the buyer a refund for a payment check that was later dishonoured. When the seller sued to recover the refund, the court found that the seller's claim was not governed by article 81 (2) because that provision deals only with what a party has "supplied or paid under the contract", whereas the seller was seeking reimbursement for an excess refund made after the contract was cancelled. Instead, the court held, the seller's claim was based on unjust enrichment principles and was governed by applicable national law.

PLACE OF RESTITUTION; JURISDICTION OVER ACTIONS FOR RESTITUTION; RISK OF LOSS FOR GOODS BEING RETURNED; CURRENCY FOR RESTITUTION OF PAYMENTS

7. Several decisions address the problem of where the obligation to make restitution under article 81 (2) should be performed. This question has arisen either as a direct issue, or as a subsidiary matter related to a court's jurisdiction or to the question of who bears risk of loss for goods that are in the process of being returned by the buyer. Thus, in determining whether an avoiding buyer offered the breaching seller restitution of delivered goods at the proper location, a court has held that the issue of the place for restitution is not expressly settled in the CISG, nor can the CISG provision dealing with the place for seller's delivery (article 31) be applied by analogy, so that the matter must be resolved by reference to national law—specifically (in this case), the law governing the enforcement of a judgement ordering such restitution.[33] Employing somewhat similar reasoning for purposes of determining its jurisdiction under article 5 (1) of the 1968 Brussels Convention on Jurisdiction, a court has held that the CISG does not expressly settle where a seller must make restitution of the price under article 81 (2), that the CISG provision governing the place for buyer's payment of the price (article 57 (1)) did not contain a general principle of the Convention that can be used to resolve the issue, and thus that the matter must be referred to applicable national law.[34] In contrast to the reasoning of the foregoing decisions, which led to the application of national law to the issue of the place for restitution, another decision asserted that jurisdiction under article 5 (1) of the Brussels Convention over a buyer's claim for restitution of the price should be determined by reference to the place of the delivery obligation under article 31 of the CISG.[35] Another court has found that the CISG does not expressly deal with the question of where, for purposes of determining who bore risk of loss, an avoiding buyer makes restitution of goods that are returned via third party carrier, but it resolved the issue by reference to the CISG itself without recourse to national law: it filled the "gap" pursuant to article 7 (2) by identifying a general principle that the place for performing restitutionary obligations should mirror the place for performing the primary contractual obligations; it found that buyer made its delivery (and thus risk of loss transferred to the seller) when it handed the goods over to the carrier for return shipment, because under the contract risk had passed to buyer in the original delivery when the manufacturer handed the goods over to the carrier.[36] The court also found this result consistent with the principles of article 82, which creates very broad exceptions to an avoiding buyer's obligation to return goods in their original condition and thereby suggests that the seller generally bears the risk that the condition of the goods will deteriorate. Finally, it has been concluded that an avoiding buyer's refund of the price was due in the same currency in which the price had been duly paid, and at the exchange rate specified in the contract for payment of the price to the seller.[37]

REQUIREMENT THAT MUTUAL RESTITUTION BE CONCURRENT

8. The second sentence of article 81 (2) specifies that, where both parties are required under the first sentence of the provision to make restitution (i.e. where both parties have "supplied or paid" something under an avoided contract), then mutual restitution is to be made "concurrently". An arbitration panel has ordered an avoiding buyer and the breaching seller to make simultaneous restitution of the goods and the price.[38] Consistently with the principle of mutual restitution, a court has ruled that a breaching seller was not in default of its obligation to give the avoiding buyer restitution of the price until the buyer actually offered to return the goods that seller had delivered, and it ordered the parties to make concurrent restitution.[39] Another decision stated that an avoiding seller need not make restitution of the buyer's payments until delivered goods were returned.[40]

INTERACTION BETWEEN RIGHT TO RESTITUTION UNDER ARTICLE 81 (2) AND RIGHTS UNDER NATIONAL LAW

9. An avoiding seller's right to restitution of delivered goods under article 81 (2) can come into conflict with the rights of third parties (e.g. the buyer's other creditors) in the goods. Such conflicts are particularly acute where the buyer has become insolvent, so that recovery of the goods themselves is more attractive than a monetary remedy (such as a right to collect the price or damages) against the buyer. Several decisions have dealt with this conflict. In one, a court found that an avoiding seller's restitutionary rights under article 81(2) were trumped by the rights of one of the buyer's creditors that had obtained and perfected, under national law, a security interest in the delivered goods: the court ruled that the question of who had priority rights in the goods as between the seller and the third party creditor was, under CISG article 4, beyond the scope of the Convention and was governed instead by applicable national law, under which the third party creditor prevailed.[41] This was the result even though the sales contract included a clause reserving title to the goods in the seller until the buyer had completed payment (which buyer had not done): the court ruled that the effect of that clause with respect to a non-party to the sales contract was also governed by national law rather than the CISG, and under the applicable law the third party's claim to the goods had priority over seller's. Another court, in contrast, found that an avoiding seller could recover goods from a buyer that had gone through insolvency proceedings after the goods were delivered.[42] In this case, however, the seller had a retention of title clause that was valid under applicable national law and that had survived the buyer's now-completed insolvency proceedings, and there apparently was no third party with a claim to the goods that was superior to the seller's under national law. Thus the two cases described in this discussion do not appear to be inconsistent. Indeed, the later case cited the earlier case in support of its analysis.

Notes

[1]CLOUT case No. 422 [Oberster Gerichtshof, Austria, 29 June 1999], Unilex.

[2]Id.; see also Landgericht Düsseldorf, Germany, 11 October 1995, Unilex (stating that avoidance "changes the contractual relationship into a restitutional relationship [winding up]").

[3]Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russia, award in case No. 82/1996 of 3 March 1997, Unilex; Oberster Gerichtshof, Austria, 29 June 1999, Unilex. Compare CLOUT case No. 288 [Oberlandesgericht München, Germany, 28 January 1998] (where seller "refunded" buyer the purchase price of goods even though buyer's check for payment of the price had been dishonoured, seller's claim for restitution of the refund was not governed by article 81 (1) because article 81 (1) is limited to restitution of what is supplied or paid under the contract; seller's "refund" had not been made under the contract); but see CLOUT case No. 136 [Oberlandesgericht Celle, Germany, 24 May 1995], where the tribunal appears to apply article 81 (2) even though the parties terminated the contract by mutual consent. See also the discussion of the application of article 81 to fill gaps in the parties' termination agreement in CLOUT case No. 422 [Oberster Gerichtshof, Austria, 29 June 1999], Unilex.

[4]Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russia, award in case No. 82/1996 of 3 March 1997, Unilex; CLOUT case No. 422 [Oberster Gerichtshof, Austria, 29 June 1999], Unilex.

[5]Tribunal of International Commercial Arbitration at the Federation Chamber of Commerce and Industry, case No. 82/1996, Russia, 3 March 1997, Unilex.

[6]CLOUT case No. 422 [Oberster Gerichtshof, Austria, 29 June 1999], Unilex.

[7]For general statements regarding the parties' release from their obligations upon avoidance see, e.g. CLOUT case No. 422 [Oberster Gerichtshof, Austria, 29 June 1999], Unilex; CLOUT case No. 2 [Oberlandesgericht Frankfurt am Main, Germany, 17 September 1991] (see full text of the decision); CLOUT case No. 261 [Berzirksgericht der Sanne, Switzerland, 20 February 1997]; ICC Court of Arbitration, award No. 9887, August 1999, Unilex.

[8]CLOUT case No. 235 [Bundesgerichtshof, Germany, 25 June 1997] (partial avoidance); CLOUT case No. 348 [Schweizerisches Bundesgericht, Switzerland, 28 October 1998]; CLOUT case No. 2 [Oberlandesgericht Frankfurt am Main, Germany, 17 September 1991] (see full text of the decision); ICC Court of Arbitration, award No. 7645, March 1995, Unilex. See also Landgericht Krefeld, Germany, 24 November 1992, English abstract available in the Unilex database (implying that in a partial avoidance situation the buyer was released from its obligation to pay for the portion of the goods subject to avoidance); CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997] (in a partial performance situation, court appears to presume that buyer's avoidance released both parties from remaining executory duties).

[9]ICC Court of Arbitration, award No. 9887, August 1999, Unilex.

[10]CLOUT case No. 261 [Berzirksgericht der Sanne, Switzerland, 20 February 1997]. See also arbitral award No. ZHK 273/95, Zürich Chamber of Commerce Arbitration Proceedings, Switzerland, 31 May 1996, Unilex, where the tribunal indicates that the buyer's action for damages based on avoidance was an alternative to an action to require seller to deliver.

[11]In the following cases, the tribunal indicated that the buyer was not released from its obligation to pay because it had failed to avoid the contract: CLOUT case No. 284 [Oberlandesgericht Köln, Germany, 21 August 1997]; Landgericht München, Germany, 20 March 1995, Unilex; CLOUT case No. 229 [Bundesgerichtshof, Germany, 4 December 1996]; CLOUT case No. 79 [Oberlandesgericht Frankfurt am Main, Germany, 18 January 1994]. See also CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994] (implying that, because buyer did not validly avoid the contract it was not released from its obligation to pay) and CLOUT case No. 83 [Oberlandesgericht München, Germany, 2 March 1994] (same). It has also been found that a seller who fails to validly avoid the contact is not released from its obligation to deliver the goods. Arbitral award No. ZHK 273/95, Zürich Chamber of Commerce Arbitration Proceedings, Switzerland, 31 May 1996, Unilex.

[12]CLOUT case No. 229 [Bundesgerichtshof, Germany, 4 December 1996] (buyer did not have right to avoid because its notice of lack of conformity was not sufficiently specific to satisfy article 39); Landgericht München, Germany, 20 March 1995, Unilex (buyer lost right to avoid because it did give sufficient notice of lack of conformity under article 39 and its notice of avoidance was untimely under article 49(2)); CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994] (buyer lacked right to avoid because its notice of lack of conformity was not timely under article 39) (see full text of the decision); CLOUT case No. 83 [Oberlandesgericht München, Germany, 2 March 1994] (buyer did not have right to avoid because its declaration of avoidance was untimely under article 49 (2)); ICC Court of Arbitration Case No. 9887, August 1999, Unilex (seller's delivery of non-conforming goods did not release buyer from its obligation to pay because buyer did not give notice declaring the contract avoided as required by article 49 (2) *(b)* (i) (although seller's subsequent avoidance released both parties from their obligations)).

[13]CLOUT case No. 284 [Oberlandesgericht Köln, Germany, 21 August 1997] (buyer lacked right to avoid because it either failed to prove or had waived its right to complain of lack of conformity); CLOUT case No. 79 [Oberlandesgericht Frankfurt am Main, Germany, 18 January 1994], (buyer did not have right to avoid for late delivery because it did not fix an additional period of time for seller to perform under articles 47 and 49 (1) *(b)*, and buyer lacked right to avoid for lack of conformity because it failed to prove that the defects constituted a fundamental breach) (see full text of the decision); CLOUT case No. 83 [Oberlandesgericht München, Germany, 2 March 1994] (buyer had no right to avoid because the inferior quality of the goods did not constitute a fundamental breach); arbitral award No. ZHK 273/95, Zürich Chamber of Commerce Arbitration Proceedings, Switzerland, 31 May 1996, Unilex (seller lacked right to avoid because buyer's failure to make one instalment payment did not constitute a fundamental breach of the contract, buyer had not committed an anticipatory repudiation of the contract, and seller had not fixed an additional deadline period under article 64 for buyer to pay); ICC Court of Arbitration, award No. 9887, August 1999, Unilex (seller's late delivery did not release buyer from its obligation to pay because buyer did not grant seller additional time for performance under article 47 (1) (although seller's subsequent avoidance released both parties from their obligations)).

[14]CLOUT case No. 422 [Oberster Gerichtshof, Austria, 29 June 1999], Unilex; see also Landgericht Düsseldorf, Germany, 11 October 1995, Unilex (stating that avoidance "changes the contractual relationship into a restitutional relationship [winding up]").

[15]CLOUT case No. 253 [Cantone del Ticino Tribunale d'appello, Switzerland, 15 January 1998] (see full text of the decision); CLOUT case No. 345 [Landgericht Heilbronn, Germany, 15 September 1997]; CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997]; CLOUT case No. 348 [Oberlandesgericht Hamburg, Germany, 26 November 1999]; CLOUT case No. 422 [Oberster Gerichtshof, Austria, 29 June 1999], Unilex; arbitral award No. ZHK 273/95, Zürich Chamber of Commerce Arbitration Proceedings, Switzerland, 31 May 1996, Unilex; CLOUT case No. 166 [Arbitration-Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996] (see full text of the decision).

[16]CLOUT case No. 166 [Arbitration-Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996] (see full text of the decision).

[17]CLOUT case No. 23 [Federal District Court, Southern District of New York, United States, 14 April 1992] (see full text of the decision).

[18]ICC Court of Arbitration, award No. 9978, March 1999, Unilex.

[19]CLOUT case No. 422 [Oberster Gerichtshof, Austria, 29 June 1999], Unilex.

[20]Id.

[21]See the Digest for article 82.

[22]See the Digest for article 84, paras 5-6.

[23]See the Digest article 84, paras 2-4.

[24]ICC Court of Arbitration, award No. 9978, March 1999, Unilex; but see Landgericht Landshut, Germany, 5 April 1995, Unilex, in which the court apparently held a breaching seller liable for failing to make restitution to a buyer that had properly avoided the contract (although the remedy granted for this liability, if any, is unclear).

[25]CLOUT case No. 293 [Arbitration-Schiedsgericht der Hamburger freundschatlichen Arbitrage, 29 December 1998] ("The claimant's claim as buyer under Art. 81 (2) first sentence CISG for reimbursement of the prepayment first requires contract avoidance (article 81 (1) first sentence CISG)") (see full text of the decision); CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997] (see full text of the decision); Landgericht Düsseldorf, Germany, 11 October 1995, Unilex (denying buyer restitution because it had not properly avoided the contract); CLOUT case No. 345 [Landgericht Heilbronn, Germany, 15 September 1997]; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russia, award in case No. 1/1993 of 15 April 1994, Unilex; Landgericht Krefeld, Germany, 24 November 1992, Unilex; but see Compromex arbitration, Mexico, 4 May 1993, Unilex (invoking article 81 (2) to justify the seller's claim for the price of delivered goods where it does not appear the contract was avoided).

[26]Landgericht Düsseldorf, Germany, 11 October 1995, Unilex.

[27]Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russia, award in case No. 1/1993 of 15 April 1994, Unilex; CLOUT case No. 302 [Arbitration-International Chamber of Commerce no. 7660, 1994] (see full text of the decision); CLOUT case No. 312 [Cour d'appel Paris, France, 14 January 1998] (see full text of the decision); China International Economic and Trade Arbitration Commission (CIETAC), People's Republic of China, 30 October 1991, Unilex, also available on the INTERNET at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/911030c1.html; CLOUT case No. 345 [Landgericht Heilbronn, Germany, 15 September 1997]; CLOUT case No. 253 [Cantone del Ticino Tribunale d'appello, Switzerland, 15 January 1998] (see full text of the decision); CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997]; CLOUT case No. 103 [Arbitration-International Chamber of Commerce no. 6653 1993] (without citing art. 81); CLOUT case No. 136 [Oberlandesgericht Celle, Germany, 24 May 1995]; Cour d'appel Aix-en-Provence, France, 21 November 1996, Unilex (affirmed in CLOUT case No. 315 [Cour de Cassation, France, 26 May 1999]; Landgericht Düsseldorf, Germany, 11 October 1995, Unilex; Käräjäoikeus Kuopio, Finland, 5 November 1996, available on the Internet at http://www.utu.fi/oik/tdk/xcisg/tap6.html; ICC Court of Arbitration, award No. 9978, March 1999, Unilex; CLOUT case No. 293 [Arbitration-Schiedsgericht der Hamburger freundschatlichen Arbitrage, 29 December 1998] (awarding restitution of the buyer's prepayment for a delivery because "[t]he rendered prepayment is, in the meaning of art. 81 (2) first sentence CISG, performance of the contract on the part of the claimant as buyer") (see full text of the decision).

[28]See Landgericht Landshut, Germany, 5 April 1995, Unilex (ordering a breaching seller to make restitution of price to the avoiding buyer concurrently with buyer making restitution of goods to seller); China International Economic and Trade Arbitration Commission (CIETAC), People's Republic of China, 30 October 1991, Unilex; CLOUT case No. 165 [Oberlandesgericht Oldenburg, Germany, 1 February 1995] (stating that buyer who avoided contract for the purchase of furniture must make restitution of defective furniture it received under the contract) (citing article 84) (see full text of the decision). See also article 82 (stripping a buyer of the right to avoid the contract if it cannot make restitution of the goods substantially in the condition in which it received them, unless one of the exceptions in article 82 (2) applies).

[29]Landgericht Krefeld, Germany, 24 November 1992, Unilex.

[30]CLOUT case No. 308 [Federal Court of Australia, 28 April 1995] (see full text of the decision).

[31]CLOUT case No. 261 [Berzirksgericht der Sanne, Switzerland, 20 February 1997]; CLOUT case No. 308 [Federal Court of Australia, 28 April 1995] (see full text of the decision).

[32]CLOUT case No. 288 [Oberlandesgericht München, Germany, 28 January 1998].

[33]Landgericht Landshut, Germany, 5 April 1995, Unilex.

[34]CLOUT case No. 312 [Cour d'appel Paris, France, 14 January 1998].

[35]CLOUT case No. 295 [Oberlandesgericht Hamm, Germany, 5 November 1997] (see full text of the decision).

[36]CLOUT case No. 422 [Oberster Gerichtshof, Austria, 29 June 1999], Unilex.

[37]CLOUT case No. 302 [Arbitration-International Chamber of Commerce no. 7660, 1994].

[38]China International Economic and Trade Arbitration Commission (CIETAC), People's Republic of China, 30 October 1991, Unilex (ordering avoiding buyer to return goods and breaching seller to return price); see also Cour d'appel Aix-en-Provence, France, 21 November 1996, Unilex ("the avoidance of the sale has, as a consequence, the restitution of the goods against restitution of the price").

[39]Landgericht Landshut, Germany, 5 April 1995, Unilex.

[40]CLOUT case No. 308 [Federal Court of Australia, 28 April 1995] (see full text of the decision).

[41]CLOUT case No. 613 [Federal] Court of Appeals for the Northern District of Illinois, United States, 28 March 2002] (Usinor Industeel v. Leeco Steel Products, Inc.).

[42]CLOUT case No. 308 [Federal Court of Australia, 28 April 1995] (see full text of the decision).

Article 82

1. The buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.

2. The preceding paragraph does not apply:

(*a*) If the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which the buyer received them is not due to his act or omission;

(*b*) If the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 38; or

(*c*) If the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered or ought to have discovered the lack of conformity.

OVERVIEW

1. Article 81 (2) of the Convention requires the parties to an avoided contract to make restitution of whatever has been "supplied or paid under the contract"; article 82 deals with the effect of an aggrieved buyer's inability to make restitution of goods substantially in the condition in which they were delivered. Specifically, article 82 (1) conditions an aggrieved buyer's right to declare the contract avoided (or to require that the seller deliver substitute goods) on the buyer's ability to return whatever goods have already been delivered under the contract substantially in the condition in which he received them.[1] Article 82 (2), however, creates three very broad exceptions to the rule of article 82 (1): a buyer is not precluded from avoiding the contract or demanding substitute goods if his inability to return the goods to the seller substantially in their original condition was not the result of the buyer's own act or omission (article 82 (2) *(a)*), if it occurred as a consequence of the examination of the goods provided for in article 38 (article 82 (2) *(b)*), or if it arose from buyer's resale, consumption or transformation of the goods in the normal course and "before he discovered or ought to have discovered the lack of conformity" (article 82 (2) *(c)*).

ARTICLE 82 IN GENERAL

2. The provisions in Chapter V, Section V of Part III of the CISG, which include article 82, have been cited in support of the proposition that avoidance of contract is "a constitutive right of the buyer, which changes the contractual relationship into a restitutional relationship."[2] Article 82 has also been characterized as part of the Convention's "risk distribution mechanism" for avoided contracts, under which "the seller alone bears the risk of chance accidents and force majeure".[3] This decision found that a buyer is not liable for loss or damage to the goods that occurred while they were being transported back to the seller following the buyer's justified avoidance of the contract.[4] The court reasoned that this "one-sided or predominant burdening of the seller with the risks of restitution" of the goods is explained by the fact that the seller caused these risks by breaching the contract.[5]

ARTICLE 82 (1)

3. Article 82 (1) states that, in order to preserve its right to avoid the contract or require the seller to deliver substitute goods, an aggrieved buyer must have the ability to make restitution of goods that the buyer received under the contract "substantially in the condition in which he received them". Several decisions have denied a buyer the right to avoid the contract because he could not meet this requirement. Thus, where a buyer attempted to avoid a contract for the sale of flower plants because the delivered plants allegedly were defective in appearance and colour, a court noted that the buyer had lost the right to avoid under article 82 (1) because it had discarded some plants and resold others.[6] A buyer of textiles, some of which did not conform to a pattern specified in the contract, was also found to have lost the right to avoid because he resold the goods.[7] And another buyer lost the right to avoid the contract because, after he discovered that marble slabs delivered by the seller were stuck together and broken, he cut and processed the slabs, thus making it impossible to return them substantially in the condition in which they were received.[8]

4. On the other hand, a decision has noted that article 82 does not prevent a buyer from avoiding the contract where the seller did not claim that that the requirements of article 82 were not met[9]—suggesting that a seller who is

resisting avoidance bears the burden of going forward with evidence that the buyer cannot return the goods substantially in the condition in which he received them. The same decision also indicates that article 82 only encompasses loss of or deterioration in the goods that occurs before the declaration of avoidance is made.[10] It has also been found that a buyer did not lose the right to avoid under article 82 merely by announcing, prior to trial, that he was attempting to resell the goods (an attempt that the court characterized as an effort to mitigate damages): the court indicated that article 82 would prevent the buyer from avoiding only if he had actually resold the goods before declaring the contract avoided.[11] Another decision found that article 82 (1) did not deprive a buyer of the right to avoid the contract when delivered goods suffered damage as they were being transported back to the seller (as the seller had agreed) provided the buyer did not bear risk of loss during such transport.[12] Several other decisions have refused to deny a buyer the right to avoid, even though the buyer could not make restitution of the goods substantially in the condition in which they were received, because the requirements of one or more of the exceptions in article 82 (2) were satisfied.[13]

ARTICLE 82 (2) (*a*)

5. Even if a buyer is unable to give restitution of previously delivered goods substantially in the condition in which they were received, article 82 (2) *(a)* provides that the buyer retains the right to avoid the contract or to require the seller to deliver substitute goods if the buyer's inability to make restitution is not due its own act or omission. This provision was cited by a court in holding that a buyer was not liable for damage to goods that occurred while they were being transported back to the seller following the buyer's justified avoidance of contract: the seller itself conceded that the damage occurred while the goods were in the hands of the carrier, and thus could not have been caused by the buyer's act or omission.[14] On the other hand, article 82 (2) *(a)* did not preserve the avoidance rights of a buyer who cut and processed non-conforming marble slabs before avoiding the contract, because the buyer's inability to make restitution of the goods substantially in the condition in which they were received was indeed due to its own acts.[15]

ARTICLE 82 (2) (*b*)

6. Article 82 (2) *(b)* preserves an aggrieved buyer's right to avoid the contract or to demand substitute goods where the buyer's inability to make restitution of the goods substantially in the condition in which they were received arose as a result of the examination of the goods provided for in article 38. This provision has been invoked to preserve the avoidance rights of a buyer that processed wire before discovering that it did not conform to the contract: the court found that defects in the wire could not be detected until it was processed.[16] The court also determined that the rule of article 82 (2) *(b)*, which by its terms applies if the goods "have perished or deteriorated" because of the article 38 examination, applied even though the processing of the wire actually enhanced its value.[17] On the other hand, a court has held that the substantial change in condition of marble slabs that occurred when the buyer cut and processed them did not result from the article 38 examination, and thus the buyer's avoidance rights were not preserved under article 82 (2) *(b)*.[18]

ARTICLE 82 (2) (*c*)

7. Under article 82 (2) *(c)*, a buyer retains the right to avoid the contract or to demand that the seller deliver substitute goods even though he is unable to make restitution of the goods substantially in their delivered condition, provided that the goods were "sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered or ought to have discovered the lack of conformity". Under this provision, a buyer who resold paprika in the ordinary course of business before discovering that the goods contained ethylene oxide in amounts that exceeded domestic legal limits retained his right to avoid the contract.[19] On the other hand, the requirements for this exception were not satisfied when a buyer resold textiles that were, in part, of a different pattern than that called for in the contract, and the buyer lost the right to avoid because it could not make restitution of the goods as required by article 82 (1).[20] And a buyer that cut and processed marble slabs after discovering that they were non-conforming did not meet the requirements of article 82 (2) *(c)* and did not have the right to avoid the contract.[21] It has also been suggested that a buyer's resale of the goods after declaring the contract avoided is beyond the scope of article 82.[22]

Notes

[1]Thus, although it is located in the part of the CISG entitled "Effects of avoidance" (Part III, Chapter V, Section V), article 82 is not limited to situations where a buyer seeks to avoid the contract (or some part thereof) under articles 49, 51, 72 or 73: it also applies when a buyer does not avoid the contract and instead invokes the substitute goods remedy in article 46 (2). Whereas article 81 (2) clearly requires an avoiding buyer to make restitution of goods delivered under the avoided contract, article 46 (2) does not expressly state that a buyer who wishes to require the seller to deliver substitute goods must return the original goods, except insofar as use of the term "substitute goods" suggests such an obligation. Article 82, however, indicates that a buyer seeking substitute goods must in fact give back the originals substantially in the condition in which it received them, unless one of the exceptions in article 82 (2) applies.

[2]Landgericht Düsseldorf, Germany, 11 October 1995, Unilex.

[3]CLOUT case No. 422 [Oberster Gerichtshof, Austria, 29 June 1999], Unilex.

[4]Id.

[5]Id.

[6]Rechtbank Rotterdam, the Netherlands, 21 November 1996, Unilex. Presumably the resale occurred after the buyer discovered or ought to have discovered the alleged lack of conformity.

[7]CLOUT case No. 82 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994]. Again, the resale presumably occurred after the buyer discovered or ought to have discovered the alleged lack of conformity.

[8]CLOUT case No. 316 [Oberlandesgericht Koblenz, Germany, 27 September 1991].

[9]CLOUT case No. 2 [Oberlandesgericht Frankfurt am Main, Germany, 17 September 1991] (see full text of the decision).

[10]Id.

[11]Amtsgericht Charlottenburg, Germany, 4 May 1994, Unilex. The court also indicated that the buyer would lose the right to avoid only if the resale occurred before the buyer discovered the lack of conformity. Article 82 (2) *(c)*, however, preserves the buyer's right to avoid unless the resale (or other ordinary course consumption or transformation of the goods by the buyer) occurs after the buyer discovers or ought to have discovered the lack of conformity.

[12]CLOUT case No. 594 [Oberlandesgericht Karlsruhe, Germany 19 December 2002].

[13]CLOUT case No. 235 [Bundesgerichtshof, Germany, 25 June 1997] (article 82 (2) *(b)* satisfied); Landgericht Ellwangen, Germany, 21 August 1995, Unilex (article 82 (2) *(c)* satisfied). For discussion of the exceptions in article 82 (2), see infra paras. 5-7.

[14]CLOUT case No. 422 [Oberster Gerichtshof, Austria, 29 June 1999], Unilex.

[15]CLOUT case No. 316 [Oberlandesgericht Koblenz, Germany, 27 September 1991].

[16]CLOUT case No. 235 [Bundesgerichtshof, Germany, 25 June 1997].

[17]Id. (see full text of the decision).

[18]CLOUT case No. 316 [Oberlandesgericht Koblenz, Germany, 27 September 1991].

[19]Landgericht Ellwangen, Germany, 21 August 1995, Unilex.

[20]CLOUT case No. 82 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994].

[21]CLOUT case No. 316 [Oberlandesgericht Koblenz, Germany, 27 September 1991].

[22]Amtsgericht Charlottenburg, Germany, 4 May 1994, Unilex, where the court stated that the buyer would have lost the right to avoid the contract under article 82 (1) only if it had resold by the time of the letter declaring the contract avoided. The court also indicated that the buyer would retain the right to avoid unless the resale occurred before the buyer discovered the lack of conformity. Article 82 (2) *(c)*, however, preserves the buyer's right to avoid unless the resale (or other ordinary course consumption or transformation of the goods by the buyer) occurs after the buyer discovers or ought to have discovered the lack of conformity.

Article 83

A buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods in accordance with article 82 retains all other remedies under the contract and this Convention.

OVERVIEW

1. Article 83 states that a buyer who has lost the right to avoid the contract or to require the seller to deliver substitute goods under article 82 nevertheless retains its other remedies, whether those remedies have their origin in provisions of the contract or in the CISG itself. Decisions have devoted very little attention to article 83. The provisions of Part III, Chapter V, Section V of the CISG ("Effects of avoidance"), which include article 83,[1] have been cited in support of certain broad propositions concerning avoidance under the Convention. Thus, it has been asserted that "[t]he avoidance of the contract is thus a constitutive right of the buyer, which changes the contractual relationship into a restitutional relationship (arts. 81-84 CISG)".[2] And in a decision holding that a buyer was not responsible for damage to goods that occurred while they were being transported by carrier back to the seller following the buyer's avoidance of the contract, the court asserted that "Articles 81-84 CISG contain at their core a risk distribution mechanism, which within the framework of the reversal of the contract (restitution), overrides the general provisions on the bearing of risk contained in Art. 66 et. seq. CISG".[3] In addition, an arbitral tribunal has asserted that, where the contract is avoided and damages under article 74 are claimed, "one uniform right to damages comes into existence, which can be compared to the right to damages for non-performance under [applicable domestic law] and prevails over the consequences of the termination of a contract provided for in articles 81-84 CISG."[4]

2. In one decision a buyer was found to have lost the right to avoid the contract both because he failed to set an additional period of time for performance under article 47 and because he was unable to make restitution of the goods as required by article 82; the court noted that the buyer nevertheless retained a right to damages for breach of contract (although the buyer had not sought them), but the court did not cite article 83 in support of its assertion.[5]

Notes

[1]Chapter V, Section V of Part III comprises articles 81 through 84 of the CISG.

[2]Landgericht Düsseldorf, Germany, 11 October 1995, Unilex.

[3]CLOUT case No. 422 [Oberster Gerichtshof, Austria, 29 June 1999], Unilex.

[4]CLOUT case No. 166 [Arbitration-Schiedsgericht der Handelskammer Hamburg, Germany, 21 March, 21 June 1996] (see full text of the decision).

[5]CLOUT case No. 82 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994].

Article 84

1. If the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid.

2. The buyer must account to the seller for all benefits which he has derived from the goods or part of them:

(*a*) If he must make restitution of the goods or part of them; or

(*b*) If it is impossible for him to make restitution of all or part of the goods or to make restitution of all or part of the goods substantially in the condition in which he received them, but he has nevertheless declared the contract avoided or required the seller to deliver substitute goods.

OVERVIEW

1. Article 84 elaborates on the restitutionary obligations imposed on parties to a contract that has been validly avoided, as well as on the restitutionary obligations of a buyer that invokes its rights under article 46 (2) to require the seller to deliver substitute goods.

WHEN INTEREST IS DUE UNDER ARTICLE 84 (1)

2. Many decisions have awarded interest under article 84 (1) on payments that a seller must refund to a buyer.[1] Such awards have frequently been made against a breaching seller in favour of a buyer that has avoided the contract.[2] Interest under article 84 has also been awarded to a breaching buyer who became entitled to a refund of payments when the aggrieved seller avoided the contract.[3] Article 84 (1) has also been found to govern a buyer's claim for repayment of funds that a seller obtained under a bank guarantee for part of the price of goods covered by a cancelled contract, even though the buyer's claim was based on principles of applicable national law (because it arose from the seller's dealing with the bank rather than the buyer) and not on restitutionary obligations under the Convention: the court reasoned that the buyer's claim, while not based on the CISG, was nevertheless a claim for a refund of the price in a transaction governed by the CISG, and thus came within the terms of article 84 (1).[4] A court has also determined that a buyer is entitled to interest under article 84 even though it had not made a formal request for such interest in its pleadings.[5]

RATE OF INTEREST UNDER ARTICLE 84 (1)

3. Like article 78, article 84 (1) does not specify the rate of interest applicable to awards made under its authority. Many decisions have set the interest rate according to the dictates of national law, resulting in the imposition of a domestic statutory rate of interest.[6] Such decisions often invoke choice of law principles to determine the applicable national law,[7] and they frequently cite the directive in article 7 (2) that issues within the scope of the CISG which are settled neither by its express provisions nor by the general principles on which it is based should be determined "in conformity with the law applicable by virtue of the rules of private international law".[8] On the other hand, interest has been awarded at the rate prevailing at the seller's place of business because this is where sellers are likely to have invested the payments they must refund.[9] And an arbitral tribunal has awarded interest under article 84 (1) on the basis of the rate used in international trade with respect to the currency of the transaction (Eurodollars), leading to the application of London Inter-Bank Offered Rate (LIBOR);[10] this aspect of the arbitration award, however, was reversed on appeal because the parties had not been given sufficient opportunity to be heard on the question of the proper interest rate.[11] In lieu of interest under article 84, some courts appear to have awarded avoiding buyers' damages under article 74 in the amount of foreseeable finance charges that the buyer incurred in order to finance payment for the goods.[12]

TIME PERIODS FOR WHICH INTEREST IS AWARDED UNDER ARTICLE 84 (1); CURRENCY AND EXCHANGE RATE CONSIDERATIONS

4. Article 84 (1) specifies that, when the seller must refund payments made by the buyer, it must pay interest "from the date on which the price was paid". Many decisions have in fact awarded interest from this date.[13] Where payment was made on behalf of the buyer by a guarantor bank and the buyer reimbursed the bank, the buyer was awarded interest from the date that the guarantor made payment.[14] In the case of partial contract avoidance, it has been determined that interest is due from the time that the buyer paid for goods covered by the avoided portion of the contract.[15] Article 84 (1) does not state the date as of which interest should cease to accrue, but it has been determined that interest accrues until the time that the price is in fact refunded.[16] It has also been determined that an avoiding buyer's refund, including interest thereon, was due in the

same currency as that in which the price was duly paid (even though the contract price was valued in a different currency), and at the exchange rate that was specified in the contract for payment of the price to seller.[17]

ARTICLE 84 (2)

5. Article 84 (2) requires a buyer to account to the seller for benefits derived from goods that were delivered under a contract that was avoided, or from goods that the buyer is requiring the seller to replace pursuant to article 46 (2). In both situations, the buyer is subject to the seller's claim for restitution of delivered goods. Thus, under article 81 (2), a buyer who is party to a contract that has been avoided (whether by the buyer or the seller) must make restitution of goods received under the contract. Under article 82, furthermore, if a buyer wishes either to avoid the contract or to require the seller to deliver substitute goods pursuant to article 46 (2), the buyer must make restitution of goods already delivered "substantially in the condition in which he received them", unless one of the exceptions in article 82 (2) applies. Article 84 (2), in turn, requires the buyer to "account to the seller for all benefits which he has derived from the goods or part of them" in two situations: whenever the buyer is obligated to make restitution of the goods (article 84 (2) *(a)*); and whenever the buyer successfully avoids the contract or requires the seller to deliver substitute goods despite being unable to make restitution of the original goods substantially in the condition in which they were received (i.e., when one of the article 82 (2) exceptions from the requirement to make restitution applies).

6. Article 84 (2) has been the subject of considerably fewer decisions than article 84 (1). Article 84 (2) has been characterized in general as requiring that the buyer "account to the seller the exchange value of all benefits which the [buyer] has derived from the goods or part of them".[18] It has been stated that the burden of proving the amount of benefits for which the buyer must account under article 84 (2) falls to the seller.[19] In line with this principle, the seller was found not to have carried its burden, and thus a lower court's award to the seller under article 84 (2) was reversed, where it had only been shown that the buyer's own customer might in the future avoid its contract to purchase of the goods in question (furniture that proved non-conforming): proof of the possibility that the buyer might obtain benefits from its customer's rescission, the court reasoned, was not sufficient to trigger the obligation to account for benefits under article 84 (2), particularly where the amount of the possible benefits was also uncertain.[20] The court therefore found no proof that the buyer obtained benefits from the goods "because the use of defective furniture is not a measurable monetary benefit and would thus have to be considered as an imposed benefit".[21] Another decision indicated, in passing, that if a buyer had succeeded in reselling shoes received under a contract that it avoided, the buyer "would have had to account to the seller for any profit under article 84 (2) CISG"; this suggested to the court that the buyer's attempt to resell the shoes was merely an effort to mitigate the "negative effect for both sides" of the shoes' lack of conformity, and should not be deemed an "acceptance" of the shoes as conforming.[22]

Notes

[1]CLOUT Case No. 103 [Arbitration-International Chamber of Commerce no. 6653, 1993]; Court d'appel Paris, France, 6 April 1995, Unilex; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russia, award in case No. 1/1993 of 15 April 1994, Unilex; Cour d'appel Aix-en-Provence, France, 21 November 1996, Unilex; CLOUT case No. 253 [Cantone del Ticino Tribunale d'appello, Switzerland, 15 January 1998] (see full text of the decision); CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997]; CLOUT case No. 302, Arbitration, 1994; Landgericht Landshut, Germany, 5 April 1995, Unilex; ICC Court of Arbitration, award No. 9978, March 1999, Unilex; CLOUT case No. 136 [Oberlandesgericht Celle, Germany, 24 May 1995]; CLOUT case No. 133 [Oberlandesgericht München, Germany, 8 February 1995]; CLOUT case No. 261 [Berzirksgericht der Sanne, Switzerland, 20 February 1997]; CLOUT case No. 293 [Arbitration-Schiedsgericht der Hamburger freundschatlichen Arbitrage, Germany, 29 December 1998]; China International Economic and Trade Arbitration Commission (CIETAC), People's Republic of China, 30 October 1991, Unilex, also available on the INTERNET at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/911030c1.html; see also CLOUT case No. 313 [Cour d'appel Grenoble, France, 21 October 1999] (indicating that an avoiding buyer was entitled to interest, under article 84, on the price to be refunded by the breaching seller, but then declining jurisdiction over case). On the other hand, in lieu of interest under article 84 some courts appear to have awarded avoiding buyers damages under article 74 in the amount of foreseeable finance charges that the buyer incurred in order to finance payment for the goods. See CLOUT case No. 304 [Arbitration-International Chamber of Commerce no. 7531, 1994]; Käräjäoikeus Kuopio, Finland, 5 November 1996, available on the Internet at http://www.utu.fi/oik/tdk/xcisg/tap6.html.

[2]Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russia, award in case No. 1/1993 of 15 April 1994, Unilex; CLOUT case No. 253 [Cantone del Ticino Tribunale d'appello, Switzerland, 15 January 1998] (see full text of the decision); CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997]; Landgericht Landshut, Germany, 5 April 1995, Unilex; ICC Court of Arbitration, award No. 9978, March 1999, Unilex; CLOUT case No. 293 [Arbitration-Schiedsgericht der Hamburger freundschatlichen Arbitrage 29 December 1998]; China International Economic and Trade Arbitration Commission (CIETAC), People's Republic of China, 30 October 1991, Unilex; CLOUT case No. 103 [Arbitration-International Chamber of Commerce no. 6653, 1993]; Cour d'appel Paris, France, 6 April 1995. See also Käräjäoikeus Kuopio, Finland, 5 November 1996, available on the Internet at http://www.utu.fi/oik/tdk/xcisg/tap6.html (apparently awarding buyer's actual finance charges as damages under article 74, not as interest under article 84); CLOUT case No. 90 [Pretura circondariale di Parma, Italy, 24 November 1989] (court applied CISG to transaction and held that buyer was entitled to avoid and recover payments from seller; it also awarded interest, but without citing article 84 and perhaps on the basis of national law); CLOUT case No. 302 [Arbitration-International Chamber of Commerce no. 7660, 1994] (court allowed interest on buyer's partial refund claim for undelivered spare part parts, but did not specifically discuss whether buyer avoided this part of the contract).

[3]CLOUT case No. 261 [Berzirksgericht der Sanne, Switzerland, 20 February 1997].

[4]CLOUT case No. 133 [Oberlandesgericht München, Germany, 8 February 1995].

[5]CLOUT case No. 103 [Arbitration-International Chamber of Commerce no. 6653, 1993], where the court noted that article 84 (1) is not clear on whether such a formal request for interest is necessary, but that the provision would be construed not to require such a request; the tribunal noted that the domestic law that would apply under article 7 (2) to resolve matters not settled by the provisions of the CISG or its general principles did not require a formal request for interest. This portion of the decision was affirmed in Cour d'appel Paris, France, 6 April 1995, Unilex.

[6]CLOUT case No. 594 [Oberlandesgericht Karlsruhe, Germany 19 December 2002] (see full text of the decision); CLOUT case No. 253 [Cantone del Ticino Tribunale d'appello, Switzerland, 15 January 1998] (see full text of the decision); CLOUT case No. 302 [Arbitration-International Chamber of Commerce no. 7660, 1994]; Landgericht Landshut, Germany, 5 April 1995, Unilex; CLOUT case No. 136 [Oberlandesgericht Celle, Germany, 24 May 1995]; CLOUT case No. 261 [Berzirksgericht der Sanne, Switzerland, 20 February 1997]; CLOUT case No. 293 [Arbitration-Schiedsgericht der Hamburger freundschatlichen Arbitrage, Germany, 29 December 1998]; CLOUT case No. 133 [Oberlandesgericht München, Germany, 8 February 1995]; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russia, award in case No. 1/1993 of 15 April 1994, Unilex; Cour d'appel Aix-en-Provence, France, 21 November 1996, Unilex; ICC Court of Arbitration, award No. 9978, March 1999, Unilex. See also CLOUT case No. 90 [Pretura circondariale di Parma, Italy, 24 November 1989] (the court applied the CISG to the transaction and held that buyer was entitled to avoid and recover payments from seller; it also awarded interest at the domestic law statutory rate, but without citing article 84 and perhaps on the basis of national law); China International Economic and Trade Arbitration Commission (CIETAC), People's Republic of China, 30 October 1991, Unilex (tribunal awarded 8 per cent interest on payments that seller had to refund to avoiding buyer, but did not specify how it determined the rate).

[7]CLOUT case No. 594 [Oberlandesgericht Karlsruhe, Germany 19 December 2002] (see full text of the decision); CLOUT case No. 253 [Cantone del Ticino Tribunale d'appello, Switzerland, 15 January 1998] (see full text of the decision); CLOUT case No. 302 [Arbitration-International Chamber of Commerce no. 7660, 1994]; Landgericht Landshut, Germany, 5 April 1995, Unilex; CLOUT case No. 136 [Oberlandesgericht Celle, Germany, 24 May 1995]; ICC Court of Arbitration, award No. 9978, March 1999, Unilex; CLOUT case No. 261 [Berzirksgericht der Sanne, Switzerland, 20 February 1997]; CLOUT case No. 293 [Arbitration-Schiedsgericht der Hamburger freundschatlichen Arbitrage, Germany, 29 December 1998]; CLOUT case No. 133 [Oberlandesgericht München, Germany, 8 February 1995].

[8]CLOUT case No. 253 [Cantone del Ticino Tribunale d'appello, Switzerland, 15 January 1998] (see full text of the decision); CLOUT case No. 261 [Berzirksgericht der Sanne, Switzerland, 20 February 1997]; CLOUT case No. 293 [Arbitration-Schiedsgericht der Hamburger freundschatlichen Arbitrage, Germany, 29 December 1998] (see full text of the decision).

[9]CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997] (see full text of the decision).

[10]CLOUT case No. 103 [Arbitration-International Chamber of Commerce no. 6653, 1993].

[11]Cour d'appel Paris, France, 6 April 1995, Unilex.

[12]See CLOUT case No. 304 [Arbitration-International Chamber of Commerce no. 7531, 1994], Unilex; Käräjäoikeus Kuopio, Finland, 5 November 1996, available on the Internet at http://www.utu.fi/oik/tdk/xcisg/tap6.html.

[13]Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russia, award in case No. 1/1993 of 15 April 1994, Unilex; CLOUT case No. 253 [Cantone del Ticino Tribunale d'appello, Switzerland, 15 January 1998] (see full text of the decision); CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997] (advance payment); CLOUT case No. 302 [Arbitration-International Chamber of Commerce no. 7660, 1994]; Landgericht Landshut, Germany, 5 April 1995, Unilex; CLOUT case No. 136 [Oberlandesgericht Celle, Germany, 24 May 1995]; CLOUT case No. 261 [Berzirksgericht der Sanne, Switzerland, 20 February 1997] (award of interest to breaching buyer on refund from avoiding seller); CLOUT case No. 293 [Arbitration-Schiedsgericht der Hamburger freundschatlichen Arbitrage, Hamburg, Germany, 29 December 1998]; China International Economic and Trade Arbitration Commission (CIETAC), People's Republic of China, 30 October 1991, Unilex; CLOUT case No. 312 [Cour d'appel Paris, France, 14 January 1998] (see full text of the decision). But see CLOUT case No. 90 [Pretura circondariale di Parma, Italy, 24 November 1989] (court applied CISG to transaction and held that buyer was entitled to avoid and recover payments from seller; it awarded interest from the date of avoidance, but without citing article 84 and perhaps on the basis of national law).

[14]Cour d'appel Aix-en-Provence, France, 21 November 1996, Unilex; CLOUT case No. 315 [Cour de Cassation, France, 26 May 1999], see also Unilex.

[15]CLOUT Case No. 103 [Arbitration-International Chamber of Commerce no. 6653, 1993]; Cour d'appel Paris, France, 6 April 1995, Unilex.

[16]Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russia, award in case No. 1/1993 of 15 April 1994, Unilex.

[17]CLOUT case No. 302 [Arbitration-International Chamber of Commerce no. 7660, 1994].

[18]CLOUT case No. 165 [Oberlandesgericht Oldenburg, Germany, 1 February 1995] (see full text of the decision).

[19]Id. (see full text of the decision).

[20]Id. (see full text of the decision).

[21]Id. (see full text of the decision).

[22]Amtsgericht Charlottenburg, Germany, 4 May 1994, Unilex.

Section VI of Part III, Chapter V

Preservation of the goods (articles 85-88)

OVERVIEW

1. Parties to a contract governed by the Convention will sometimes find themselves justifiably in possession or control of goods that should be in the hands of the other party. A seller may find himself in such a situation if a buyer refuses to make payment and the seller therefore withholds delivery, or if the buyer simply refuses to take delivery. A buyer may end up in similar circumstances if he has received delivery and either avoids the contract (which means that the goods are to be restored to the seller as provided in articles 81 (2) and 82) or demands substitute goods under article 45 (2) (which requires the buyer to return the original delivery as provided in article 82). The first two provisions of Section VI of Part III, Chapter V—articles 85 and 86—require such a buyer or seller to take reasonable steps to preserve the goods in his hands, although these provisions also give the preserving party the right to retain the goods until the other side reimburses the costs of preservation. The remaining two provisions of the section refine the rules on preserving goods by specifying that storing the goods in a third party's warehouse at the other side's (reasonable) expense is one proper method of preservation (article 87), and by giving a preserving party a right, or even an obligation, in specified circumstances, to sell the goods and to retain the reasonable costs of preservation out of the proceeds.

RELATION TO OTHER PARTS OF THE CONVENTION

2. The provisions of Section VI are closely connected to, and interact in important ways with, the Convention's rules on avoidance of contract, particularly those in Part III, Chapter V, Section V, "Effects of avoidance" (articles 81-84); as applied to buyers, the rules of chapter VI also have a close relationship to the article governing the right to demand substitute goods (article 46 (2)). Thus, because avoidance of the contract relieves a seller of its responsibility to deliver the goods to the buyer (see article 81 (1)), avoidance presumably also relieves the seller of any obligation under article 85 to preserve goods that are in its hands after the buyer refuses delivery;[1] as a result, naturally, an avoiding seller also cannot invoke the rules and rights in articles 87 and 88 that accompany the obligation to preserve. Conversely, a buyer is obligated to preserve goods under article 86 only if he intends to "reject" them, and this appears to occur only if the buyer avoids the contract or requires the seller to deliver substitute goods under article 46 (2). Thus in the case of buyers, the obligation of preservation (as well as the accompanying rules and rights in articles 87 and 88) are triggered only if the buyer avoids or demands substitute goods.

3. Under certain provisions of Section VI a party obligated to preserve goods has a right to recover from the other side (the beneficiary of such preservation) the expenses incurred in preserving the goods. See articles 85, 86 (1) and 88 (3). The right to recover the expenses of preservation has been connected, in case law, with the right to recover damages under article 74.[2]

Notes

[1]After avoidance the goods effectively belong to the seller, since he has a financial interest in preserving them, but the legal obligation to preserve imposed by article 85 is presumably eliminated.

[2]See CLOUT case No. 304 [Arbitration—International Chamber of Commerce No. 7531 1994] (awarding damages under article 74 for expenses incurred to preserve goods under articles 86, 87 and 88 (1)).

Article 85

If the buyer is in delay in taking delivery of the goods or, where payment of the price and delivery of the goods is to be made concurrently, if he fails to pay the price, and the seller is either in possession of the goods or otherwise able to control their disposition, the seller must take such steps as are reasonable in the circumstances to preserve them. He is entitled to retain them until he has been reimbursed his reasonable expenses by the buyer.

OVERVIEW

1. Article 85 creates both an obligation and a right, applicable to sellers that have retained possession or control of goods either because the buyer has delayed taking delivery or because the buyer has failed to make a payment due concurrently with delivery. Under the first sentence of article 85, such a seller must "take such steps as are reasonable in the circumstances" to preserve the goods. Under the second sentence of article 85, such a seller has the right to retain the goods until the buyer reimburses the seller's reasonable expenses of preservation. Article 85 has been cited in relatively few decisions, most of which have focused on the seller's right to reimbursement for the expenses of preserving the goods.

SELLER'S OBLIGATION TO PRESERVE GOODS

2. A small number of decisions have dealt with the seller's article 85 obligation to preserve goods. That obligation has been invoked to justify a seller's actions after a buyer demanded that a seller stop making deliveries of trucks covered by a contract for sale: an arbitral tribunal stated that, because the buyer unjustifiably refused delivery, the seller had the right to take reasonable steps toward preserving the goods, including depositing them in a warehouse.[1] In another proceeding, a buyer sought interim relief in the form of an order preventing the seller from selling a key component of industrial machinery. The seller had retained the component after the buyer failed to make full payment for the machinery, and the seller planned to transfer the machinery to another warehouse and resell it. Because the proceeding focused on interim relief, the court applied the national law of the forum rather than the CISG, holding that the seller could move the goods to a new warehouse, but (despite article 87 of the Convention) it would have to advance the warehouse expenses itself, and (despite article 88 of the Convention) it would be restrained from exporting or reselling the component.[2]

SELLER'S RIGHT TO RETAIN GOODS UNTIL REIMBURSED FOR REASONABLE EXPENSES OF PRESERVATION

3. A number of decisions have held breaching buyers liable for expenses that an aggrieved seller incurred to preserve the goods. These decisions usually (although not always) cite article 85 in support of the award,[3] but they frequently characterize the award as damages recoverable under article 74 of the CISG.[4] One court has stated that "when applying the CISG, the [buyer's] duty to pay damages is based on article 74, in part also on article 85".[5] The preservation costs for which sellers have successfully claimed reimbursement have generally been incurred after the buyer unjustifiably refused to take delivery,[6] although in one case they were incurred after the buyer failed to open a letter of credit required by the sales contract.[7] In several cases, an award to cover the seller's expenses for preserving the goods was made only after the tribunal expressly determined the costs were reasonable.[8] Where the seller was in breach and the buyer properly avoided the contract, however, it was found that the prerequisites for the seller to claim, under either article 74 or article 85, reimbursement for expenses of storing and reselling the goods were not met because the buyer did not breach its obligations to pay the price or take delivery; the seller's claim was therefore denied.[9] And even where a buyer was found liable for seller's costs of storing the goods in a warehouse, an arbitral tribunal denied seller's claim for damage to the goods resulting from prolonged storage, because risk of loss had not passed to the buyer under applicable rules.[10] Finally, the principle of the second sentence of article 85 that, in proper circumstances, a seller can retain goods until reimbursed for the reasonable costs of preserving them has also been invoked to support the idea that, unless otherwise agreed, a seller is not obligated to make delivery until the buyer pays the price.[11]

Notes

[1]CLOUT case No. 141 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, award in case No. 192/1994 of 25 April 1995], also in Unilex.

[2]CLOUT case No. 96 and No. 200 [Tribunal Cantonal Vaud, Switzerland, 17 May 1994] (both abstracts dealing with the same case).

[3]See CLOUT case No. 361 [Oberlandesgericht Braunschweig, Germany, 28 October 1999] (citing article 85 and awarding the seller's costs for cold storage of meat) (see full text of the decision); ICC Court of Arbitration, award No. 9574, August 1998, Unilex (citing article 85 and awarding the seller's costs for storing and transporting equipment and spare parts); CLOUT case No. 141 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, award in case No. 192/1994 of 25 April 1995], also in Unilex (citing article 85 and awarding the seller's costs for storing trucks in warehouse); CLOUT case No. 104 [Arbitration-International Chamber of Commerce no. 7197, 1993] (citing article 85 and awarding the seller's costs for storing goods in a warehouse). But see Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, award in case No. 375/1993 of 9 September 1994, Unilex (apparently not citing article 85 when awarding seller's costs for storing goods). See also CLOUT case No. 96 and No. 200 [Tribunal Cantonal Vaud, Switzerland, 17 May 1994] (both abstracts dealing with the same case) (citing article 85, but applying the national law of the forum to deny seller an interim order requiring the buyer to pay the costs of transporting the goods to a new warehouse) (see full text of the decision).

[4]See CLOUT case No. 361 [Oberlandesgericht Braunschweig, Germany, 28 October 1999] (see full text of the decision); CLOUT case No. 104 [Arbitration-International Chamber of Commerce no. 7197, 1993] (see full text of the decision).

[5]CLOUT case No. 361 [Oberlandesgericht Braunschweig, Germany, 28 October 1999] (see full text of the decision).

[6]CLOUT case No. 141 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, award in case No. 192/1994 of 25 April 1995], also in Unilex; CLOUT case No. 361 [Oberlandesgericht Braunschweig, Germany, 28 October 1999] (see full text of the decision); ICC Court of Arbitration, award No. 9574, August 1998, Unilex; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, award in case No. 375/1993 of 9 September 1994, Unilex.

[7]CLOUT case No. 104 [Arbitration-International Chamber of Commerce no. 7197, 1993] (see full text of the decision).

[8]CLOUT case No. 141 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, award in case No. 192/1994 of 25 April 1995], also in Unilex; CLOUT case No. 361 [Oberlandesgericht Braunschweig, Germany, 28 October 1999] (see full text of the decision); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, award in case No. 375/1993 of 9 September 1994, Unilex.

[9]CLOUT case No. 293 [Arbitration-Schiedsgericht der Hamburger freundschaftlichen Arbitrage, Hamburg, Germany, 29 December 1998] (see full text of the decision).

[10]CLOUT case No. 104 [Arbitration-International Chamber of Commerce no. 7197, 1993] (see full text of the decision).

[11]CLOUT case No. 96 and No. 200 [Tribunal Cantonal Vaud, Switzerland, 17 May 1994] (both abstracts dealing with the same case) (see full text of the decision).

Article 86

(1) If the buyer has received the goods and intends to exercise any right under the contract or this Convention to reject them, he must take such steps to preserve them as are reasonable in the circumstances. He is entitled to retain them until he has been reimbursed his reasonable expenses by the seller.

(2) If goods dispatched to the buyer have been placed at his disposal at their destination and he exercises the right to reject them, he must take possession of them on behalf of the seller, provided that this can be done without payment of the price and without unreasonable inconvenience or unreasonable expense. This provision does not apply if the seller or a person authorized to take charge of the goods on his behalf is present at the destination. If the buyer takes possession of the goods under this paragraph, his rights and obligations are governed by the preceding paragraph.

OVERVIEW

1. Article 86 governs a buyer's obligation to preserve goods if the goods are subject to the buyer's control and the buyer intends to reject them. Article 86 (1) closely parallels for buyers the provisions of article 85 applicable to sellers: article 86 (1) imposes a duty on a buyer who has received goods and intends to reject them to take such steps to preserve them as are reasonable in the circumstances.[1] Furthermore, article 86 (1) gives a rejecting buyer a right to retain rejected goods until the seller reimburses reasonable preservation expenses. If a buyer who intends to reject goods has not "received" them within the meaning of article 86 (1), but the goods have nevertheless reached their destination and been placed at the buyer's disposition, article 86 (2) requires the buyer to take possession of the goods "on behalf of the seller", and the buyer then is subject to the rights and obligations relating to preservation provided for in article 86 (1).

APPLICATIONS

2. Article 86 has been cited or involved in a small number of decisions. Most of those decisions have focused on a buyer's claim for the recovery of expenses of preserving goods that it wished to reject.[2] Thus article 86 has been invoked as the basis for a buyer's recovery of the cost of preserving delivered goods after the buyer justifiably avoided the contract.[3] On the other hand, an avoiding buyer's costs of storing rejected air conditioner compressors have been treated as damages recoverable under article 74 without citation of article 86.[4] A buyer's failure to meet its obligation under article 86 (1) to take reasonable steps to preserve a shipment of non-conforming chemicals (as well as its failure to sell the chemicals as required by article 88 (1)) caused a court to deny, in large part, the buyer's claim for the expenses of nearly three years of warehousing the goods.[5] Finally, a buyer who allegedly received "excess" goods beyond the quantity called for in the contract was found to have an obligation either to return them or pay for them; in response to the buyer's argument that article 86 (1) permits a buyer to retain goods that it intends to reject until the seller reimburses the buyer's expenses of preserving them, the court noted that the buyer had not come forward with any allegation that it had incurred such expenses.[6]

Notes

[1]As was the case with the seller's article 85 obligation to preserve goods, furthermore, a rejecting buyer's duty of preservation is further elaborated in article 87, which permits goods to be preserved by being deposited in a warehouse at the other party's expense, and article 88, which in certain circumstances permits (or even requires) goods to be sold by the party obligated to preserve them.

[2]But see CLOUT case No. 594 [Oberlandesgericht Karlsruhe, Germany 19 December 2002], where the court noted that the buyer's obligation under article 86 to take reasonable steps to preserve goods was limited to periods when the goods were in the buyer's possession, and did not impose on the buyer responsibility for transporting nonconforming goods back to a seller who had agreed to remedy the lack of conformity (see full text of the decision).

[3]CLOUT case No. 304 [Arbitration International Chamber of Commerce No. 7531 1994].

[4]CLOUT case No. 85 [Federal District Court, Northern District of New York, United States, 9 September 1994] (characterizing recovery of preservation costs as “consequential damages”), *affirmed in relevant part* in CLOUT case No. 138 [Federal Court of Appeals for the Second Circuit, United States, 6 December 1993, 3 March 1995] (characterizing recovery of preservation costs as “incidental damages”) (see full text of the decision).

[5]China International Economic and Trade Arbitration Commission (CIETAC), People’s Republic of China, 6 June 1991, Unilex, also available on the Internet at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/910606c1.html.

[6]CLOUT case No. 155 [Cour de Cassation, France, 4 January 1995] (see full text of the decision).

Article 87

A party who is bound to take steps to preserve the goods may deposit them in a warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable.

OVERVIEW

1. In certain circumstances, the CISG imposes upon sellers (article 85) and buyers (article 86) an obligation to take reasonable steps to preserve goods that are within the party's possession or control, along with a right to retain the goods until the party is reimbursed its expenses of preservation. Article 87 specifies one means by which a party can fulfil its obligation to preserve goods: it can store the goods in a third party's warehouse "at the expense of the other party provided that the expense incurred is not unreasonable".

APPLICATION

2. Only a small number of decisions, generally involving a party's claim for reimbursement of the costs of storing goods in a warehouse, have applied article 87. Thus where a buyer refused to take delivery of trucks and the seller deposited them in a warehouse (before eventually reselling them to another buyer), an arbitral tribunal found that the seller's actions were justified under articles 85 and 87; after determining that the warehousing costs were reasonable, it awarded seller compensation for those expenses.[1] Similarly, article 87 has been cited as part of the basis for a buyer's recovery of the cost of storing delivered goods in a warehouse after the buyer justifiably avoided the contract.[2] In another decision, an arbitral tribunal held a breaching buyer liable for the seller's costs of storing the goods in a warehouse, but the tribunal denied the seller's claim for damage to the goods resulting from prolonged storage because risk of loss had not passed to the buyer under applicable rules.[3] Where the buyer had properly avoided the contract, a tribunal denied the seller's claim under article 87 (and article 85) for reimbursement of the expenses of warehousing the goods because the buyer did not breach its obligations.[4] An avoiding buyer's costs of warehousing rejected air conditioner compressors have also been treated as damages recoverable under article 74 without citation of article 87.[5] And where a buyer sought interim relief to prevent re-sale of a key component of industrial machinery that the seller had retained after the buyer failed to make full payment, the court held that the seller could move the component to a warehouse but, because the proceeding involved interim remedies, the seller could not rely on article 87 and would itself have to advance the expenses of depositing the component in the warehouse.[6]

Notes

[1]CLOUT case No. 141 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, award in case No. 192/1994 of 25 April 1995], also in Unilex.

[2]CLOUT case No. 304 [Arbitration—International Chamber of Commerce No. 7531 1994] (see full text of the decision).

[3]CLOUT case No. 104 [Arbitration—International Chamber of Commerce No. 7197 1993] (see full text of the decision).

[4]CLOUT case No. 293 [Arbitration—Schiedsgericht der Hamburger freundschaftlichen Arbitrage, 29 December 1998] (see full text of the decision).

[5]CLOUT case No. 85 [Federal District Court, Northern District of New York, United States, 9 September 1994] (characterizing recovery of preservation costs as "consequential damages" recoverable under article 74) (see full text of the decision), affirmed in relevant part in CLOUT case No. 138 [Federal Court of Appeals for the Second Circuit, United States, 6 December 1993, 3 March 1995] (characterizing recovery of preservation costs as "incidental damages") (see full text of the decision).

[6]CLOUT case No. 96 and No. 200 [Tribunal Cantonal Vaud, Switzerland, 17 May 1994] (both abstracts dealing with the same case) (see full text of the decision).

Article 88

(1) A party who is bound to preserve the goods in accordance with article 85 or 86 may sell them by any appropriate means if there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the price or the cost of preservation, provided that reasonable notice of the intention to sell has been given to the other party.

(2) If the goods are subject to rapid deterioration or their preservation would involve unreasonable expense, a party who is bound to preserve the goods in accordance with article 85 or 86 must take reasonable measures to sell them. To the extent possible he must give notice to the other party of his intention to sell.

(3) A party selling the goods has the right to retain out of the proceeds of sale an amount equal to the reasonable expenses of preserving the goods and of selling them. He must account to the other party for the balance.

OVERVIEW

1. Under article 88 a party who is required by either article 85 or article 86 to preserve the goods for the other side may be entitled or even required to sell the goods to a third party.

ARTICLE 88 (1): A PRESERVING PARTY'S OPTION TO SELL THE GOODS TO A THIRD PARTY

2. In several decisions, a party who was under an obligation to preserve goods was found under article 88 (1) to have the right to sell them to a third party. Where a buyer refused to take delivery of trucks that it had contracted to purchase, triggering the seller's obligation to preserve the goods under article 85, the seller was held to have the right to resell them at the market price when the buyer continued to refuse delivery.[1] And where a buyer rightfully avoided a contract for the sale of scaffold fittings after the goods had been delivered, thus imposing on the buyer an obligation under article 86 to preserve them for the seller, and the seller thereafter refused to take the goods back, the buyer was found to have the right to sell the goods.[2] In another decision, a buyer had rightfully avoided a contract for the sale of jeans after discovering that the delivered goods had various non-conformities; because the buyer had made the jeans available for return to the seller on 22 September 1993 but the seller had not taken them back, the court approved the buyer's sale of the goods, which occurred between April 1995 and November 1996.[3] The court also approved the buyer's actions in disposing of a portion of the jeans that were infected with fungus, and reselling the remainder through "special sales" of second-quality goods, noting that the seller had been notified that the buyer would initiate the sale in order to recoup its costs unless the seller suggested another solution.[4] In another decision, which was reached under applicable domestic law but which the tribunal justified by reference to article 88 of the Convention, an arbitral tribunal also approved a preserving party's decision to dispose of some goods while reselling the remainder: the seller had withheld delivery of equipment because the buyer refused to make payment, and the tribunal asserted that the seller's "right to sell undelivered equipment in mitigation of its damages is consistent with recognized international law of commercial contracts. The conditions of article 88 of the Convention are all satisfied in this case: there was unreasonable delay by the buyer in paying the price and the seller gave reasonable notice of its intention to sell".[5] Specifically, the tribunal found that the seller proved it had taken reasonable measures in reselling the goods by showing that it had sought buyers all over the world and by offering a reasonable explanation for why the goods did not fetch as much as the original contract price; the seller also demonstrated that it had used its best efforts to resell the goods by showing that the part of the equipment the seller decided to scrap could not be resold; with respect to notice, the seller had informed the buyer of its intention to resell, and although it had not notified the buyer of its intention to scrap some equipment, the buyer had never responded to the sales notices—thus it was clear that the buyer was not genuinely interested in receiving delivery of the goods and had not been prejudiced.[6] Failure to satisfy the notice required by article 88 (1), however, has been cited to justify a court's rejection of a freight forwarder's argument that article 88 supported its claim to ownership of goods that it was supposed to deliver to the buyer.[7] On the other hand, a court has held that a seller satisfied the notice requirement of article 88 (1) when it attempted to communicate its intention to resell to the buyer by fax (and by telephone); because the fax was sent to the correct number (and thus, under article 27, was effective even if it did not arrive), and the 14 days the seller gave the buyer to take delivery of the goods was reasonable under article 88 (1).[8]

3. Other decisions have suggested limits to the authorization to resell given by article 88 (1). Thus where a seller had withheld delivery of one component of machinery because the buyer had paid only part of the price,[9] and the buyer sought interim relief in the form of an order preventing the seller from selling the component to any third party, the court issued the order; it recognized that article 88 (1) authorized the seller to resell the goods if the buyer had unreasonably delayed paying the price, but the court held that it was not bound by article 88 in an action for interim relief.[10] And an arbitral tribunal has found that a seller was only authorized to resell undelivered goods under article 88 (1) (and thus to recover the expenses of preserving and reselling the goods) if the buyer had breached its obligation to pay the sale price or take delivery; in the case at hand it was the seller who fundamentally breached and the buyer that rightfully avoided the contract; thus the tribunal concluded that the seller was not entitled to proceed under article 88 (1).[11]

ARTICLE 88 (2): A PRESERVING PARTY'S OBLIGATION TO TAKE REASONABLE MEASURES TO SELL THE GOODS TO A THIRD PARTY

4. The article 88 (2) obligation to take reasonable measures to resell goods, which is imposed on a party required to preserve goods under article 85 or 86 if the goods are subject to rapid deterioration or their preservation would involve unreasonable expense, was deemed violated where an aggrieved buyer deposited goods that it had received under an avoided contract (and was attempting to return to the seller) in a warehouse, where they remained for almost three years accumulating storage charges: an arbitral tribunal concluded that the buyer had failed to meet its article 88 (2) resale obligation, which was triggered when the storage fees (eventually totalling almost the contract price for the goods) reached unreasonable levels; as a result of the buyer's violation of article 88 (2), the tribunal denied the greater part of the buyer's claim against the seller for the expenses of preservation.[12] On the other hand, several decisions have involved circumstances that were deemed not to trigger an obligation under article 88 (2) to attempt to resell goods. Thus in issuing an interim order forbidding an aggrieved seller from reselling a key component of industrial machinery that the seller had retained because the buyer failed to pay the full contract price, a court noted that article 88 (2) would not require the seller to sell the component because it was not subject to rapid deterioration.[13] And an aggrieved seller that rightfully withheld delivery of venison when the buyer refused to make payment was found not to be obligated to sell the goods under article 88 (2) "because the meat in question could be preserved through freezing, because the cost of such preservation did not exceed 10 per cent of the value of the meat, and because the decrease in prices in venison to be expected after the Christmas holidays does not constitute a deterioration" in the meaning of article 88 of the Convention.[14]

ARTICLE 88 (3): DISPOSITION OF THE PROCEEDS OF SALE

5. Several decisions have dealt with the rules in article 88 (3) that govern how proceeds of a sale conducted under the authority of article 88 are to be allocated between the parties. According to article 88 (3), a party that has sold goods pursuant to article 88 has the right to retain from the sale proceeds "an amount equal to the reasonable expenses of preserving the goods and selling them", but must "account to the other party for the balance". In one case an arbitral tribunal, applying domestic law but also supporting its decision by reference to article 88 (3), found that an aggrieved seller who had justifiably resold the goods to a third party could deduct from sale proceeds the expenses it incurred in carrying out the sale, with the balance to be credited against the buyer's liability under the contract: the tribunal found that the seller had adequately documented and proved such costs, and the buyer had not substantiated its objections to the documentation.[15] Similarly, a buyer who rightfully avoided the contract and justifiably sold the goods after the seller refused to take them back was found to have adequately documented the total profit the buyer gained from the sale, and the seller failed to make specific objection to the documentation; the buyer, however, was denied the right to deduct certain other expenses (agent costs and carriage costs) because the buyer failed to prove it was entitled to such deductions.[16] In the same decision, furthermore, the court found that the breaching seller's claim under article 88 (3) for the balance of the sale proceeds was subject to set-off by the buyer's claim for damages under articles 45 and 74: although article 88 (3) expressly mentions only a selling party's right to deduct reasonable costs of preserving and selling the goods from the sale proceeds, the court suggested that the Convention contained a general principle within the meaning of article 7 (2) that permitted reciprocal claims arising under the Convention (here, the buyer's claims for damages and the seller's claim for the balance of the sale proceeds) to be offset; the court refused, however, to declare whether the buyer's right in this case to set off its damage claim against its liability for the balance of sale proceeds was derived directly from the Convention, or was based on applicable domestic law that led to the same result.[17]

Notes

[1]CLOUT case No. 141 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, award in case No. 192/1994 of 25 April 1995], also in Unilex.

[2]CLOUT case No. 304 [Arbitration—International Chamber of Commerce No. 7531 1994] (see full text of the decision).

[3]CLOUT case No. 348 [Oberlandesgericht Hamburg, Germany, 26 November 1999] (see full text of the decision).

[4]*Id* (see full text of the decision).

[5]Iran/US Claims Tribunal, 28 July 1989, (*Watkins-Johnson Co., Watkins-Johnson Ltd. v. Islamic Republic of Iran, Bank Saderat Iran*), Unilex.

[6]*Id.*

[7]CLOUT case No. 485 [Audiencia Provincial de Navarra, Spain, 22 January 2003].

[8]CLOUT case No. 540 [Oberlandesgericht Graz, Austria, 16 September 2002.

[9]Despite the buyer's partial payment, the seller had not avoided the contract and thus was presumably obliged to preserve the goods pursuant to article 85.

[10]CLOUT case No. 96 and No. 200 [Tribunal Cantonal Vaud, Switzerland, 17 May 1994] (both abstracts dealing with the same case).

[11]CLOUT case No. 293 [Arbitration—Schiedsgericht der Hamburger freundschaftlichen Arbitrage, 29 December 1998] (see full text of the decision).

[12]China International Economic and Trade Arbitration Commission (CIETAC), People's Republic of China, 6 June 1991, Unilex, also available on the Internet at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/910606c1.html. The tribunal also noted that resale by the buyer pursuant to article 88 (2) would have avoided or reduced the deterioration in the condition of the goods (chemicals) that occurred during the lengthy storage period.

[13]CLOUT case No. 96 and No. 200 [Tribunal Cantonal Vaud, Switzerland, 17 May 1994] (both abstracts dealing with the same case) (see full text of the decision).

[14]CLOUT case No. 361 [Oberlandesgericht Braunschweig, Germany, 28 October 1999] (see full text of the decision).

[15]Iran/US Claims Tribunal, 28 July 1989, (*Watkins-Johnson Co., Watkins-Johnson Ltd. v. Islamic Republic of Iran, Bank Saderat Iran*), Unilex.

[16]CLOUT case No. 348 [Oberlandesgericht Hamburg, Germany, 26 November 1999] (see full text of the decision).

[17]*Id.* (see full text of the decision).

Part four

FINAL PROVISIONS

OVERVIEW

1. Part IV is the last division of the Convention. It contains what can be characterized as the public international law provisions of the Convention—i.e., provisions directed primarily to the sovereign states that are or may become Contracting States to the Convention. The provisions of Part IV address the following matters: the designated depositary for the Convention (article 89); the relationship between the Convention and other international agreements containing "provisions concerning the matters governed by this Convention" (article 90); signature, ratification, acceptance and approval of, and accession to, the Convention (article 91); declarations that a Contracting State is not bound by Part II or by Part III of the Convention (article 92); declarations with respect to territorial units of a Contracting State (federal state clause) (article 93); declarations excluding application of the Convention to contracts of sale between states with "the same or closely related legal rules on matters governed by this Convention" (article 94); declarations that a Contracting State is not bound by article 1 (1) *(b)* of the Convention (article 95); declarations that Convention rules which dispense with requirements of written form do not apply when a party is located in a declaring Contracting State (article 96); the process for making and withdrawing a declaration, and the effective date thereof (article 97); limiting permitted declarations to those expressly authorized in the Convention (article 98); when the Convention enters into force with respect to a Contracting State (effective date), and denunciation of predecessor conventions (article 99); the timing of contracts of sale and offers therefor in relation to application of the Convention (article 100); denunciation of the Convention (article 101).

DISCUSSION OF PART IV ELSEWHERE IN THIS DIGEST

2. Because of the nature of the provisions in Part IV this Digest does not separately address the individual articles thereof. Nevertheless, several Part IV provisions—including those authorizing particular declarations (articles 92-96) and those addressing matters of timing in relation to the Convention's applicability to a transaction (articles 99-100)—impact the application of substantive sales law rules in prior parts of the Convention. The following list catalogues discussions of Part IV and individual provisions thereof that appear elsewhere in this Digest.

Part IV as a whole: See para. 1 footnote 1 of the Digest for Part III, Chapter V.

Article 92: See para. 3 of the Digest for Part I; para. 19 of the Digest for article 1; para. 3 of the Digest for Part II; para. 1 of the Digest for article 14; para. 2 of the Digest for Part III.

Article 93: See para. 3 of the Digest for Part I; para. 19 of the Digest for article 1.

Article 94: See para. 4 of the Digest for Part II; para. 2 of the Digest for Part III.

Article 95: See para. 3 of the Digest for Part I; para. 23 of the Digest for article 1.

Article 96: See para. 3 of the Digest for Part I; para. 7 of the Digest for article 11; the Digest for article 12 *passim*; para. 9 of the Digest for Part II; para. 5 of the Digest for article 29.

Article 99: See para. 3 of the Digest for Part I; para. 19 of the Digest for article 1.

Article 100: See para. 3 of the Digest for Part I; para. 19 of the Digest for article 1; para. 1 of the Digest for Part II; para. 1 of the Digest for Part 3.

Authentic Text and Witness Clause

DONE at Vienna, this day of eleventh day of April, one thousand nine hundred and eighty, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by the respective Governments, have signed this Convention.

OVERVIEW

1. The clause quoted above is the final clause of the Convention. It identifies the date and place at which the final text of the Convention was approved (11 April 1980, in Vienna), declares that the text constitutes a "single original" in the six official language of the United Nations, proclaims that the texts in each of these languages "are equally authentic", and introduces the signatures of the witnesses to the approved text.

DISCREPANCIES IN THE DIFFERENT LANGUAGE VERSIONS

2. Textual discrepancies among the six different language versions in which the Convention was approved (Arabic, Chinese, English, French, Russian and Spanish), each of which is declared "equally authentic" by the clause quoted above, are possible; differences in shades of meaning among the different language versions are, given the nature of language, perhaps inevitable. Article 33 of the United Nations Convention on the Law of Treaties (1969), which is entitled "interpretation of treaties authenticated in two or more languages", addresses how such discrepancies and differences should be resolved should they arise. Article 33 (1) of this Convention affirms the language of the Convention clause quoted above which declares each of the different language versions "equally authentic": "When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaties provide or the parties agree that, in case of divergence, a particular text shall prevail." Article 33 (4) of the Law of Treaties Convention addresses the resolution of discrepancies among equally authoritative treaty texts: "Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 [containing rules on the interpretation of treaties] does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted."

NOTES FOR AUTHENTIC TEXT AND WITNESS CLAUSE SECTION OF REVISED DIGEST

Schlechtriem makes the argument for using the English (and French) text to resolve discrepancies in different language version at p. 21 (Intro to art. 1-6, paras 29 & 30) and on p. 940 (Witness clause discussion para 4).

From Malcolm Evans: "Every effort was made at the Vienna Conference to ensure the concordance of the six language versions and it is to be hoped that no discrepancies will be found. Since, however, such a possibility cannot be excluded *a priori*, it may be recalled that Article 33 (4) of the United Nations Convention on the Law of Treaties provides that when a comparison of the authentic texts [page 677] discloses a difference of meaning which the application of the general rule of interpretation (Article 31) and supplementary rules of interpretation (Article 32) do not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted."

Article 33 of the United Nations Convention on the Law of Treaties (1969) is entitled "interpretation of treaties authenticated in two or more languages". It provides "When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaties provide or the parties agree that, in case of divergence, a particular text shall prevail." (article 33 (1)) "Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 [containing rules on the interpretation of treaties] does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted."

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Cour d'appel de Versailles, 29 January 1998	(Giustina International (SpA) v. Perfect Circle Europe (formerly Floquet Monopole (SARL))	39 46 47 49	19, 110, 180 19, 24 14 41	CLOUT case No. 225
Cour d'appel de Paris, 4 March 1998	(Société Laborall v. SA Matis)	1 30 31 35 45	45 2 4, 6, 21 53 17	CLOUT case No. 244
Cour d'appel de Paris, 18 March 1998	(Société Franco-Africaine de distribution textile v. More and More Textilfabrik GmbH)	1 31 35 45	45 4, 6, 21 53 16	CLOUT case No. 245
Cour d'appel de Grenoble, 4 February 1999	(SARL Ego Fruits v. La Verja)	1 25	45 29	CLOUT case No. 243
Cour d'appel de Paris, 21 May 1999	(S.A. JCP Industrie v. ARIS Antrieb und Steuerungen GmbH)	1	45	CLOUT case No. 314
Cour d'appel de Grenoble, 21 October 1999	(Société Calzados Magnanni v. SARL Shoes General International (SGI))	1 3 8 9 18 25 49 74 84	45 4 12 13 19, 21 27 33 23 1	CLOUT case No. 313
Cour d'appel de Colmar, 24 October 2000	(S.a.r.l. Pelliculest/S.A. Rhin et Moselle Assurances v. GmbH Morton International/Société Zurich Assurances)	1 10	51 5	CLOUT case No. 400
Cour d'appel d'Orléans, 29 March 2001	(Société TCE Diffusion S.a.r.l. v. Société Elettrotecnica Ricci)	1	45	CLOUT case No. 398
Cour d'appel de Colmar, 12 June 2001	(Romay AG v. SARL Behr France)	1 53 77 79	12 2 34 9, 16, 53, 68, 81	CLOUT case No. 480
Cour d'appel de Paris, 14 June 2001	(Aluminium and Light Industries Company (ALICO Ltd.) v. SARL Saint Bernard Miroiterie Vitrerie)	3 35 36 49	10 52 14 3, 36, 39	CLOUT case No. 481
Cour d'appel de Paris, 6 November 2001	(Traction Levage SA v. Drako Drahtseilerei Gustav Kocks GmbH)	4 6 7 12 38 39	40 20 18 3 41, 58, 67 98	CLOUT case No. 482

Case	*Parties*	*Article*	*Footnote*	*Remarks*
District Courts				
Tribunal Grande Instance de Colmar, 18 December 1997	(Société Romay AG v. Société Behr France SARL)	1	45	
Special Courts				
Tribunal Commercial de Paris, 28 October 1997	(SA Matis v. Societé Laborall)	1	45	
Tribunal de commerce Besancon, 19 January 1998	(Flippe Christian v. SARL Douet Sport Collections)	1 79	45 8, 13, 20, 22, 35, 56, 60, 73, 81, 85, 102	
Tribunal de commerce Montargis, 6 October 2000	(Société TCE Diffusion S.a.r.l. v. Société Elettrotecnica Ricci)	1	45	
FORMER YUGOSLAVIA				
Arbitration				
Yugoslav Chamber of Economy, Arbitration Proceeding, 15 April 1999, award No. T-23/97		2	11	
GERMANY				
Federal High Court of Justice				
Bundesgerichtshof, 15 February 1995		4 26 49 72 80	37 18 37 1, 19 10, 11, 23, 30	CLOUT case No. 124
Bundesgerichtshof, 3 April 1996		1 7 25 34 46 49 58 72	45 3 17, 25, 30 3, 8 10 1, 19, 29, 44 7 1	CLOUT case No. 171
Bundesgerichtshof, 4 December 1996		1 6 35 38 39 81	45 3 12 15 41, 60, 67, 86, 173 11, 12	CLOUT case No. 229
Bundesgerichtshof, 11 December 1996		1 8 31 45	44, 45 12, 36 3, 4, 24 17	CLOUT case No. 268

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Bundesgerichtshof, 5 February 1997		61	5	
Bundesgerichtshof, 25 June 1997		1	45	CLOUT case No. 235
		26	13, 16	
		38	18	
		39	42	
		48	1	
		51	6, 12	
		61	6	
		74	30, 81	
		77	25	
		81	8	
		82	13, 16	
Bundesgerichtshof, VIII ZR 134/96, 23 July 1997		1	45	CLOUT Case No. 236
		6	20	
		14	36	
		45	2	
		53	4	
Bundesgerichtshof, 23 July 1997		6	9	CLOUT case No. 231
Bundesgerichtshof, 12 February 1998		1	10, 45	CLOUT case No. 269
		4	36, 45	
Bundesgerichtshof, 25 November 1998		1	45	CLOUT case No. 270
		6	20	
		8	5, 27	
		38	18, 31, 33	
		39	8, 45, 120, 123	
		40	5, 15	
		44	5	
		80	1	
Bundesgerichtshof, 24 March 1999		1	45	CLOUT case No. 271
		7	4	
		35	47	
		77	4, 20	
		79	7, 9, 14, 18, 28, 31, 56, 58, 76, 82, 89, 96	
Bundesgerichtshof, 3 November 1999		1	45	CLOUT case No. 319
		38	27, 36, 41, 43, 78	
		39	60, 62, 63, 69, 71, 108, 122, 183	
Bundesgerichtshof, 31 October 2001		1	34, 36	CLOUT Case No. 445
		2	2, 8	
		7	20, 23	
		8	49	
		Part II	16, 17, 20, 21, 22	
Bundesgerichtshof, 9 January 2002		4	12	
		7	20, 33	
		19	16, 17	
		74	90	
		79	19, 32, 91, 92	

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Regional Appellate Courts				
Oberlandesgericht Koblenz, 23 February 1990	n/a	1	68	
Oberlandesgericht Frankfurt a. M., 13 June 1991	n/a	1	60	CLOUT case No. 1
		58	2	
		78	5, 17, 29	
Oberlandesgericht Celle, 2 September 1991	n/a	1	45	CLOUT case No. 318
		Part II	18	
		15	1	
		53	4	
		Part III, Chap. V, Sect. II	21	
		74	7, 41, 46, 48, 89, 95	
		76	12, 23	
		77	21, 43	
Oberlandesgericht Frankfurt a. M., 17 September 1991	n/a	1	51	CLOUT case No. 2
		3	7	
		25	1, 28	
		30	1	
		46	4	
		48	1	
		49	5, 34	
		81	7, 8	
		82	9	
Oberlandesgericht Koblenz, 27 September 1991	n/a	1	51, 60	CLOUT case No. 316
		82	8, 15, 18, 21	
Oberlandesgericht Köln, 27 November 1991	n/a	1	35	
Oberlandesgericht Koblenz, 16 January 1992	n/a	4	31	CLOUT case No. 226
		30	4	
Oberlandesgericht Hamm, 22 September 1992	n/a	1	22, 51	CLOUT case No. 227
		Part II	33	
		18	9, 10	
		19	5	
		61	2	
		64	6	
		71	21	
		Part III, Chap. V, Sect. II	3	
		75	6, 19	
		76	6	
		77	31	
		78	29	
Oberlandesgericht Karlsruhe, 20 November 1992		1	51, 61	CLOUT case No. 317
		6	1	
		8	30	
		31	25	
		Part III, Chap. IV	12, 14, 15, 16, 17, 23	
		66	3	
		67	8, 14	

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Oberlandesgericht Düsseldorf, 8 January 1993		1	51, 54	CLOUT case No. 48
		6	20	
		38	3, 41	
		39	3, 50, 104, 172	
		50	7	
		51	3, 10, 11	
Oberlandesgericht Saarbrücken, 13 January 1993		1	51	CLOUT case No. 292
		6	8	
		9	21	
		Part II	30	
		18	13	
		38	17, 33, 35, 91	
		39	34, 36, 39, 147	
		44	12, 14	
Oberlandesgericht Düsseldorf, 12 March 1993		1	51	CLOUT case No. 310
		39	43, 92, 94, 95, 112, 124, 153	
Oberlandesgericht Düsseldorf, 2 July 1993		1	51	CLOUT case No. 49
		5	2	
		6	17	
		7	26	
		57	10	
		Part III, Chap. V, Sect. II	21	
		74	20, 43, 45, 47, 92	
Oberlandesgericht Koblenz, 17 September 1993		1	12, 14, 15, 26, 29, 51, 54	CLOUT case No. 281
		4	38	
		6	20	
		7	46	
		53	4	
		54	4	
		59	2	
		61	3	
		Part III, Chap. V, Sect. II	19	
		74	9, 33	
		78	11, 17, 29	
Oberlandesgericht Düsseldorf, 18 November 1993		80	9, 11, 23, 30	
Oberlandesgericht Düsseldorf, 14 January 1994		25	6	CLOUT case No. 130
		64	3	
		71	36	
		72	10, 18, 20	
		Part III, Chap. V, Sect. II	4	
		74	9, 28, 57, 62, 69	
		75	5, 24, 28, 29, 32	
		76	5	
		77	7, 8, 31	
		78	11	

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Oberlandesgericht Frankfurt a. M., 18 January 1994		25	19	CLOUT case No. 79
		35	4, 31	
		46	12	
		49	21	
		58	2	
		59	3	
		60	3	
		78	5, 10, 11, 12, 16, 17, 29	
		81	11, 13	
Kammergericht Berlin, 24 January 1994		1	37, 51	CLOUT case No. 80
		4	24, 53	
		7	48	
		54	4	
		78	29	
Oberlandesgericht Düsseldorf, 10 February 1994 [6 U 32/93]		1	50, 59, 60	CLOUT case No. 81
		38	3, 11, 33, 41, 44, 45, 47, 55, 76	
		39	14, 94, 95, 98, 104, 112, 124, 148	
		78	29	
		81	11, 12	
Oberlandesgericht Düsseldorf, 10 February 1994 [6 u 119/93]		25	28	CLOUT case No. 82
		45	13	
		46	5	
		40	18	
		51	5, 15	
		74	17	
		78	29	
		82	7, 20	
		83	5	
Oberlandesgericht Köln, 22 February 1994		1	51	CLOUT case No. 120
		6	20	
		11	4	
		Part II	3	
		18	3, 22	
		29	3, 4, 5	
		38	25, 53, 90	
		39	26, 177	
		47	5	
Oberlandesgericht München, 2 March 1994		26	18	CLOUT case No. 83
		45	13	
		49	37	
		50	9	
		78	17, 29	
		81	11, 12, 13	
Oberlandesgericht Frankfurt a. M., 4 March 1994		Part II	8	CLOUT case No. 121
		14	1	
		18	5	
Oberlandesgericht Frankfurt a. M., 20 April 1994		1	2	CLOUT case No. 84
		4	51	
		7	2, 6	
		26	18	
		35	8, 29	
		78	28	

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Oberlandesgericht Oldenburg, 1 February 1995		Part II	26	CLOUT case No. 165
		48	1	
		49	40	
		81	28	
		84	18	
Oberlandesgericht Hamm, 8 February 1995		4	36	CLOUT case No.132
		8	53	
		Part II	24, 36	
		24	3	
		27	4	
		74	9	
		78	16, 29, 36	
Oberlandesgericht München, 8 February 1995 [7 U 1720/94]		1	11	CLOUT case No. 133
		Part II	2	
		18	2	
		19	6	
		49	35	
		53	4	
		62	2	
		77	32	
		80	6, 13, 25, 29	
		84	1, 4, 6, 7	
Oberlandesgericht München, 8 February 1995		3	2	CLOUT case No. 167
		6	20	
		38	25, 28	
		39	114, 129, 146	
		44	10, 14, 17	
		77	17	
Oberlandesgericht Frankfurt a. M., 31 March 1995		14	20	CLOUT case No. 135
		18	7	
		19	5	
		62	3	
Oberlandesgericht Frankfurt a. M., 23 May 1995		14	27	CLOUT case No. 291
		15	1	
		18	1, 12, 25	
		19	5	
		39	14	
Oberlandesgericht Celle, 24 May 1995		6	11, 26	CLOUT case No. 136
		7	20	
		25	5, 8	
		47	6, 8	
		49	10, 12	
		78	29	
		81	3, 27	
		84	1, 6, 7, 13	
Oberlandesgericht Hamm, 9 June 1995		4	38, 40	CLOUT case No. 125
		6	20, 25	
		7	46	
		45	6	
		46	20	
		48	8	
		73	20, 36, 94	
Oberlandesgericht München, 28 June 1995		57	5	

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Oberlandesgericht Frankfurt a. M., 5 July 1995		1	51	CLOUT case No. 276
		9	37	
		Part II	27, 32, 34	
Oberlandesgericht Rostock, 27 July 1995		1	48	CLOUT case No. 228
		Part II	5	
		58	2	
		74	56	
		78	29	
Oberlandesgericht Stuttgart, 21 August 1995		4	38	CLOUT case No. 289
		7	46	
		39	14, 122	
Oberlandesgericht Frankfurt a. M., 15 March 1996		6	9, 23	
		14	36	
Oberlandesgericht Köln, 21 May 1996		1	19, 21, 31, 45	CLOUT case No. 168
		7	55	
		35	7, 15, 39	
		40	8, 44	
		45	13	
		74	42, 67, 84	
Oberlandesgericht Düsseldorf, 11 July 1996		1	12, 14, 45	CLOUT case No.169
		4	38	
		7	46	
		53	4	
		61	2	
		74	57	
Oberlandesgericht Düsseldorf, 13 September 1996		1	45	
Oberlandesgericht Köln, 8 January 1997		1	45	CLOUT case No. 311
		6	1	
		31	21, 25	
		61	4	
		71	9	
		74	39	
		77	12	
		80	4, 18, 21	
Oberlandesgericht Koblenz, 31 January 1997		1	45	CLOUT case No. 282
		8	6	
		14	36	
		25	24	
		35	6	
		39	3, 10, 60, 63, 89	
		46	17	
		48	9	
		49	2, 5, 27, 34, 38	
		50	10	
		74	17	
		78	29	
		80	3, 16, 28, 29	

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Oberlandesgericht Hamburg, 28 February 1997		7	20, 21	CLOUT case No. 277
		25	13	
		47	13	
		49	15	
		75	12, 15	
		77	9	
		79	2, 9, 14, 27, 48, 54, 57, 61, 63, 65, 103	
Oberlandesgericht Düsseldorf, 24 April 1997		1	45	CLOUT case No. 275
		4	38	
		7	46	
		25	4, 7, 12, 15	
		47	12	
		49	9, 11, 14	
		51	14	
		53	4	
		59	3	
		71	22	
		78	16	
Oberlandesgericht Karlsruhe, 25 June 1997		1	45	CLOUT case No. 230
		4	49	
		6	1, 20	
		7	3, 24	
		Part II	20	
		38	9, 31, 33, 39, 47, 60, 73, 77	
		39	8, 120, 123, 154, 171	
		40	5, 15, 16, 17, 19	
		44	4, 14	
		80	1	
Oberlandesgericht Hamburg, 4 July 1997		14	9, 24	
		47	3	
		76	20	
		79	2, 14, 27, 44, 61, 67, 85	
Oberlandesgericht München, 9 July 1997		1	12, 14, 45	CLOUT case No. 273
		4	38, 39	
		6	11	
		8	22	
		39	9, 88	
		44	14	
		50	7, 8	
		53	4	
		57	1, 5	
		59	1	
		62	3	
		Part III, Chap. V, Sect. II	21	
		74	95	
		80	6, 12, 24, 29	
Oberlandesgericht Köln, 9 July 1997		1	51	CLOUT case No. 283
		Part III, Chap. IV	13, 22	
		66	3	
		67	7, 11	
		69	2	

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Oberlandesgericht München, 9 July 1997		1	45	CLOUT case No. 287
		3	9	
		6	20	
		57	5	
Oberlandesgericht Köln, 21 August 1997		1	45	CLOUT case No. 284
		38	7, 10, 40, 50, 59, 61, 77	
		39	50, 113, 125, 131, 160	
		57	5	
		77	19	
		81	11, 13	
Oberlandesgericht Hamm, 5 November 1997		1	12, 14, 45	CLOUT case No. 295
		50	13	
		81	35	
Oberlandesgericht München, 28 January 1998		1	45	CLOUT case No. 288
		53	4	
		Part III, Chap. V, Sect. II	19	
		74	53, 93	
		81	3, 32	
Oberlandesgericht München, 11 March 1998		1	45	CLOUT case No. 232
		4	38	
		7	46	
		Part II	16	
		18	10	
		19	16, 18	
		38	23, 32, 33	
		39	9, 10, 32, 34, 35, 117, 135, 144	
		40	5, 14, 28	
Oberlandesgericht Zweibrücken, 31 March 1998		1	45	CLOUT case No. 272
		Part II	16, 20	
		35	24	
		79	14, 17, 30, 59, 75, 82, 88, 95	
Oberlandesgericht Jena, 26 May 1998		1	22, 45	CLOUT case No. 280
		38	34, 52, 81	
		39	120, 169	
		44	13, 14	
		Part III, Chap. V, Sect. II	21	
		74	17, 95	
Oberlandesgericht Saarbrücken, 3 June 1998		1	45	CLOUT case No. 290
		38	16, 44, 48	
		39	14, 76, 123, 127, 161	

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Oberlandesgericht Hamm, 23 June 1998		1	45	CLOUT case No. 338
		4	44	
		6	1	
		31	19	
		33	1, 4, 10	
		Part III, Chap. IV	4, 21	
		66	1, 2	
		68	1	
		69	7	
		71	12, 16, 30	
Oberlandesgericht Dresden, 9 July 1998		9	18, 27	CLOUT case No. 347
		Part II	2, 27	
		18	2, 20	
Oberlandesgericht Bamberg, 19 August 1998		1	45	
Oberlandesgericht Koblenz, 11 September 1998		1	45	CLOUT case No. 285
		38	24, 33, 59, 71	
		39	105, 119, 156	
		40	5, 27, 32	
		44	9, 12, 14, 15	
Oberlandesgericht Oldenburg, 22 September 1998		1	45	CLOUT case No. 340
		30	2	
		31	22	
		53	4	
		Part III, Chap. IV	5, 19	
		66	1, 2	
		69	8	
Oberlandesgericht München, 21 October 1998		1	11, 12, 45	CLOUT case No. 297
		4	40	
		6	20	
		7	20	
		59	1	
Oberlandesgericht Celle, 11 November 1998		1	51	CLOUT case No. 274
		57	5, 13	
Oberlandesgericht Bamberg, 13 January 1999		1	51	CLOUT case No. 294
		26	2, 5	
		74	16, 78, 89, 91	
		75	12, 30	
Oberlandesgericht Naumburg, 27 April 1999		1	45	CLOUT case No. 362
		Part II	8, 16	
		19	12	
		27	8, 10	
		33	13, 14, 20	
		47	7, 8, 9	
		75	13	
Oberlandesgericht Braunschweig, 28 October 1999		Part II	19	CLOUT case No. 361
		77	7, 35	
		85	3, 4, 5, 6, 8	
		88	14	

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Oberlandesgericht Koblenz, 18 November 1999		1	45	CLOUT Case No. 359
		38	26, 59, 71	
		39	121, 153	
Oberlandesgericht Hamburg, 26 November 1999		1	51	CLOUT case No. 348
		7	45	
		45	13	
		49	43	
		61	6	
		Part III, Chap. V, Sect. II	6, 21	
		74	68, 90, 95	
		76	4	
		81	8, 15	
		88	3, 16	
Oberlandesgericht München, 3 December 1999		1	45	CLOUT case No. 430
		15	1	
		31	5, 26	
Oberlandesgericht Dresden, 27 December 1999		1	30	
		6	11	
		8	26	
		71	11, 24	
		78	28	
Hanseatisches Oberlandesgericht Hamburg, 26 January 2000		1	45	
Oberlandesgericht Stuttgart, 28 February 2000		1	32, 45	
		3	2	
		Part II	34	
		14	3	
		78	29	
Oberlandesgericht Frankfurt a. M., 30 August 2000		1	45	CLOUT case No. 429
		6	20, 23	
		8	4, 12, 19	
		14	3	
		18	5, 12	
Oberlandesgericht Köln, 13 November 2000		1	38	
Oberlandesgericht Oldenburg, 5 December 2000		1	45	CLOUT case No. 431
Saarländisches Oberlandesgericht Saarbrücken, 14 February 2001		3	2	
Oberlandesgericht Stuttgart, 28 February 2001		10	6	
Oberlandesgericht Köln, 16 July 2001		8	19	CLOUT case No. 607
Oberlandesgericht Karlsruhe, 19 December 2002		26	15	CLOUT case No. 594
		31	7	
		Part III, Chap. IV	27	
		82	12	
		84	6, 7	
		86	2	

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Oberlandesgericht Karlsruhe, 6 March 2003		39	20, 59, 66, 73, 94, 112, 113, 116, 127, 179	CLOUT case No. 593
Oberlandesgericht Zweibrücken, 2 February 2004		39	139	CLOUT case No. 596
		40	10, 12, 24, 35, 40	
		44	8, 4, 19	
		74	20	
		79	86, 90	
Oberlandesgericht Celle, 10 March 2004		39	6, 57, 65	CLOUT case No. 597
		40	11	
		44	20	
		49	25	
Oberlandesgericht München, 15 September 2004		7	15	CLOUT case No. 595
		25	8	
		26	2	
		55	9	
		76	18, 22	
Regional Courts				
Landgericht Aachen, 3 April 1989	n/a	1	68	CLOUT case No. 46
		38	64	
		39	9, 174	
		53	2	
		59	1	
Landgericht München I, 3 July 1989	n/a	1	68	CLOUT case No. 3
		39	50, 52, 79	
Landgericht Frankfurt, a. M., 2 May 1990	n/a	1	61, 68	
Landgericht Hildesheim, 20 July 1990	n/a	1	68	
Landgericht Stuttgart, 31 August 1990	n/a	1	68	CLOUT case No. 4
		38	4, 23, 32, 33, 37, 77	
		39	22, 24, 66, 74, 98, 104, 159	
		78	30	
Landgericht Hamburg, 26 September 1990	n/a	1	11, 37, 68	CLOUT case No. 5
		4	7	
Landgericht Bielefeld, 18 January 1991	n/a	39	6, 65, 175	
		9	33	
		Part II	34	
		14	3	
		23	1	
		29	7	
		78	10, 29	
Landgericht Stuttgart, 13 August 1991	n/a	7	42	
		27	2, 8, 9	

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Landgericht Baden-Baden, 14 August 1991	n/a	1 19 35 39 51 61 74	62 15 47, 51 8, 11, 32, 36 4, 10 6 17	CLOUT case No. 50
Landgericht Frankfurt a. M., 16 September 1991	n/a	1 26 49 78	61 6, 10, 12, 17, 18 2 30	CLOUT case No. 6
Landgericht Mönchengladbach, 22 May 1992	n/a	38 39 59	59, 71 119, 152 3	
Landgericht Heidelberg, 3 July 1992	n/a	1 78	27 29	
Landgericht Düsseldorf, 9 July 1992	n/a	80	8, 11, 23, 30	
Landgericht Berlin, 16 September 1992		39	99, 125, 145, 157	
Landgericht Berlin, 30 September 1992	n/a	72 75	5, 10 29	
Landgericht Berlin, 6 October 1992	n/a	59 74 77	3 9 27	
Landgericht Krefeld, 24 November 1992		15 81	1 8, 25, 29	
Landgericht Frankfurt a. M., 9 December 1992		39	21, 181	
Landgericht Verden, 8 February 1993		78	29	
Landgericht Landshut, 5 April 1993		39	118	
Landgericht Krefeld, 28 April 1993		72	10	
Landgericht Aachen 14 May 1993		4 31 60 61 63 74 79	6, 35 17 2 2 5 84 5	CLOUT case No. 47
Landgericht Aachen, 28 July 1993		39	26	
Landgericht Berlin, 30 September 1993		39	125	

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Landgericht Köln,		38	51, 58, 72	
11 November 1993		39	134, 156	
Landgericht Hannover,		39	33, 57, 84	
1 December 1993		59	1	
Landgericht Memmingen,		3	2	
1 December 1993		11	14	
Landgericht Düsseldorf,		38	43, 54, 55, 60, 64	
23 June 1994		39	105, 109, 139	
Landgericht Gießen,		6	7	
5 July 1994		39	33	
		78	29	
Landgericht Frankfurt,		1	62	
6 July 1994		4	14	
		7	34	
		9	40	
Landgericht Kassel,		78	12, 16	
14 July 1994				
Landgericht Düsseldorf,		1	51, 60	
25 August 1994		4	17, 21	
		35	42	
		77	27	
		78	29	
Landgericht Berlin,		35	21, 32	
15 September 1994		71	13, 14, 15, 31	
		77	6	
Landgericht Oldenburg,		3	2	
9 November 1994		46	22	
		78	15, 29	
Landgericht München I,		1	28	CLOUT case No. 131
8 February 1995		14	10, 15	
		39	91	
Landgericht Oldenburg,		78	29	
15 February 1995				
Landgericht München,		4	38	
20 March 1995		7	45	
		39	63, 85	
		61	6	
		78	29	
		81	11, 12	
Landgericht Landshut,		6	14, 25	
5 April 1995		25	19	
		38	1, 44, 74, 83, 85	
		39	3, 6, 125, 158	
		40	3, 4, 5, 16, 20, 26, 31, 32, 37	
		46	12	
		49	21	
		61	6	
		78	29	
		81	24, 28, 33, 39	
		84	1, 2, 6, 7, 13	

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Landgericht Alsfeld, 12 May 1995		1	37	CLOUT case No. 410
		14	36	
		59	3	
		74	57, 65	
		77	27	
		78	29	
		79	9, 16, 25, 50	
Landgericht München, 29 May 1995		1	27	
		6	11	
		Part II	18	
Landgericht Kassel, 22 June 1995		1	37, 52	
		78	29, 30, 38	
		79	29	
Landgericht Aachen, 20 July 1995		7	6	
		74	57	
		78	6, 17, 29, 37	
Landgericht Ellwangen, 21 August 1995		1	9	
		35	25	
		38	36, 37, 81	
		39	107	
		47	8, 9	
		73	2, 6, 23	
		79	14, 28, 52, 57, 59	
		82	13, 19	
Landgericht Kassel, 21 September 1995		64	4	
Landgericht Düsseldorf, 11 October 1995		2	6	
		4	40	
		Part III, Chap. V, Sect. II	1	
		81	2, 14, 25, 26, 27	
		82	2	
		83	2	
Landgericht Trier, 12 October 1995		6	1	CLOUT case No. 170
		25	22	
		35	17, 45	
		38	16, 34	
		40	4, 23	
		46	15	
		49	24	
		68	1	
		73	20, 94	
Landgericht Hamburg, 23 October 1995		1	51	
Landgericht Köln, 16 November 1995		1	21	
Landgericht Siegen, 5 December 1995		1	51	
		57	5	
Landgericht Marburg, 12 December 1995		39	14, 22, 64, 82, 184, 186, 187	

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Landgericht Bochum, 24 January 1996		39	21, 30, 63	CLOUT case No. 411
Landgericht München, 25 January 1996		4	46	
		59	3	
Landgericht Kassel, 15 February 1996		1	54	CLOUT case No. 409
		6	20	
		8	19, 54	
		27	3, 4, 7	
		39	29, 53	
		53	3	
		59	3	
		74	9	
Landgericht Oldenburg, 28 February 1996		Part II	33	
		14	23	
		15	1	
		16	2	
		17	1	
Landgericht Düsseldorf, 5 March 1996		50	4	
Landgericht Bad Kreuznach, 12 March 1996		1	51, 62	
Landgericht Saarbrücken, 26 March 1996		1	45	CLOUT case No. 337
		3	2	
		7	20	
		38	20	
		39	47, 51, 74	
Landgericht Oldenburg, 27 March 1996		1	51	
		33	15, 17	
Landgericht Duisburg, 17 April 1996		1	45	
		4	38	
		7	46	
		Part II	18, 27	
		38	21	
		39	14	
		53	4	
		54	1	
Landgericht Aachen, 19 April 1996		1	45	
		35	13	
		65	1	
Landgericht Hamburg, 17 June 1996		1	45	
Landgericht Paderborn, 25 June 1996		1	45	
		35	2, 5	
		38	30, 81	
		39	107, 184	
		74	42	
Landgericht Bielefeld, 2 August 1996		62	3	CLOUT case No. 376
		74	53	
		78	29	
Landgericht Heidelberg, 2 October 1996		1	45	

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Landgericht München, 9 December 1996		1	45	
Landgericht Frankenthal, 17 April 1997		1	45	
Landgericht München, 6 May 1997		1	45, 61	
		4	38	
		7	20, 46	
Landgericht Paderborn, 10 June 1997		1	45	
Landgericht Hamburg, 19 June 1997		1	45	
Landgericht München, 23 June 1997		1	45	
Landgericht Saarbrücken, 18 July 1997		1	45	
Landgericht Göttingen, 31 July 1997		1	45	
Landgericht Heilbronn, 15 September 1997		1	2, 45	CLOUT case No. 345
		4	40	
		8	51	
		Part II	16, 17, 20, 25, 36	
		24	4	
		61	6	
		Part III, Chap. V, Sect. II	1	
		74	7	
		81	15, 25, 27	
Landgericht Hagen, 15 October 1997		1	45	
		4	38	
		7	46	
Landgericht Erfurt, 28 October 1997		1	45	
Landgericht Bayreuth, 11 December 1997		1	45	
Landgericht Bückeburg, 3 February 1998		1	45	
Landgericht Berlin, 24 March 1998		1	61	
		3	4	
		4	53	
		7	30	
Landgericht Aurich, 8 May 1998		1	45	
Landgericht Erfurt, 29 July 1998		1	45	CLOUT case No. 344
		39	52, 58, 68, 187	
		62	3	
		74	17	

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Landgericht Regensburg, 24 September 1998		1	45	CLOUT case No. 339
		39	81, 172	
		48	4	
Landgericht Mainz, 26 November 1998		1	45	CLOUT case No. 346
		3	15	
		46	7	
Landgericht Zwickau, 19 March 1999		1	2, 45	
		7	43, 49	
		8	4, 21	
		9	16	
		78	9	
Landgericht Berlin, 24 March 1999		4	24	
Landgericht Flensburg, 24 March 1999		31	29	CLOUT case No. 377
		36	15	
		50	1	
		Part III, Chap. IV	7	
		66	2, 4	
		74	3, 9	
		78	29	
Landgericht Köln, 30 November 1999		38	4	CLOUT case No. 364
		39	31, 75	
		45	8	
		74	17	
Landgericht Darmstadt, 9 May 2000		14	37	CLOUT case No. 343
		35	23	
		38	20	
		39	2, 48	
		40	40	
		50	7	
		55	2	
		57	5	
		74	25	
		77	26, 40	
		78	16	
Landgericht Stendal, 12 October 2000		1	45	CLOUT case No. 432
		6	5	
		7	19	
		53	4	
		59	1	
		71	1, 4, 32, 34	
		78	29	
Landgericht Trier, 7 December 2000		1	45	
		57	5	
Landgericht Stendal, 10 December 2000		78	5, 6	
Landgericht Flensburg, 19 January 2001		1	22	
		57	5	
Landgericht München, 27 February 2002		3	4	
		53	4	
		62	3	

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Landgericht Berlin, 21 March 2003		38	4, 33, 41, 43, 57, 68	CLOUT case No. 634
		39	98, 105, 109, 137, 150	
		53	3	
		74	57	
		78	18, 33	
District Courts (lower)				
Amtsgericht Oldenburg in Holstein, 24 April 1990	n/a	1	68	CLOUT case No. 7
		33	11	
		47	5	
		59	1, 3	
		78	10, 11, 13, 29	
Amtsgericht Ludwigsburg, 21 December 1990	n/a	1	68	
		59	1	
Amtsgericht Frankfurt a. M., 31 January 1991	n/a	71	2, 27, 34, 35	CLOUT case No. 51
		74	12	
Amtsgericht Zweibrücken, 14 October 1992		26	8	
		78	29	
Amtsgericht Charlottenburg, 4 May 1994		79	1, 2, 15, 23, 37, 76, 81, 85, 101	
		82	11, 22	
		84	22	
Amtsgericht Nordhorn, 14 June 1994		4	25	
		Part II	20	
		48	11	
		78	6, 29, 37	
Amtsgericht Mayen, 6 September 1994		1	51	
Amtsgericht Mayen, 19 September 1994		4	38	
		7	46	
Amtsgericht Riedlingen, 21 October 1994		38	53, 58, 74	
		39	105, 123, 125, 157	
		78	37	
Amtsgericht Wangen, 8 March 1995		1	51	
Amtsgericht München, 23 June 1995		80	2, 17, 20	
Amtsgericht Mayen, 6 September 1995		7	18	
Amtsgericht Kehl, 6 October 1995		Part II	25	
		19	16, 17	
		24	4	
		27	4	
		39	22, 151	
		59	3	
		78	29	

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Amtsgericht Augsburg,		39	4, 122, 128	
29 January 1996		78	29	
Amtsgericht Bottrop,		1	45	
25 June 1996		78	16	
Amtsgericht Koblenz,		1	45	
12 November 1996		74	9	
		78	12, 16	
Amtsgericht Stendal,		1	45	
12 October 1999				
Amtsgericht Duisburg,		1	32	CLOUT case No. 360
13 April 2000		4	38, 39	
		7	46	
		9	14, 18	
		14	16	
		31	9, 31	
		36	4, 8, 18	
		Part III, Chap. IV	1, 6, 18	
		66	1	
		67	9, 12, 16	
		69	1, 6	
Arbitration				
Arbitral Tribunal of the Hamburg		1	9, 51	CLOUT case No. 166
Chamber of Commerce, Arbitration,		6	12, 21	
21 June 1996		7	20	
		8	21	
		45	2	
		61	2	
		73	8, 13	
		Part III, Chap. V, Sect. II	6, 13	
		74	60, 61, 85	
		76	3	
		77	28	
		78	6, 29	
		79	3, 9, 10, 14, 27, 29, 41, 55, 57, 61, 63, 74, 93, 97	
		80	5, 19, 22	
		81	15, 16	
		83	4	
Schiedsgericht der Hamburger		1	9, 45	CLOUT case No. 293
freundschaftlichen Arbitrage,		6	24	
29 December 1998		26	14	
		45	13	
		47	17	
		72	9	
		73	6, 15, 19	
		81	25, 27	
		84	1, 2, 6, 7, 8, 13	
		85	9	
		87	4	
		88	11	

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HUNGARY				
Supreme Court				
Legfelsóbb Biróság, 25 September 1992	United Technologies International Inc. Pratt and Whitney Commercial Engine Business v. Magyar Légi Közlekedési Vállalat (Malév Hungarian Airlines)	2 14 19 23 55	13 33, 39 14 2 5, 8	CLOUT case No. 53
Appellate Courts				
Fováosi Biróság (Metropolitan Court), Budapest, 10 January 1992	United Technologies International Inc. Pratt and Whitney Commercial Engine Business v. Magyar Légi Közlekedési Vállalat (Málev Hungarian Airlines)	19 23	14 2	
Fovárosi Biróság, Budapest, 24 March 1992	Adamfi Video Production GmbH v. Alkotk Studisa Kisszövetkezet	11 12 14 54	19 7 13, 30 4	CLOUT case No. 52
Fovárosi Biróság, Budapest, 19 March 1996	n/a	1	12	CLOUT case No. 126
Fovárosi Biróság, Budapest, 21 May 1996	n/a	1 Part II	45, 48 5	CLOUT case No. 143
Fovárosi Biróság, Budapest, 17 June 1997	n/a	1 Part II 18 19	45 12 7 2	CLOUT case No. 173
Fovárosi Biróság, Budapest, 1 July 1997	n/a	1	45	CLOUT case No. 172
Arbitration				
Arbitration Court of the Hungarian Chamber of Commerce and Industry, 20 December 1993	n/a	1	23	CLOUT case No. 161
Arbitration Court of the Chamber of Commerce and Industry of Budapest, award VB/94124, 17 November 1995	n/a	6 71 73 78	21 19, 20 6, 24 31	
Arbitration Court of the Hungarian Chamber of Commerce and Industry, 5 December 1995	n/a	3 39 71 78	2, 5 113, 122 13, 17 31	CLOUT case No. 164
Arbitration Court of the Hungarian Chamber of Commerce and Industry, 10 December 1996	n/a	53 59 Part III, Chap. IV 66 67 69 79	4 1 3 1, 2, 6 10 3 11, 25, 46	CLOUT case No. 163

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Arbitration Court of the Hungarian Chamber of Commerce and Industry, 8 May 1997		1	45	CLOUT case No. 174
Arbitration Court of the Hungarian Chamber of Commerce and Industry, 25 May 1999	n/a	1 73 77	45 20 39	CLOUT case No. 265

ISRAEL

Supreme Court

Case	*Parties*	*Article*	*Footnote*	*Remarks*
Supreme Court of Israel, 22 August 1993		42 80	4 32	

ITALY

Constitutional Court

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Corte costituzionale, 19 November 1992	(F.A.S. Italiana s.n.c. - Ti.Emme s.n.c. - Pres.Cons.Ministri (Avv.gen. Stato))	31 67	1 4	CLOUT case No. 91

Supreme Court

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Corte di Cassazione, 9 June 1995, no. 6499	(Alfred Dunhill Ltd. v. Tivoli Group s.r.l.)	3	16	
Corte di Cassazione, 8 May 1998	(Codispral S.A. v. Fallimento F.lli Vismara di Giuseppe e Vincenzo Vismara s.n.c.)	1	46	
Corte di Cassazione, 7 August 1998	(AMC di Ariotti e Giacomini s.n.c vs. A. Zimm & Söhne GmbH)	1	45	CLOUT case No. 644
Corte di Cassazione S.U., 14 December 1999	(Imperial Bathroom Company v. Sanitari Pozzi s.p.a.)	1	12	CLOUT case No. 379
Corte di Cassazione, 10 March 2000	(Krauss Maffei Verfahrenstechnik GmbH, Krauss Maffei AG v. Bristol Meyer Squibb s.p.a.)	31	28	CLOUT case No. 646
Corte di Cassazione S.U., 19 June 2000	(Premier Steel Service Sdn. Bhd v. Oscam S.)	6	4	Clout case No. 647

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Corte d'appello di Genova, 24 March 1995	(Marc Rich & Co. AG v. Iritecna s.p.a.)	9	44	
Corte d'appello di Milano, 20 March 1998	(Italdecor s.a.s. v. Yiu's Industries (H.K.) Limited)	1 25 33 49	51 12, 14 2 14, 16	
Corte d'appello di Milano, 11 December 1998	(Bielloni Castello v. EGO)	1 7 63 75	45 20 2 26, 33	CLOUT case No. 645

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District Courts				
Tribunale civile di Monza, 14 January 1993	(Nuova Fucinati s.p.a. v. Fondmetal International A.B.)	6	19	CLOUT case No. 54
		79	2, 4, 6, 47, 61, 66	
Tribunale civile di Cuneo, 31 January 1996	(Sport D'Hiver di Geneviève Culet v. Ets. Louys et Fils)	7	10	
		38	47, 58, 85	
		39	93, 111, 124, 125, 155	
Tribunale di Verona, 19 December 1997	n/a	1	64	
Tribunale di Pavia, 29 December 1999	Tessile 21 s.r.l. v. Ixela S.A.	1	2, 19, 51	CLOUT case No. 380
		4	9, 12, 21	
		7	11, 13, 31, 33	
		74	89	
		78	18, 29	
		79	92	
Tribunale di Vigevano, 12 July 2000	(Rheinland Versicherungen v. s.r.l. Atlarex and Allianz Subalpina s.p.a.)	1	1, 4, 24, 31, 37, 39, 40, 41, 43, 45, 52	CLOUT case No. 378
		4	9, 12, 14, 24, 38, 40	
		6	1, 11, 25	
		7	9, 13, 31, 33, 34, 33, 34, 35, 46	
		12	3	
		35	42, 47	
		38	21, 41, 77	
		39	13, 16, 17, 36, 51, 87, 94, 98, 104, 109, 112, 124, 126, 127, 144,	
		40	5, 16	
		44	13, 14	
		Part III, Chap. V, Sect. II	16	
		79	91, 92	
Tribunale di Rimini, 26 November 2002	(Al Palazzo s.r.1. v. Bernardaud S.A.)	1	4, 6, 18, 19, 31, 32	CLOUT case No. 608
		4	14, 15	
		7	12, 13, 19, 43	
Lower Courts				
Pretura di Torino, 30 January 1997	(C. & M. s.r.l. v. D. Bankintzopoulos & O.E.)	1	45	
		39	13, 15, 104, 126, 127	
		74	9	

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Pretura circondariale di Parma, Sezione di Fidenza, 24 November 1989	(Foliopack AG v. Daniplast s.p.a.)	25 48 49 84	5 1 10, 17 2, 6, 13	CLOUT case No. 90
Arbitration				
Ad hoc Arbitral Tribunal Florence, 19 April 1994		1 6	51 18	CLOUT case No. 92
MEXICO				
Court of First Instance				
Sixth Civil Court of First Instance, City of Tijuana, State of Baja California, 14 July 2000	n/a	1 57	45 1	
Arbitration				
Compromex arbitration, 4 May 1993	(Jose Luis Morales y/o Son Export, S.A. de C.V., de Hermosillo Sonora, México v. Nez Marketing de Los Angeles, California)	81	25	
Comisión para la protección del comercio exterior de Mexico, 29 April 1996	(Conservas L Costeña S.A. de C.V. v. Lanín San Lui S.A. & Agro-industrial Santa Adela S.A)	7 11 Part II 18 23 34 35	39 8 34 6 1 1 35	
Comisión para la protección del comercio exterior de Mexico, 30 November 1998	(Dulces Luisi, S.A. de C.V. v. Seoul International Co. Ltd. , Seoulia Confectionery Co.)	1 7	45 20	
THE NETHERLANDS				
Supreme Court				
Hoge Raad, 26 September 1997	(M.J.H.M. Foppen (h.o.d.n. Productions) v. Tissage Impression Mécanique TIM S.A.)	1 31	45 3, 10	
Hooge Raad, 7 November 1997	(J.T. Schuermans v. Boomsma Distilleerderij/Wijnkoperij))	1 8 11 12 Part II 14	51 19, 20, 21 19 7 33, 34 3	
Hoge Raad, 20 February 1998	(Bronneberg v. Belvédère)	1 38 39	45 4, 24, 43, 53 69, 72, 90, 102, 110, 163	

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Appellate Courts				
Hof 's Hertogenbosch, 26 February 1992	(Melody v. Loffredo, h.o.d.n. Olympic)	4 7 39	49 24 49	
Hof Amsterdam, 16 July 1992	(Box Doccia Megius v. Wilux International)	1	12	
Hof 's Hertogenbosch, 26 October 1994	(Jungmann Nutzfahrzeuge v. Terhaag Bedrijfsauto's)	57	5	
Hof Arnhem, 22 August 1995	(Diepeveen-Dirkson v. Nieuwenhoven Veehandel)	4 77	34 3	
Hof 's Hertogenbosch, 9 October 1995	(Tissage Impression Mecanique v. Foppen)	3 31 45 57	2 4 17 5	
Hof Arnhem, 21 May 1996	(Maglificio Esse v. Wehkamp)	4 42	19 3	
Hof Leeuwarden, 5 June 1996, No. 404	(Schuermans v. Boomsa)	1	51	
Hof Arnhem, 17 June 1997	(Bevaplast v. Tetra Médical)	1 38 39	45 6, 44, 49 135, 146	
Hof 's Hertogenbosch, 24 July 1997	(La Metallifera v. Bressers Metaal)	1	45	
Hof 's Hertogenbosch, 2 October 1997	(Van Dongen Waalwijk Leder v. Conceria Adige)	1	45	
Hof 's Hertogenbosch, 15 December 1997	(Nurka Furs v. Nertsenfokkerij de Ruiter)	38 39 64	40, 50 104, 130, 170 14, 18	
Hof Arnhem, 9 February 1999	(Kunsthaus Mathias Lempertz v. Wilhelmina van der Geld)	36 Part III, Chap. IV 69	10 9 5	
Hof Arnhem, 27 April 1999	(G. Mainzer Raumzellen v. Van Keulen Mobielbouw Nijverdal BV)	1 3	12 9	
District Courts				
Rechtbank Alkmaar, 30 November, 1989	(Société Nouvelle Baudou S.S. v. Import - en Exportmaatschappis Renza BV)	1	68	
Rechtbank Alkmaar, 8 February 1990	(Cofacredit S.A. v. Import - en Exportmaatschappij Renza)	1	68	
Rechtbank Dordrecht, 21 November 1990	(E.I.F. S.A. v. Factron BV)	1	68	

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Rechtbank Roermond, 19 December 1991	(Fallini Stefano v. Foodik)	1	51, 68	CLOUT case No. 98
		38	33, 35, 48, 55	
		39	80, 126, 127, 184	
		40	4, 16, 25	
Rechtbank Arnhem, 25 February 1993	P.T. van den Heuvel (Netherlands) v. Santini Maglificio Sportivo di Santini P & C S.A.S. (Italy)	1	51	CLOUT case No. 99
		4	38	
		7	46	
Rechtbank Roermond, 6 May 1993	(Gruppo IMAR v. Protech Horst)	1	60	
		4	38	
		7	46	
		74	26	
		78	29	
Rechtbank Arnhem, 27 May 1993	(Hunfeld v. Vos)	2	5	
Rechtbank Arnhem, 30 December 1993	(Nieuwenhoven Veehandel v. Diepeveen)	1	22, 51	CLOUT case No. 100
		78	29	
Rechtbank Amsterdam, 15 June 1994	(Galerie Moderne v. Waal)	78	29	
Rechtbank Amsterdam, 5 October 1994	(Tuzzi Trend Tex Fashion v. Keijer-Somers)	1	61	
		4	48	
		7	25	
		24	1, 2	
Rechtbank Middelburg, 25 January 1995	(CL Eurofactors v. Brugse Import- en Exportmaatschappij)	1	51	
		4	38	
		7	46	
		57	5	
Rechtbank Zwolle, 1 March 1995	(Wehkamp v. Maglificio Esse)	1	51	
		4	19	
		42	3	
Rechtbank 's Gravenhage, 7 June 1995	(Smits v. Jean Quetard)	1	54	
		6	20	
		39	14	
Rechtbank Almelo, 9 August 1995	(Wolfgang Richter Montagebau v. Handelsonderneming Euro-Agra and Te Wierik)	1	51	
		78	32	
Gerechtshof 's Hertogenbosch, 24 April 1996	(Peters v. Kulmbacher Spinnerei Produktions)	Part II	19	
		18	20	
Rechtbank Rotterdam, 21 November 1996	(Biesbrouck v. Huizer Export)	1	45	
		82	6	
Rechtbank Zwolle, 5 March 1997, No. 230	(CME Cooperative Maritime Etaploise S.A.C.V. v. Bos Fishproducts Urk BV)	1	45	
		7	59	
		38	7, 14, 16, 34, 40, 41, 47, 48, 50, 56	
		39	33, 55, 127, 130, 132, 172	

Case	Parties	Article	Footnote	Remarks
Rechtbank Zutphen, 29 May 1997	(Aartsen v. Suykens)	1 4 7	51 25 18	
Rechtbank Arnhem, 17 July 1997	(Kunsthaus Math. Lempertz v. Wilhelmina van der Geld)	1 7 36 Part II, Chap. IV 69	45 20 10 9 5	
Rechtbank 's Hertogenbosch, 2 October 1998	(Malaysia Dairy Industries v. Dairex Holland)	71 77 79	13, 26 14 9, 14, 27, 28, 43, 78	
Rechtbank Rotterdam, 12 July 2001	(Hispafruit BV v. Amuyen S.A.)	11 12	18, 19 6, 7	
Rechtbank Rotterdam, 1 November 2001		1	6	

RUSSIAN FEDERATION

Arbitration

Case	Parties	Article	Footnote	Remarks
Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, case No. 1/1993, 15 April 1994	n/a	81 84	25, 27 1, 2, 6, 13, 16	
Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, case No. 375/1993, 9 September 1994	n/a	85	3, 6, 8	
Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, case No. 251/1993, 23 November 1994	n/a	51 Part III, Chap. V, Sect. II	15 9	
Federation Chamber of Commerce and Industry case No. 304/1993, 3 March 1995	n/a	14 55	34, 38 4	CLOUT case No. 139
Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, case 155/1994, 16 March 1995		45 74 75 76 79	2, 10 8 9, 28 7 14, 27, 39, 55, 57, 77, 83, 93	CLOUT case No. 140
Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, case No. 192/1994, 25 April 1995	n/a	37 52 85 87 88	3 4 1, 3, 6, 8 1 1	CLOUT case No. 141

Case	*Parties*	*Article*	*Footnote*	*Remarks*
Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, case No. 123/1992, 17 October 1995		54 79	3 16, 25, 38, 104	CLOUT case No. 142
Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, case No. 155/1996, 22 January 1997	n/a	79	15, 24, 34, 70, 81, 85, 100	
Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, case No. 82/199, 3 March 1997	n/a	81	3, 4, 5	
Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, case No. 38/ 1996, 28 March 1997	n/a	7	18	
Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, case No. 387/1995, 4 April 1997	n/a	25 49	8 12	
Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Arbitration, case No. 2/1995, 11 May 1997	n/a	10	3	
Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, case No. 229/1996, 5 June 1997	n/a	9	45	
Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, case No. 255/1996, 2 September 1997	n/a	2	12	
Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, case No. 236/1997, 6 April 1998	n/a	2	11	
Russian Maritime Commission Arbitral Tribunal, 18 December 1998	n/a	2	14	
Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, case No. 302/1996, 27 July 1999		7 71 Part III, Chap. V, Sect. II 74	24 8, 34 9 6	

Case	*Parties*	*Article*	*Footnote*	*Remarks*
Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, case No. 54/1999, 24 January 2000		6 40 44 Part III, Chap. V, Sect. II 74 75 76 77	15 30 3, 6, 14, 22 12 18, 83 12 9 18, 38	CLOUT case No. 474
Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Arbitration, case No. 406/1998, 6 June 2000	n/a	9 74 77	43 67, 70, 82, 89 22	
Other				
Letter No. 29 of the High Arbitration Court of the Russian Federation, 16 February 1998	n/a	11 12 29 79	20 8 11 16, 25, 42, 69, 104	
SPAIN				
Supreme Court				
Tribunal Supremo, 28 January 2000	(Internationale Jute Maatschappi BV v. Marin Palomares SL)	1 18 23 75 77	45 11 4 31 33	CLOUT case No. 395
Appellate Courts				
Audiencia Provincial de Barcelona, 4 February 1997	(Manipulados del Papel y Cartón SA v. Sugem Europa SL)	1	45	CLOUT case No. 396
Audiencia Provincial Barcelona, 20 June 1997	n/a	4 33	21 12	CLOUT case No. 210
Audiencia Provincial de Córdoba, 31 October 1997	n/a	1 31 Part III, Chap. IV 67	45 15, 30 10, 24 3	CLOUT case No. 247
Audiencia Provincial de Barcelona, 3 November 1997	(T, SA v. E)	1 47 49 73	45 15 42 6, 21, 26	CLOUT case No. 246
Audiencia Provincial de Barcelona, sección 17ª, 7 June 1999	n/a	57	5	CLOUT case No. 320
Audiencia Provincial de Navarra, 27 March 2000	(EMC v. C de AB SL)	1	45	CLOUT case No. 397*

*Cited in CLOUT as Audiencia Provincial de Pamplona (Pamplona is a city in the Province of Navarra).

Case	Parties	Article	Footnote	Remarks
Audiencia Provincial de Alicante, 16 November 2000	(BSC Footwear Supplies v. Brumby St)	6	11, 17	CLOUT case No. 483
Audiencia Provincial de La Coruña, 21 June 2002	n/a	35 39	44, 52 56, 100, 136, 167	CLOUT case No. 486
Audiencia Provincial de Navarra, 22 January 2003	(Gimex, S.A v. Basque Imagen Gráfica y Textil, S.L.)	88	7	CLOUT case No. 485

SWEDEN

Arbitration

Case	Parties	Article	Footnote	Remarks
1998 Arbitration Institute of the Stockholm Chamber of Commerce, 5 June 1998		1 7 35 38 39 40	45 53 14, 19, 49 5 1, 37, 192 1, 4, 6, 9, 11, 13, 16, 17, 18, 21, 29, 32, 33, 38, 42	CLOUT case No. 237

SWITZERLAND

Supreme Court

Case	Parties	Article	Footnote	Remarks
Bundesgericht, 18 January 1996	n/a	57 58	6 4	CLOUT case No. 194
Schweizerisches Bundesgericht (I. Zivilabteilung), 28 October 1998	n/a	1 7 25 39 45 46 49 50 78	45 50 17, 18 129 2 10, 11 19, 20 11 11, 12, 17, 29	CLOUT case No. 248
Bundesgericht, Switzerland, 11 July 2000	n/a	1 4	42 42	
Bundesgericht, Switzerland, 15 September 2000	(FCF S.A. v. Adriafil Commerciale s.r.l)	11 Part III, Chap. V, Sect. II 75 77	2 16, 18 25, 34, 35 42	
Bundesgericht, Switzerland, 22 December 2000	(Roland Schmidt GmbH v. Textil-Werke Blumenegg AG)	8	10, 19, 25	

Case	*Parties*	*Article*	*Footnote*	*Remarks*
Cantonal Supreme Courts				
Des Zivilgerichts des Kantons Basel-Stadt, 21 December 1992	n/a	1	37, 51	CLOUT case No. 95
		3	2	
		4	5	
		9	38	
		11	3	
		Part II	29, 34	
		78	29	
Kantonsgericht Wallis, 6 December 1993	n/a	1	63	
		78	29	
Tribunal cantonal de Vaud, 17 May 1994	n/a	85	2, 3, 11	CLOUT case No. 96 and No. 200
		87	6	
		88	10, 13	
Tribunal cantonal du Valais, 29 June 1994	n/a	6	1, 4	CLOUT case No. 199
		74	57	
Kantonsgericht Zug, 1 September 1994	n/a	78	29	
Kantonsgericht Zug, 15 December 1994	n/a	78	29	
Tribunal cantonal du Valais, 20 December 1994	n/a	58	1	CLOUT case No. 197
		59	1	
Kantonsgericht des Kantons Zug, 16 March 1995	n/a	6	19	CLOUT case No. 326
Kanton St. Gallen, Gerichtskommission Oberrheintal, 30 June 1995	n/a	1	51	CLOUT case No. 262
		3	2	
		38	41	
		39	104, 141	
Obergericht des Kantons Thurgau, 19 December 1995	n/a	1	37	CLOUT case No. 334
		4	24, 36	
		8	4	
		Part II	33, 35, 36	
		14	3, 5	
Canton Ticino, seconda Camera civile del Tribunale d'appello, 12 February 1996	n/a	1	37	CLOUT case No. 335
		4	24	
		78	29	
Tribunal cantonal de Vaud, 11 March 1996	n/a	1	6	
		53	2	
		78	6, 33	
Tribunal cantonal de Vaud, 11 March 1996	n/a	6	1	CLOUT case No. 211
Tribunal de la Glane, 20 May 1996	n/a	78	29	
Kantonsgericht Nidwalden, 5 June 1996	n/a	2	4	CLOUT case No. 213
Obergericht des Kantons Luzern, 8 January 1997	n/a	1	13, 16, 45	CLOUT case No. 192
		3	9	
		38	34, 35, 47, 69, 92	
		39	117, 145	
		44	11, 14, 22	
		74	17	

Case	*Parties*	*Article*	*Footnote*	*Remarks*
Kantonsgericht St. Gallen, 12 August 1997	n/a	1	45	CLOUT case No. 216
		34	2, 4	
		58	6, 8	
Cour de Justice Genève, 10 October 1997	n/a	4	40	CLOUT case No. 249
		39	188	
Kantonsgericht Zug, 16 October 1997	n/a	1	45	CLOUT case No. 218
Tribunal cantonal du Valais, 28 October 1997	n/a	1	45	CLOUT case No. 219
		33	12	
		35	1, 37	
		39	138	
		45	13	
		Part III, Chap. IV	8	
		67	13	
Kantonsgericht Nidwalden, 3 December 1997	n/a	1	45	CLOUT case No. 220
		6	20	
		39	28, 78	
		78	32	
Zivilgericht des Kantons Basel-Stadt, 3 December 1997	n/a	1	45	CLOUT case No. 221
		9	15, 28	
		57	6	
Tribunal cantonal du Vaud, 24 December 1997	n/a	1	45	CLOUT case No. 257
Cantone del Ticino Tribunale d'appello, 15 January 1998	n/a	1	45	CLOUT case No. 253
		4	11	
		7	36	
		35	41, 42	
		36	6, 7, 9, 13	
		38	20	
		Part III, Chap. IV	19, 20	
		67	5, 17	
		74	38	
		81	15, 27	
		84	1, 2, 6, 7, 8, 13	
Kantonsgericht Freiburg, 23 January 1998	n/a	1	45	CLOUT case No. 259
		4	38	
		7	46	
Tribunal cantonal du Valais (IIe Cour Civile), 29 June 1998	n/a	1	45	CLOUT case No. 256
		35	1, 38	
		39	106, 143	
Kantonsgericht Kanton Wallis (Zivilgerichtshof I), 30 June 1998	n/a	1	45	CLOUT case No. 255
		4	52	
		54	5	
Kanton St. Gallen, Bezirksgericht Unterrheintal, 16 September 1998	n/a	1	45	CLOUT case No. 263
		39	141	
		44	14	
Canton de Genève, Cour de Justice (Chambre civile), 9 October 1998	n/a	2	10	CLOUT case No. 260

Case	*Parties*	*Article*	*Footnote*	*Remarks*
Kantonsgericht des Kantons Zug, 25 February 1999	n/a	1 3 53 74 78	45 9, 11 4 55 15, 29	CLOUT case No. 327
Canton Ticino, seconda Camera civile del Tribunale d'appello, 8 June 1999	n/a	1 39	45 33, 74	CLOUT case No. 336
Obergericht Kanton Basel-Landschaft, 5 October 1999	n/a	1 29	45 3, 4	CLOUT Case No. 332
Kantonsgericht des Kantons Zug, 21 October 1999	n/a	1 76 78	8, 19, 45 19 1, 7, 29	CLOUT case No. 328
Lower Courts				
Canton of Ticino: Pretore della giurisdizione di Locarno Campagna, 16 December 1991	n/a	1 59 78	51 3 6, 19, 29	CLOUT case No. 55*
Canton of Ticino: Pretore della giurisdizione di Locarno Campagna, 27 April 1992	n/a	1 7 38 39 50 78	51, 63 48 4, 41, 44, 49 172 6, 12 28	CLOUT case No. 56
Richteramt Laufen des Kantons Berne, 7 May 1993	n/a	1 3 7	51, 63 9 2, 3	CLOUT case No. 201
Bezirksgericht Arbon, 9 December 1994	n/a	4 78	36 2, 30	
Bezirksgericht der Sanne (Zivilgericht), 20 February 1997	n/a	1 4 7 10 14 32 61 63 64 72 Part III, Chap. V, Sect. II 74 75 81 84	10, 42, 45 10 36 7 17 2 4 4 11 14 18 2, 92 35 7, 10, 31 1, 3, 6, 7, 8, 13	CLOUT case No. 261

*Cited as 15 December 1991 in CLOUT 55.

Case	Parties	Article	Footnote	Remarks
Bezirksgericht St. Gallen, 3 July 1997	n/a	1	45	CLOUT case No. 215
		8	13, 14, 21, 23, 34, 45, 46	
		11	1	
		14	6, 7, 41	
		55	6	
Commercial Courts				
Handelsgericht des Kantons Zurich, 9 September 1993	n/a	3	2	CLOUT case No. 97
		4	4, 9, 13	
		7	18, 31, 32	
		35	42, 53	
		38	21	
		39	13, 16	
		78	20, 29, 36	
Handelsgericht des Kantons Zürich, 26 April 1995	n/a	3	9	CLOUT case No. 196
		4	9, 16, 20, 41	
		5	1, 3, 4	
		7	31	
		39	7, 13, 16, 97, 169	
		46	16	
		49	4, 26	
		74	17, 22	
Handelsgericht des Kantons Zürich, 21 September 1995	n/a	74	9	CLOUT case No. 195
		78	11, 12, 29	
Handelsgericht des Kantons St. Gallen, 5 December 1995	n/a	8	4	CLOUT case No. 330
		11	6, 12	
		Part II	34	
		14	3, 8, 14, 35	
		78	29	
Handelsgericht des Kantons Zürich, 10 July 1996	n/a	1	45	CLOUT case No.193
		Part II	2	
		18	2, 14, 18, 25	
		19	3	
		23	4	
		79	9	
Handelsgericht des Kantons Zürich, 5 February 1997	n/a	1	51	CLOUT case No. 214
		4	20	
		6	20	
		25	11	
		45	13	
		49	13	
		73	2, 6, 14, 17	
		Part II, Chap. V, Sect. III	18	
		74	29, 67	
		78	1, 7	
		81	8, 15, 25, 27	
		84	1, 2, 9, 13	

Case	*Parties*	*Article*	*Footnote*	*Remarks*
Handelsgericht des Kantons Aargau, 26 September 1997	n/a	1	45	CLOUT case No. 217
		7	4, 48	
		14	11	
		25	1, 28	
		49	5, 34	
		61	4	
		64	6, 9	
		Part III, Chap. V, Sect. II	16	
		74	73, 87	
		75	28, 29, 34	
		78	3, 6	
Handelsgericht des Kantons Aargau, 19 December 1997	n/a	1	45	CLOUT case No. 254
		74	57, 58	
		78	4	
Handelsgericht des Kantons Zürich, 21 September 1998	n/a	1	45	CLOUT case No. 252
		3	2	
		35	20	
		39	67, 68, 74	
		78	2	
Handelsgericht des Kantons Zürich, 30 November 1998	n/a	1	2, 9, 51	CLOUT case No. 251
		4	16, 24, 52	
		7	20	
		8	29, 48	
		Part II	2	
		18	2	
		19	2	
		35	3, 44	
		38	18, 21, 33, 38, 45, 70	
		39	13, 16, 44, 95, 105, 121	
		40	3, 24	
		73	6, 7	
Handelsgericht des Kantons Zürich, 10 February 1999	n/a	1	45	CLOUT case No. 331
		3	2, 7	
		4	9	
		6	8	
		31	13, 29	
		74	23	
		79	12, 13, 21, 36, 76, 81, 85, 99, 100	
Handelsgericht des Kantons Zürich, 8 April 1999	n/a	1	45	CLOUT case No. 325
		3	2	
Handelsgericht des Kantons Aargau, 11 June 1999	n/a	1	45	CLOUT case No. 333
		4	24	
		7	4, 18	
Arbitration				
Arbitration award No. 273/95, Zürich Handelskammer, 31 May 1996	n/a	2	10	
		4	8	
		39	14	
		71	12, 24	
		72	4, 13, 16	
		73	2, 5, 11, 12, 16, 18	
		80	7, 15, 27, 31	
		81	10, 11, 13, 15	

Case	Parties	Article	Footnote	Remarks
UNITED STATES				
Federal Courts				
Court of Appeals				
U.S. Federal Court of Appeals, Second Circuit, 6 December 1995	(Delchi Carrier s.p.a v. Rotorex Corp.)	1	67	CLOUT case No. 138
		7	5, 2	
		25	21	
		35	31	
		45	2	
		46	14	
		49	23	
		74	2, 4, 19, 31, 34, 35, 45, 67, 68, 71, 75, 92	
		75	14, 18	
		77	10	
		86	4	
		87	5	
U.S. [Federal] Court of Appeals, Fourth Circuit, 21 June 2002	(Schmitz-Werke GmbH + Co. v. Rockland Industries, Incorporated)	7	5	CLOUT case No. 580
U.S. Court of Appeals, Fifth Circuit, 15 June 1993	(Beijing Metals & Minerals Import/ Export Corporation v. American Business Center, Inc., et al.)	1	67	CLOUT case No. 24
		8	38	
U.S. [Federal] Court of Appeals, Fifth Circuit, 7 July 2003	(BP Oil International, Ltd. and BP Exploration & Oil, Inc. v. Empresa Estatal Petroleos de Ecuador et al.)	6	22	CLOUT case No. 575
U.S. Court of Appeals, Eleventh Circuit, 29 June 1998	(MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, s.p.a.)	1	45, 67	CLOUT case No. 222
		7	3	
		8	11, 12, 17, 19, 38, 44	
		11	4	
		Part II	16	
		39	18, 36	
District Courts				
[Federal] Northern District Court for California, 27 July 2001	(Asante Technologies, Inc. v. PMC-Sierra, Inc.)	Preamble	1	CLOUT case No. 433
		4	22	
		6	2	
		10	3	
U.S. [Federal] District Court, Northern District of Illinois, 27 October 1998	(Mitchell Aircraft Spares, Inc. v. European Aircraft Service AB)	1	46, 67	CLOUT case No. 419
		8	39	
		Part II	5	
U.S. [Federal] District Court, Northern District of Illinois, 7 December 1999	(Magellan International Corp. v. Salzgitter Handel GmbH)	1	67	CLOUT case No. 417
		Part II	33	
		14	12	
		18	15	
		19	3	
		28	1, 2, 3, 4	
		72	6, 8	
U.S. [Federal] District Court, Northern District of Illinois, 27 March 2002	(Usinor Industeel v. Leeco Steel Products, Inc.)	4	29, 45, 50	CLOUT case No. 613
		7	11	
		81	41	

Case	*Parties*	*Article*	*Footnote*	*Remarks*
Federal District Court, Eastern District of Louisiana, 17 May 1999	(Medical Marketing International, Inc. v. Internazionale Medico Scientifica, S.r.l.)	1 7 25 35 49	46 2 2 26 6	CLOUT case No. 418
Western District Court for Michigan, United States, 17 December 2001	(Shuttle Packaging Systems, L.L.C. v. Tsonakis, Ina S.A. and Ina Plastics Corporation)	8 64 71 73	39 3 14 4	CLOUT case No. 578
U.S. District Court for the Northern District of New York, 9 September 1994	(Delchi Carrier, s.p.a. v. Rotorex Corp.)	1 45 74 75 77 78 86 87	67 2 2, 19, 32, 34, 35, 45, 67, 71, 75, 92 14, 18 10 34 4 5	CLOUT case No. 85
U.S. [Federal] District Court for the Southern District of New York, 14 April 1992	(Filanto, s.p.a. v. Chilewich International Corp)	1 8	67 42, 47	CLOUT case No. 23
U.S. District Court Southern District, New York, 6 April 1994	(S.V. Braun Inc. v. Alitalia Linee Aeree Italiane, S.p.A.)	50	1, 2	
U.S. [Federal] District Court, Southern District of New York, 22 September 1994	(Graves Import Co. Ltd. and Italian Trading Company v. Chilewich Int'l Corp.)	1 29	67 1, 15	CLOUT case No. 86
US [Federal] District Court, Southern District of New York, 23 July 1997	(Helen Kaminski Pty. Ltd. v. Marketing Australian Products, Inc. doing business as Fiona Waterstreet Hats)	1 14 25 61 63	12, 45, 67 28 10 9 4	CLOUT case No. 187
U.S. [Federal] District Court for the Southern District of New York, 6 April 1998	(Calzaturificio Claudia s.n.c. v. Olivieri Footwear Ltd.)	1 7 8 Part II 19 29	45, 67 3 43 33 6 9	CLOUT case No. 413
U.S. [Federal] District Court, Southern District of New York, 8 August 2000	(Fercus, s.r.l. v. Palazzo)	11	13	CLOUT case No. 414
U.S. [Federal] District Court, Southern District of New York, 26 March 2002	(St. Paul Guardian Insurance Co. & Travelers Insurance Co. v. Neuromed Medical Systems & Support)	9 Part III, Chap. IV 67	41 2, 19 1, 2	CLOUT case No. 447
[Federal] District Court, Southern District of New York, 10 May 2002	(Geneva Pharmaceuticals Tech. Corp. v. Barr Labs. Inc.)	4 9 14 16 18	22, 47 19 26 4 17	CLOUT case No. 579
U.S. [Federal] District Court, Eastern District of Pennsylvania, 29 August 2000	(Viva Vino Import Corporation v. Farnese Vini S.r.l.)	74 4 74	15 47 15	CLOUT case No. 420

Case	*Parties*	*Article*	*Footnote*	*Remarks*
Special Courts				
[Federal] Bankruptcy Court, United States, 10 April 2001	(Victoria Alloys, Inc. v. Fortis Bank SA/NV)	4 53	29 4	CLOUT case No. 632
U.S. [Federal] Court of International Trade, 24 October, 1989	(Orbisphere Corp. v. United States)	6	14	
State Courts				
Oregon Supreme Court, 11 April 1996	(GPL Treatment, Ltd. v. Louisiana-Pacific Corp.)	11	1	CLOUT case No. 137
Oregon Court of Appeals, 12 April, 1995	(GPL Treatment Ltd. v. Louisiana-Pacific Group)	6	27	
Minnesota State District Court for the County of Hennepin, 14 December 1999	(KSTP-FM, LLC v. Specialized Communications, Inc. and Adtronics Signs, Ltd.)	1 Part II 18	45, 67 35 25	CLOUT case No. 416
ARBITRATION				
ICC, Court of Arbitration, case No. 5713/1989	n/a	38 39 40	8, 65 178 4, 25	CLOUT case No. 45
ICC, Court of Arbitration, 26 August 1989, case No. 6281		75 79	3 9, 14, 27, 52, 61, 63, 68, 81	CLOUT case No. 102
ICC, Court of Arbitration, case No. 7585/1992		Part II 25 63 Part III, Chap. V, Sect. II 74 75 77 78	6 12, 16 4 10 51, 52, 60, 67 10, 28 30 6, 14, 17, 22	CLOUT case No. 301
ICC, Court of Arbitration, 26 March 1993, case No. 6653		4 6 7 35 78 81 84	10 21 36 41 23, 27 27 1, 2, 5, 10, 15	CLOUT case No. 103

Case	*Parties*	*Article*	*Footnote*	*Remarks*
ICC, Court of Arbitration, case No. 7197/1992		4	34	CLOUT case No. 104
		53	4	
		54	3	
		61	4	
		62	3	
		69	4, 9	
		Part III, Chap. V, Sect. II	15	
		74	9, 50	
		77	17	
		78	11	
		79	16, 26, 51, 80, 87, 93	
		85	3, 4, 7, 10	
		87	3	
ICC, Court of Arbitration, case No. 7153/1992		3	12	CLOUT case No. 26
		53	4	
		78	32	
ICC, Court of Arbitration, case No. 7565/1994		6	21	CLOUT case No. 300
		39	189, 191, 193	
		78	29	
ICC, Court of Arbitration, case No. 7331/1994		1	11	CLOUT case No. 303
		8	1, 9	
		39	33, 35	
		44	13, 14	
		50	7, 8	
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Cour de cassation, 23 January 1996	(Société Sacovini v. S.A.R.L. Les Fils de Henri Ramel)	25 35 46 49	19, 21, 22 18 12, 14, 15 21, 23, 24	CLOUT case No. 150
Cour d'appel de Grenoble, 15 May 1996	(Société Thermo King v. Société Cigna France et al.)	1 35 36	14, 45 16, 43, 46 7, 9, 16	CLOUT case No. 204
Cour d'appel de Grenoble, 23 October 1996	(SCEA des Beauches v. Teso Ten Elsen GmbH & Co KG)	1 7 57	51 11, 58 5, 11	CLOUT case No. 205

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Cour d'appel Aix-en-Provence, 21 November 1996	(Karl Schreiber GmbH v. Société Thermo Dynamique Service et autres)	81 84	27, 38 1, 6, 14	
Cour de cassation, 17 December 1996	(Société Céramique culinaire de France v. Musgrave Ltd.)	1 6	45 20	CLOUT case No. 206
Cour d'appel de Paris, 15 October 1997	(SARL Sodime-La Rosa v. Softlife Design Ltd. et al.)	6 57	1 5	CLOUT case No. 223
Tribunal commercial Paris, France, 28 October 1997	(S.A. Matis v. Societé Laborall)	1	45	
Cour de cassation, 2 December 1997	(Société Mode jeune diffusion v. Société Maglificio il Falco di Tiziana Goti e Fabio Goti et al.)	1 31	45 3	CLOUT case No. 207
Tribunal Grande Instance Colmar, 18 December 1997	(Romay AG v. Société Behr France SARL)	1	45	
Cour d'appel de Paris, 14 January 1998	(Société Productions S.C.A.P. v Roberto Faggioni)	1 7 57 81	22, 45 29 9 27, 34	CLOUT case No. 312
Tribunal commercial Besancon, 19 January 1998	(Flippe Christian v. SARL Douet Sport Collections)	1 79	45 8, 13, 20, 22, 35, 56, 60, 73, 81, 85, 102	
Cour de cassation, 27 January 1998	(Mr. Glyn Hughes v. Société Souriau Cluses)	1 18	51 18	CLOUT case No. 224
Cour d'appel de Versailles, 29 January 1998	(Giustina International (s.p.a.) v. Perfect Circle Europe (formerly Floquet Monopole (SARL))	39 46 47 49	19, 110, 180 19, 24 14 41	CLOUT case No. 225
Cour d'appel de Paris, 4 March 1998	(Société Laborall v. S.A. Matis)	1 30 31 35 45	45 2 4, 6, 21 54 17	CLOUT case No. 244
Cour d'appel de Paris, 18 March 1998	(Société Franco-Africaine de distribution textile v. More and More Textilfabrik GmbH)	1 31 35 45	45 4, 6, 21 54 17	CLOUT case No. 245
Cour de cassation, 16 July 1998	(S.A. Les Verreríes de Saint-Gobain v. Martinswerk GmbH)	1 18 19 31	45 9 7 3	CLOUT case No. 242
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Cour d'appel de Grenoble, 4 February 1999	(SARL Ego Fruits v. La Verja)	1 25	46 29	CLOUT case No. 243
Cour d'appel de Paris, 21 May 1999	(S.A. JCP Industrie v. ARIS Antrieb und Steuerungen GmbH)	1	45	CLOUT case No. 314

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Cour de cassation, 26 May 1999	(Karl Schreiber GmbH v. Société Thermo Dynamique Service et al.)	1 25 38 39 46 49 81 84	45 21 55, 62 182 14 23 27 14	CLOUT case No. 315
Cour d'appel de Grenoble, 21 October 1999	(Calzados Magnanni v. SARL Shoes General International (SGI))	1 3 8 9 18 25 49 74 84	45 4 12 13 19, 21 27 33 23 1	CLOUT case No. 313
Tribunal Commercial Montargis, 6 October 2000	(TCE Diffusion S.a.r.l. v. Société Elettrotecnica Ricci)	1	45	
Cour d'appel de Colmar, 24 October 2000	(S.a.r.l. Pelliculest/S.A. Rhin et Moselle Assurances v. GmbH Morton International/Société Zurich Assurances)	1 10	51 5	CLOUT case No. 400
Cour d'appel d'Orléans, 29 March 2001	(TCE Diffusion S.a.r.l. v. Société Elettrotecnica Ricci)	1	45	CLOUT case No. 398
Cour d'appel de Colmar, 12 June 2001	Romay AG v. SARL Behr France	1 53 77 79	12 2 34 9, 16, 53, 68, 81	CLOUT case No. 480
Cour d'appel de Paris, 14 June 2001	(Aluminium and Light Industries Company (ALICO Ltd.) v. SARL Saint Bernard Miroiterie Vitrerie)	3 35 36 49	10 52 14 3, 36, 39	CLOUT case No. 481
Cour de cassation, 26 June 2001	(Anton Huber GmbH & Co. KG v. S.A. Polyspace)	1 6 57	64 11, 28 5	
Cour d'appel de Paris, 6 November 2001	(Traction Levage S.A. v. Drako Drahtseilerei Gustav Kocks GmbH)	4 6 7 12 38 39	40 20 18 3 41, 58, 67 98	CLOUT case No. 482
Cour de cassation, 19 March 2002	(S.A. Tachon diffusion v. Marshoes SL)	42	5	CLOUT case No. 479
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		39	50, 52, 79	
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Amtsgericht Oldenburg in Holstein, 24 April 1990	n/a	1	68	CLOUT case No. 7
		33	11	
		47	5	
		59	1, 3	
		74	9	
		78	10, 11, 13, 29	
Landgericht Frankfurt, a. M., 2 May 1990	n/a	1	61, 68	
Landgericht Hildesheim, 20 July 1990	n/a	1	68	
Landgericht Stuttgart, 31 August 1990	n/a	1	68	CLOUT case No. 4
		38	4, 23, 32, 33, 37, 77	
		39	22, 24, 66, 74, 98, 104, 159	
		78	30	
Landgericht Hamburg, 26 September 1990	n/a	1	11, 37, 68	CLOUT case No. 5
		4	7	
		8	7, 15, 45	
		9	33	
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		14	3	
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		78	10, 29	
Amtsgericht Ludwigsburg, 21 December 1990	n/a	1	68	
		59	1	
Landgericht Bielefeld, 18 January 1991	n/a	39	6, 65, 175	
Amtsgericht Frankfurt a. M., 31 January 1991	n/a	71	2, 27, 34, 35	CLOUT case No. 51
		74	12	
Oberlandesgericht Frankfurt a. M., 13 June 1991	n/a	1	60	CLOUT case No. 1
		58	2	
		78	5, 17, 29	
Landgericht Stuttgart, 13 August 1991	n/a	7	42	
		27	2, 8, 9	
Landgericht Baden-Baden, 14 August 1991	n/a	1	62	CLOUT case No. 50
		19	15	
		35	47, 51	
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		Part II	18	
		15	1	
		53	2	
		Part III, Chap. V Sect. II	21	
		74	7, 41, 46, 48, 89, 95	
		76	12, 23	
		77	21, 43	
Landgericht Frankfurt a. M., 16 September 1991	n/a	1	61	CLOUT case No. 6
		26	6, 10, 12, 17, 18	
		49	2	
		78	30	
Oberlandesgericht Frankfurt a. M., 17 September 1991	n/a	1	51	CLOUT case No. 2
		3	7	
		25	1, 28	
		30	1	
		46	4	
		48	1	
		49	5, 34	
		81	7, 8	
		82	9	
Oberlandesgericht Koblenz, 27 September 1991	n/a	1	51, 60	CLOUT case No. 316
		82	8, 15, 18, 21	
Oberlandesgericht Köln, 27 November 1991	n/a	1	35	
Oberlandesgericht Koblenz, 16 January 1992	n/a	4	31	CLOUT case No. 226
		30	4	
Landgericht Mönchengladbach, 22 May 1992	n/a	38	59, 71	
		39	119, 152	
		59	3	
Landgericht Heidelberg, 3 July 1992	n/a	1	27	
		78	29	
Landgericht Düsseldorf, 9 July 1992	n/a	80	8, 11, 23, 30	
Landgericht Berlin, 16 September 1992		39	99, 125, 157	
Oberlandesgericht Hamm, 22 September 1992	n/a	1	22, 51	CLOUT case No. 227
		Part II	33	
		18	9, 10	
		19	5	
		61	2	
		64	6	
		71	21	
		Part III Chap. V, Sect. II	3	
		75	6, 19	
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		75	29	
Landgericht Berlin, 6 October 1992	n/a	59	3	
		74	9	
		77	27	
Amtsgericht Zweibrücken, 14 October 1992		26	8	
		78	29	
Oberlandesgericht Karlsruhe, 20 November 1992		1	51, 61	CLOUT case No. 317
		6	1	
		8	30	
		31	25	
		Part III, Chap. IV	12, 14, 15, 16, 17, 23	
		66	3	
		67	8, 14	
Landgericht Krefeld, 24 November 1992		15	1	
		81	8, 25, 29	
Landgericht Frankfurt a. M., 9 December 1992		39	21, 181	
Oberlandesgericht Düsseldorf, 8 January 1993		1	51, 54	CLOUT case No. 48
		6	20	
		38	3, 41	
		39	3, 50, 104, 172	
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		51	3, 10, 11	
Oberlandesgericht Saarbrücken, 13 January 1993		1	51	CLOUT case No. 292
		6	8	
		9	21	
		Part II	30	
		18	13	
		38	17, 33, 35, 91	
		39	34, 36, 39, 147	
		44	12, 14	
Landgericht Verden, 8 February 1993		78	29	
Oberlandesgericht Düsseldorf, 12 March 1993		1	51	CLOUT case No. 310
		39	43, 92, 94, 95, 112, 124, 153	
Landgericht Landshut, 5 April 1993		39	118	
Landgericht Krefeld, 28 April 1993		72	10	
Landgericht Aachen, 14 May 1993		4	6, 35	CLOUT case No. 47
		31	17	
		60	2	
		61	2	
		63	5	
		74	84	
		79	5	

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Oberlandesgericht Düsseldorf, 2 July 1993		1	51	CLOUT case No. 49
		5	2	
		6	17	
		7	26	
		57	10	
		Part III, Chap. V Sect. II	22	
		74	21, 45, 47, 49, 96	
Landgericht Aachen, 28 July 1993		39	26	
Oberlandesgericht Koblenz, 17 September 1993		1	12, 14, 15, 26, 29, 51, 54	CLOUT case No. 281
		4	38	
		6	20	
		7	46	
		53	3	
		54	4	
		59	2	
		61	3	
		Part III, Chap. V, Sect. II	19	
		74	9, 33	
		78	11, 17, 29	
Landgericht Berlin, 30 September 1993		39	125	
Landgericht Köln, 11 November 1993		38	51, 58, 72	
		39	134, 156	
Oberlandesgericht Düsseldorf, 18 November 1993		80	9, 11, 23, 30	
Landgericht Hannover, 1 December 1993		39	33, 57, 84	
		59	1	
Landgericht Memmingen, 1 December 1993		3	2	
		11	13, 14	
Oberlandesgericht Düsseldorf, 14 January 1994		25	6	CLOUT case No. 130
		64	3	
		71	36	
		72	10, 18, 20	
		Part III, Chap. V Sect. II	4	
		74	9, 28, 57, 62, 69	
		75	5, 24, 28, 29, 32	
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		77	7, 8, 31	
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		35	4, 31	
		46	12	
		49	21	
		58	2	
		59	3	
		60	3	
		78	5, 10, 11, 12, 16, 17, 29	
		81	11, 13	
Kammergericht Berlin, 24 January 1994		1	37, 51	CLOUT case No. 80
		4	24, 53	
		7	48	
		54	4	
		78	29	
Oberlandesgericht Düsseldorf, 10 February 1994 [6 U 32/93]		1	51, 60, 61	CLOUT case No. 81
		38	3, 11, 33, 41, 44, 45, 47, 55, 76	
		39	14, 94, 95, 98, 104, 112, 124, 148	
		78	29	
		81	11, 12	
Oberlandesgericht Düsseldorf, 10 February 1994 [6 u 119/93]		25	28	CLOUT case No. 82
		45	13	
		46	5	
		40	18	
		51	5, 15	
		74	17	
		78	29	
		82	7, 20	
		83	5	
Oberlandesgericht Köln, 22 february 1994		1	51	CLOUT case No. 120
		6	20	
		11	4	
		Part II	3	
		18	3, 22	
		29	3, 4, 5	
		38	25, 53, 90	
		39	26, 177	
		47	5	
Oberlandesgericht München, 2 March 1994		26	18	CLOUT case No. 83
		45	13	
		49	37	
		50	9	
		78	17, 29	
		81	11, 12, 13	
Oberlandesgericht Frankfurt a. M., 4 March 1994		Part II	8	CLOUT case No. 121
		14	1	
		18	5	
Oberlandesgericht Frankfurt a. M., 20 April 1994		1	2	CLOUT case No. 84
		4	51	
		7	2, 6	
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		84	22	
Amtsgericht Nordhorn, 14 June 1994		4	25	
		Part II	20	
		48	11	
		78	6, 29, 37	
Landgericht Düsseldorf, 23 June 1994		38	43, 54, 55, 60, 64	
		39	105, 109, 139	
Landgericht Gießen, 5 July 1994		6	7	
		39	33	
		78	29	
Landgericht Frankfurt, 6 July 1994		1	62	
		4	14	
		7	34	
		9	40	
Landgericht Kassel, 14 July 1994		78	12, 16	
Landgericht Düsseldorf, 25 August 1994		1	51, 60	
		4	17, 21	
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Amtsgericht Mayen, 6 September 1994		1	51	
Landgericht Berlin, 15 September 1994		35	21, 32	
		71	13, 14, 15, 31	
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Amtsgericht Mayen, 19 September 1994		4	38	
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Amtsgericht Riedlingen, 21 October 1994		38	53, 58, 74	
		39	105, 123, 125, 157	
		78	37	
Landgericht Oldenburg, 9 November 1994		3	2	
		46	22	
		78	15, 29	
Oberlandesgericht Oldenburg, 1 February 1995		Part II	26	CLOUT case No. 165
		48	1	
		49	40	
		81	28	
		84	18	

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Oberlandesgericht Hamm, 8 February 1995		4 8 Part II 24 27 74 78	36 53 24, 36 3 4 9 16, 29, 36	CLOUT case No.132
Oberlandesgericht München, 8 February 1995 [7 U 1720/94]		1 Part II 18 19 49 53 62 77 80 84	11 2 2 6 35 4 2 32 6, 13, 25, 29 1, 4, 6, 7	CLOUT case No. 133
Oberlandesgericht München, 8 February 1995		3 6 38 39 44 77	2 20 25, 28 114, 129, 146 10, 14, 17 17	CLOUT case No. 167
Bundesgerichtshof, 15 February 1995		4 26 49 72 80	37 18 37 1, 19 10, 11, 23, 30	CLOUT case No. 124
Landgericht Oldenburg, 15 February 1995		78	29	
Amtsgericht Wangen, 8 March 1995		1	51	
Landgericht München, 20 March 1995		4 7 39 61 78 81	38 46 63, 85 6 29 11, 12	
Oberlandesgericht Frankfurt a. M., 31 March 1995		14 18 19 62	20 7 5 3	CLOUT case No. 135

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		25	19	
		38	1, 44, 74, 83, 85	
		39	3, 6, 125, 158	
		40	3, 4, 5, 16, 20, 26, 31, 32, 37	
		46	12	
		49	21	
		61	6	
		78	29	
		81	24, 28, 33, 39	
		84	1, 2, 6, 7, 13	
Landgericht Alsfeld, 12 May 1995		1	37	CLOUT case No. 410
		14	36	
		59	3	
		74	57, 65	
		77	27	
		78	29	
		79	9, 16, 25, 50	
Oberlandesgericht Frankfurt a. M., 23 May 1995		14	27	CLOUT case No. 291
		15	1	
		18	1, 12, 25	
		19	5	
		39	14	
Oberlandesgericht Celle, 24 May 1995		6	11, 26	CLOUT case No. 136
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		47	6, 8	
		49	10, 12	
		78	29	
		81	3, 27	
		84	1, 6, 7, 13	
Landgericht München, 29 May 1995		1	27	
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Oberlandesgericht Hamm, 9 June 1995		4	38, 40	CLOUT case No. 125
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		45	6	
		46	20	
		48	8	
		73	20, 36, 94	
Landgericht Kassel, 22 June 1995		1	37, 51	
		78	29, 30, 38	
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Amtsgericht München, 23 June 1995		80	2, 17, 20	
Oberlandesgericht München, 28 June 1995		57	5	
Oberlandesgericht Frankfurt a. M., 5 July 1995		1	51	CLOUT case No. 276
		9	37	
		Part II	27, 32, 34	

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		74	57	
		78	6, 17, 29, 37	
Oberlandesgericht Rostock, 27 July 1995		1	48	CLOUT case No. 228
		Part II	5	
		58	2	
		74	56	
		78	29	
Oberlandesgericht Stuttgart, 21 August 1995		4	38	CLOUT case No. 289
		7	46	
		39	14, 122	
Landgericht Ellwangen, 21 August 1995		1	9	
		35	25	
		38	36, 37, 81	
		39	107	
		47	8, 9	
		73	2, 6, 23	
		79	14, 28, 52, 57, 59	
		82	13, 19	
Amtsgericht Mayen, 6 September 1995		7	18	
Landgericht Kassel, 21 September 1995		64	4	
Amtsgericht Kehl, 6 October 1995		Part II	25	
		19	16, 17	
		24	4	
		27	4	
		39	22, 151	
		59	3	
		78	29	
Landgericht Düsseldorf, 11 October 1995		2	6	
		4	40	
		Part III, Chap. V Sect. V	1	
		81	2, 14, 25, 26, 27	
		82	2	
		83	2	
Landgericht Trier, 12 October 1995		6	1	CLOUT case No. 170
		25	22	
		35	17, 45	
		38	16, 34	
		40	4, 23	
		46	15	
		49	24	
		68	1	
		73	20, 94	
Landgericht Hamburg, 23 October 1995		1	51	
Landgericht Köln, 16 November 1995		1	21	
Landgericht Siegen, 5 December 1995		1	51	
		57	5	

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Landgericht Bochum, 24 January 1996		39	21, 30, 83	CLOUT case No. 411
Landgericht München, 25 January 1996		4	46	
		59	3	
Amtsgericht Augsburg, 29 January 1996		39	4, 122, 128	
		78	29	
Landgericht Kassel, 15 February 1996		1	54	CLOUT case No. 409
		6	20	
		8	19, 54	
		27	3, 4, 7	
		39	29, 53	
		53	3	
		59	3	
		74	9	
Landgericht Oldenburg, 28 February 1996		Part II	33	
		14	23	
		15	1	
		16	2	
		17	1	
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Landgericht Bad Kreuznach, 12 March 1996		1	51, 62	
Oberlandesgericht Frankfurt a. M., 15 March 1996		6	9, 23	
		14	36	
Landgericht Saarbrücken, 26 March 1996		1	45	CLOUT case No. 337
		3	2	
		7	20	
		38	20	
		39	47, 51, 74	
Landgericht Oldenburg, 27 March 1996		1	50	
		33	15, 17	
Bundesgerichtshof, 3 April 1996		1	45	CLOUT case No. 171
		7	3	
		25	17, 25, 30	
		34	3, 8	
		46	10	
		49	1, 19, 29, 44	
		58	7	
		72	1	
Landgericht Duisburg, 17 April 1996		1	45	
		4	38	
		7	46	
		Part II	18, 27	
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		53	4	
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Landgericht Aachen, 19 April 1996		1	45	
		35	13	
		65	1	
Oberlandesgericht Köln, 21 May 1996		1	19, 21, 31, 45	CLOUT case No. 168
		7	55	
		35	7, 15, 39	
		40	8, 44	
		45	13	
		74	42, 67, 84	
Landgericht Hamburg, 17 June 1996		1	45	
Arbitral Tribunal of the Hamburg Chamber of Commerce, Arbitration, 21 June 1996		1	9, 51	CLOUT case No. 166
		6	12, 24	
		7	20	
		8	21	
		45	2	
		61	2	
		73	8, 13	
		Part III, Chap. V Sect. II	6, 13	
		74	60, 61, 85	
		76	3	
		77	28	
		78	6, 29	
		79	3, 9, 10, 14, 27, 29, 41, 55, 57, 61, 63, 74, 93, 97	
		80	5, 19, 22	
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Amtsgericht Bottrop, 25 June 1996		1	45	
		78	16	
Landgericht Paderborn, 25 June 1996		1	45	
		35	2, 5	
		38	30, 81	
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Oberlandesgericht Düsseldorf, 11 July 1996		1	12, 14, 45	CLOUT case No. 169
		4	38	
		7	46	
		53	4	
		61	2	
		74	57	
Landgericht Bielefeld, 2 August 1996		62	3	CLOUT case No. 376
		74	53	
		78	29	
Oberlandesgericht Düsseldorf, 13 September 1996		1	45	
Landgericht Heidelberg, 2 October 1996		1	45	

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		74	9	
		78	12, 16	
Bundesgerichtshof, 4 December 1996		1	45	CLOUT case No. 229
		6	3	
		35	12	
		38	15	
		39	41, 60, 67, 86, 173	
		81	11, 12	
Landgericht München, 9 December 1996		1	45	
Bundesgerichtshof, 11 December 1996		1	44, 45	CLOUT case No. 268
		8	12, 36	
		31	3, 4, 24	
		45	17	
Oberlandesgericht Köln, 8 January 1997		1	45	CLOUT case No. 311
		6	1	
		31	21, 25	
		61	4	
		71	9	
		74	39	
		77	12	
		80	4, 18, 21	
Oberlandesgericht Koblenz, 31 January 1997		1	45	CLOUT case No. 282
		8	6	
		14	36	
		25	24	
		35	6	
		39	3, 10, 60, 63, 89	
		46	17	
		48	9	
		49	2, 5, 27, 34, 38	
		50	10	
		74	17	
		78	29	
		80	3, 16, 28, 29	
Bundesgerichtshof, 5 February 1997		61	5	
Oberlandesgericht Hamburg, 28 February 1997		7	20, 21	CLOUT case No. 277
		25	13	
		47	13	
		49	15	
		75	12, 15	
		77	9	
		79	2, 9, 14, 27, 48, 55, 57, 61, 63, 65, 103	
Landgericht Frankenthal, 17 April 1997		1	45	

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Oberlandesgericht Düsseldorf, 24 April 1997		1	45	CLOUT case No. 275
		4	38	
		7	46	
		25	4, 7, 12, 15	
		47	12	
		49	9, 11, 14	
		51	14	
		53	4	
		59	3	
		71	22	
		78	16	
Landgericht München, 6 May 1997		1	45, 61	
		4	38	
		7	20, 46	
Landgericht Paderborn, 10 June 1997		1	45	
Landgericht Hamburg, 19 June 1997		1	45	
Landgericht München, 23 June 1997		1	45	
Oberlandesgericht Karlsruhe, 25 June 1997		1	45	CLOUT case No. 230
		4	49	
		6	1, 20	
		7	3, 24	
		Part II	20	
		38	9, 31, 33, 39, 47, 60, 73, 77	
		39	8, 120, 123, 154, 171	
		40	5, 15, 16, 17, 19	
		44	4, 14	
		80	1	
Bundesgerichtshof, 25 June 1997		1	45	CLOUT case No. 235
		26	13, 16	
		38	18	
		39	42	
		48	1	
		51	6, 12	
		61	6	
		74	30, 81	
		77	25	
		81	8	
		82	13, 16	
Oberlandesgericht Hamburg, 4 July 1997		14	9, 24	
		47	3	
		76	20	
		79	2, 14, 27, 44, 61, 67, 85	

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Oberlandesgericht München, 9 July 1997		1	12, 14, 45	CLOUT case No. 273
		4	38, 39	
		6	11	
		8	22	
		39	9, 88	
		44	14	
		50	7, 8	
		53	4	
		57	1	
		59	1	
		62	3	
		Part III, Chap. V Sect. II	21	
		74	95	
		80	6, 12, 24, 29	
Oberlandesgericht Köln, 9 July 1997		1	51	CLOUT case No. 283
		Part III, Chap. IV	13, 22	
		66	3	
		67	7, 11	
		69	2	
Oberlandesgericht München, 9 July 1997		1	45	CLOUT case No. 287
		3	9	
		6	20	
		57	5	
Landgericht Saarbrücken, 18 July 1997		1	45	
Bundesgerichtshof, VIII ZR 134/96, 23 July 1997		1	45	CLOUT case No. 236
		6	20	
		14	36	
		45	2	
		53	4	
Bundesgerichtshof, 23 July 1997		6	9	CLOUT case No. 231
Landgericht Göttingen, 31 July 1997		1	45	
Oberlandesgericht Köln, 21 August 1997		1	45	CLOUT case No. 284
		38	7, 10, 40, 50, 58, 59, 61, 77	
		39	50, 113, 125, 131, 160	
		57	5	
		77	19	
		81	11, 13	
Landgericht Heilbronn, 15 September 1997		1	2, 45	CLOUT case No. 345
		4	40	
		8	51	
		Part II	16, 17, 20, 25, 36	
		24	4	
		61	6	
		Part III, Chap. V, Sect. II	1	
		74	7	
		81	15, 25, 27	

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Landgericht Hagen, 15 October 1997		1	45	
		4	38	
		7	46	
Landgericht Erfurt, 28 October 1997		1	45	
Oberlandesgericht Hamm, 5 November 1997		1	12, 14, 45	CLOUT case No. 295
		50	13	
		81	35	
Landgericht Bayreuth, 11 December 1997		1	45	
Oberlandesgericht München, 28 January 1998		1	45	CLOUT case No. 288
		53	4	
		Part III, Chap. V, Sect. II	19	
		74	53, 93	
		81	3, 32	
Landgericht Bückeburg, 3 February 1998		1	45	
Bundesgerichtshof, 12 February 1998		1	10, 45	CLOUT case No. 269
		4	36, 45	
Oberlandesgericht München, 11 March 1998		1	45	CLOUT case No. 232
		4	38	
		7	46	
		Part II	16	
		18	10	
		19	16, 18	
		38	23, 32, 33	
		39	9, 10, 34, 35, 117, 135, 144	
		40	5, 14, 28	
Landgericht Berlin, 24 March 1998		1	60	
		3	4	
		4	53	
		7	30	
Oberlandesgericht Zweibrücken, 31 March 1998		1	45	CLOUT case No. 272
		Part II	16, 20	
		35	24	
		79	14, 17, 30, 59, 75, 82, 88, 95	
Landgericht Aurich, 8 May 1998		1	45	
Oberlandesgericht Jena, 26 May 1998		1	22, 45	CLOUT case No. 280
		38	34, 52, 81	
		39	120, 169	
		44	13, 14	
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		74	17, 95	

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		38	16, 44, 48	
		39	14, 76, 123, 127, 161	
Oberlandesgericht Hamm, 23 June 1998		1	45	CLOUT case No. 338
		4	44	
		6	1	
		31	19	
		33	1, 4, 10	
		Part III, Chap. IV	4, 21	
		66	1, 2	
		68	1	
		69	7	
		71	12, 16, 30	
Oberlandesgericht Dresden, 9 July 1998		9	18, 27	CLOUT case No. 347
		Part II	2, 27	
		18	2, 20	
Landgericht Erfurt, 29 July 1998		1	45	CLOUT case No. 344
		39	52, 58, 68, 187	
		62	3	
		74	17	
Oberlandesgericht Bamberg, 19 August 1998		1	45	
Oberlandesgericht Koblenz, 11 September 1998		1	45	CLOUT case No. 285
		38	24, 33, 59, 71	
		39	105, 119, 156	
		40	5, 27, 32	
		44	9, 12, 14, 15	
Oberlandesgericht Oldenburg, 22 September 1998		1	45	CLOUT case No. 340
		30	2	
		31	22	
		53	4	
		Part III, Chap. IV	5, 19	
		66	1, 2	
		69	8	
Landgericht Regensburg, 24 September 1998		1	45	CLOUT case No. 339
		39	81, 172	
		48	4	
Oberlandesgericht München, 21 October 1998		1	11, 12, 45	CLOUT case No. 297
		4	40	
		6	20	
		7	20	
		59	1	
Oberlandesgericht Celle, 11 November 1998		1	51	CLOUT case No. 274
		57	5, 13	
Bundesgerichtshof, 25 November 1998		1	45	CLOUT case No. 270
		6	20	
		8	5, 27	
		38	18, 31, 33	
		39	8, 45, 120, 123	
		40	5, 15	
		44	5	
		80	1	

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		3	15	
		46	7	
Schiedsgericht der Hamburger freundschaftlichen Arbitrage, 29 December 1998		1	9, 45	CLOUT case No. 293
		6	24	
		26	14	
		45	13	
		47	17	
		72	9	
		73	6, 15, 19	
		81	25, 27	
		84	1, 2, 6, 7, 8, 13	
		85	9	
		87	4	
		88	11	
Oberlandesgericht Bamberg, 13 January 1999		1	51	CLOUT case No. 294
		26	2, 5	
		74	16, 78, 89, 91	
		75	12, 30	
Landgericht Zwickau, 19 March 1999		1	2, 45	
		7	43, 49	
		8	4, 21	
		9	16	
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Landgericht Berlin, 24 March 1999		4	24	
Bundesgerichtshof, 24 March 1999		1	45	CLOUT case No. 271
		7	4	
		35	47	
		77	4, 20	
		79	7, 9, 14, 18, 28, 31, 56, 58, 76, 82, 89, 96	
Landgericht Flensburg, 24 March 1999		31	30	CLOUT case No. 377
		36	15	
		50	1	
		Part III, Chap. IV	7	
		66	2, 4	
		74	3, 9	
		78	29	
Oberlandesgericht Naumburg, 27 April 1999		1	45	CLOUT case No. 362
		Part II	8, 16	
		19	12	
		27	8, 10	
		33	13, 14, 20	
		47	7, 8, 9	
		75	13	
Amtsgericht Stendal, 12 October 1999		1	45	
Oberlandesgericht Braunschweig, 28 October 1999		Part II	19	CLOUT case No. 361
		77	7, 35	
		85	3, 4, 5, 6, 8	
		88	14	

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		38	27, 36, 41, 43, 78	
		39	60, 62, 63, 69, 71, 108, 122, 183	
Oberlandesgericht Koblenz, 18 November 1999		1	45	CLOUT case No. 359
		38	26, 58, 71	
		39	121, 153	
Oberlandesgericht Hamburg, 26 November 1999		1	51	CLOUT case No. 348
		7	45	
		45	13	
		49	43	
		61	6	
		Part III, Chap. V Sect. II	6, 21	
		74	67, 68, 90, 95	
		76	4	
		81	8, 15	
		88	3, 16	
Landgericht Köln, 30 November 1999		38	4	CLOUT case No. 364
		39	31, 75	
		45	8	
		74	17	
Oberlandesgericht München, 3 December 1999		1	45	CLOUT case No. 430
		15	1	
		31	5, 26	
Oberlandesgericht Dresden, 27 December 1999		1	30	
		6	11	
		8	26	
		71	11, 24	
		78	28	
Hanseatisches Oberlandesgericht Hamburg, Germany, 26 January 2000		1	45	
Oberlandesgericht Stuttgart, 28 February 2000		1	32, 45	
		3	2	
		Part II	34	
		14	3	
		78	29	
Amtsgericht Duisburg, 13 April 2000		1	32	CLOUT case No. 360
		4	38, 39	
		7	46	
		9	14, 18	
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		31	9, 32	
		36	4, 8, 18	
		Part III, Chap. IV	1, 6, 18	
		66	1	
		67	9, 12, 16	
		69	1, 6	

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Landgericht Darmstadt, 9 May 2000		14	37	CLOUT case No. 343
		35	23	
		38	20	
		39	2, 48	
		40	40	
		50	7	
		55	2	
		57	5	
		74	25	
		77	26, 40	
		78	16	
Oberlandesgericht Frankfurt a. M., 30 August 2000		1	45	CLOUT case No. 429
		6	20, 23	
		8	4, 12, 19	
		14	3	
		18	5, 12	
Landgericht Stendal, 12 October 2000		1	45	CLOUT case No. 432
		6	5	
		7	19	
		53	4	
		59	1	
		71	1, 4, 32, 34	
		78	29	
Oberlandesgericht Köln, 13 November 2000		1	38	
Oberlandesgericht Oldenburg, 5 December 2000		1	45	CLOUT case No. 431
Landgericht Trier, 7 December 2000		1	45	
		57	5	
Landgericht Stendal, 10 December 2000		78	5, 6	
Saarländisches Oberlandesgericht, Saarbrücken, 14 February 2001		3	2	
Landgericht Flensburg, 19 January 2001		1	22	
		57	5	
Oberlandesgericht Stuttgart, 28 February 2001		10	6	
Oberlandesgericht Köln, 16 July 2001		8	19	CLOUT case No. 607
Bundesgerichtshof, 31 October 2001		1	34, 36	CLOUT case No. 445
		2	2, 8	
		7	20, 23	
		8	49	
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		19	16, 17	
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		79	19, 32, 91, 92	

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Oberlandesgericht Karlsruhe, 19 December 2002		26 31 Part III, Chap. IV 82 84 86	15 7 27 12 6, 7 2	CLOUT case No. 594
Oberlandesgericht Karlsruhe, 6 March 2003		39	20, 59, 66, 73, 94, 112, 113, 116, 127, 179	CLOUT case No. 593
Landgericht Berlin, 21 March 2003		38 39 53 74 78	4, 33, 41, 43, 57, 68 98, 105, 109, 137, 150 4 57 18, 33	CLOUT case No. 634
Oberlandesgericht Zweibrücken, 2 February 2004		39 40 44 74 79	139 10, 12, 24, 35, 40 8, 14, 19 20 86, 90	CLOUT case No. 596
Oberlandesgericht Celle, 10 March 2004		39 40 44 49	6, 57, 65 11 20 25	CLOUT case No. 597
Oberlandesgericht München, 15 September 2004		7 25 26 55 76	15 8 2 9 18, 22	CLOUT case No. 595

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Fováosi Biróság (Metropolitan Court) Budapest, 10 January 1992	United Technologies International Inc. Pratt and Whitney Commercial Engine Business v. Magyar Légi Közlekedési Vállalat (Málev Hungarian Airlines)	19 23	14 2	
Fovárosi Biróság, 24 March 1992	Adamfi Video Production GmbH v. Alkotk Studisa Kisszövetkezet	11 12 14 54	19 7 13, 30 4	CLOUT case No. 52
Legfelsóbb Biróság, 25 September 1992	United Technologies International Inc. Pratt and Whitney Commercial Engine Business v. Magyar Légi Közlekedési Vállalat (Malév Hungarian Airlines)	2 14 19 23 55	13 33, 39 14 2 5, 8	CLOUT case No. 53

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Arbitration Court of the Hungarian Chamber of Commerce and Industry, 20 December 1993	n/a	1	23	CLOUT case No. 161
Arbitral award VB/94124, Hungary, 17 November 1995	n/a	6 71 73 78	21 19, 20 6, 24 31	
Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, 5 December 1995	n/a	3 39 71 78	2, 5 113, 122 13, 17 31	CLOUT case No. 164
Fovárosi Biróság, 19 March 1996	n/a	1	12	CLOUT case No. 126
Fovárosi Biróság, 21 May 1996	n/a	1	45, 48	CLOUT case No. 143
		Part II	5	
Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, 10 December 1996	n/a	53 59 Part III, Chap. IV 66 67 69 79	4 1 3 1, 2, 6 10 3 11, 25, 46	CLOUT case No. 163
Arbitration Court of the Hungarian Chamber of Commerce and Industry, 8 May 1997		1	45	CLOUT case No. 174
Fovárosi Biróság, 17 June 1997	n/a	1 Part II 18 19	45 12 7 2	CLOUT case No. 173
Fovárosi Biróság, 1 July 1997	n/a	1	45	CLOUT case No. 172
Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, 25 May 1999	n/a	1 73 77	45 20 39	CLOUT case No. 265

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Tribunale civile di Monza, 14 January 1993	(Nuova Fucinati s.p.a. v. Fondmetal International A.B.)	6 79	19 2, 4, 6, 47, 61, 66	CLOUT case No. 54
Ad hoc Arbitral Tribunal Florence, 19 April 1994		1 6	51 18	CLOUT case No. 92
Corte d'appello di Genova, 24 March 1995	(Marc Rich & Co. AG v. Iritecna s.p.a.)	9	44	
Cassazione Civile, 9 June 1995, no. 6499	(Alfred Dunhill Ltd. v. Tivoli Group s.r.l.)	3	16	
Tribunale Civile di Cuneo, 31 January 1996	(Sport D'Hiver di Geneviève Culet v. Ets. Louys et Fils)	7 38 39	10 47, 58, 85 93, 111, 124, 125, 155	
Pretura di Torino, 30 January 1997	(C. & M. s.r.l. v. D. Bankintzopoulos & O.E.)	1 39 74	45 13, 15, 104, 126, 162 9	
Tribunale di Verona, 19 December 1997		1	64	
Corte d'appello di Milano, 20 March 1998	(Italdecor s.a.s. v. Yiu's Industries (H.K.) Limited)	1 25 33 49	51 12, 14 2 14, 16	
Corte di cassazione, 8 May 1998	(Codispral S.A. v. Fallimento F.lli Vismara di Giuseppe e Vincenzo Vismara s.n.c.)	1	46	
Corte di cassazione, 7 August 1998	(AMC di Ariotti e Giacomini s.n.c vs. A. Zimm & Söhne GmbH)	1	45	CLOUT case No. 644
Corte d'apello di Milano, 11 December 1998	(Bielloni Castello v. EGO)	1 7 63 75	45 20 2 26, 33	CLOUT case No. 645
Corte di cassazione S.U., 14 December 1999	(Imperial Bathroom Company v. Sanitari Pozzi s.p.a.)	1	12	CLOUT case No. 379
Tribunale di Pavia, 29 December 1999	Tessile 21 s.r.l. v. Ixela S.A.	1 4 7 74 78 79	2, 19, 51 9, 12, 21 11, 13, 31, 33 89 18, 29 92	CLOUT case No. 380
Corte di cassazione, 10 March 2000	(Krauss Maffei Verfahrenstechnik GmbH, Krauss Maffei AG v. Bristol Meyer Squibb s.p.a.)	31	28	CLOUT case No. 646

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Corte di cassazione S.U., 19 June 2000	(Premier Steel Service Sdn. Bhd v. Oscam S.)	6	4	Clout case No. 647
Tribunale di Vigevano, 12 July 2000	(Rheinland Versicherungen v. s.r.l. Atlarex and Allianz Subalpina s.p.a.)	1	1, 4, 24, 31, 37, 39, 40, 41, 43, 45, 52	CLOUT case No. 378
		4	9, 12, 14, 24, 38, 40	
		6	1, 11, 25	
		7	9, 13, 31, 33, 34, 35, 46	
		12	3	
		35	42, 47	
		38	21, 41, 77	
		39	13, 16, 17, 36, 51, 87, 94, 98, 104, 109, 112, 124, 126, 127, 144	
		40	5, 16	
		44	13, 14	
		Part III, Chap. V, Sect. II	16	
		79	91, 92	
Tribunale di Rimini, 26 November 2002	(Al Palazzo s.r.1.v. Bernardaud s.a.)	1	4, 6, 18, 19, 31, 32	CLOUT case No. 608
		4	14, 15	
		7	12, 13, 19, 43	

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Compromex arbitration, 4 May 1993	(Jose Luis Morales y/o Son Export, S.A. de C.V., de Hermosillo Sonora, México v. Nez Marketing de Los Angeles, California)	81	25	
Comisión para la protección del comercio exterior de Mexico, 29 April 1996	(Conservas L Costeña S.A. de C.V. v. Lanín San Lui S.A. & Agroindustrial Santa Adela S.A)	7	39	
		11	8	
		Part II	34	
		18	6	
		23	1	
		34	1	
		35	35	
Comisión para la protección del comercio exterior de Mexico, 30 November 1998	(Dulces Luisi, S.A. de C.V. v. Seoul International Co. Ltd., Seoulia Confectionery Co.)	1	45	
		7	20	
Sixth Civil Court of First Instance, City of Tijuana, State of Baja California, 14 July 2000	n/a	1	45	
		57	1	

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Rechtbank Alkmaar, 30 November, 1989	(Société Nouvelle Baudou S.S. v. Import - en Exportmaatschappis Renza BV)	1	68	
Rechtbank Alkmaar, 8 February 1990	(Cofacredit SA v. Import - en Exportmaatschappij Renza)	1	68	
Rechtbank Dordrecht, 21 November 1990	(E.I.F. S.A. v. Factron BV)	1	68	
Rechtbank Roermond, 19 December 1991	(Fallini Stefano v. Foodik)	1 38 39 40	51, 68 33, 35, 48, 55 80, 126, 127, 184 4, 16, 25	CLOUT case No. 98
Hof ’s Hertogenbosch, 26 February 1992	(Melody v. Loffredo, h.o.d.n. Olympic)	4 7 39	49 24 49	
Hof Amsterdam, 16 July 1992	(Box Doccia Megius v. Wilux International)	1	12	
Rechtbank Arnhem, 25 February 1993	P. T. van den Heuvel (Netherlands) v. Santini Maglificio Sportivo di Santini P & C S.A.S. (Italy)	1 4 7	51 38 46	CLOUT case No. 99
Rechtbank Roermond, 6 May 1993	(Gruppo IMAR v. Protech Horst)	1 4 7 74 78	60 38 46 26 29	
Rechtbank Arnhem, 27 May 1993	(Hunfeld v. Vos)	2	5	
Rechtbank Arnhem, 30 December 1993	(Nieuwenhoven Veehandel v. Diepeveen)	1 78	22, 51 29	CLOUT case No. 100
Rechtbank Amsterdam, 15 June 1994	(Galerie Moderne v. Waal)	78	29	
Rechtbank Amsterdam, 5 October 1994	(Tuzzi Trend Tex Fashion v. Keijer-Somers)	1 4 7 24	61 48 25 1, 2	
Hof ’s Hertogenbosch, 26 October 1994	(Jungmann Nutzfahrzeuge v. Terhaag Bedrijfsauto’s)	57	5	
Rechtbank Middelburg, 25 January 1995	(CL Eurofactors v. Brugse Import- en Exportmaatschappij)	1 4 7 57	51 38 46 5	
Rechtbank Zwolle, 1 March 1995	(Wehkamp v. Maglificio Esse)	1 4 42	51 19 3	
Rechtbank ’s Gravenhage, 7 June 1995	(Smits v. Jean Quetard)	1 6 39	54 20 14	

Case	Parties	Article	Footnote	Remarks
Rechtbank Almelo, 9 August 1995	(Wolfgang Richter Montagebau v. Handelsonderneming Euro-Agra and Te Wierik)	1 78	51 32	
Hof Arnhem, 22 August 1995	(Diepeveen-Dirkson v. Nieuwen-hoven Veehandel)	4 77	34 3	
Hof 's Hertogenbosch, 9 October 1995	(Tissage Impression Mecanique v. Foppen)	3 31 45 57	2 4 17 5	
Gerechtshof 's Hertogenbosch, 24 April 1996	(Peters v. Kulmbacher Spinnerei Produktions)	Part II 18	19 20	
Hof Arnhem, 21 May 1996	(Maglificio Esse v. Wehkamp)	4 42	19 3	
Hof Leeuwarden, 5 June 1996, No. 404	(Schuermans v. Boomsa)	1	51	
Rechtbank Rotterdam, 21 November 1996	(Biesbrouck v. Huizer Export)	1 82	45 6	
Rechtbank Zwolle, 5 March 1997, No. 230	(CME Cooperative Maritime Etaploise S.A.C.V. v. Bos Fish-products Urk BV)	1 7 38 39	45 59 7, 14, 16, 34, 40, 41, 48, 50, 56 33, 55, 127, 130, 132, 172	
Rechtbank Zutphen, 29 May 1997	(Aartsen v. Suykens)	1 4 7	51 25 18	
Hof Arnhem, 17 June 1997	(Bevaplast v. Tetra Médical)	1 38 39	45 6, 44, 49 135, 146	
Rechtbank Arnhem, 17 July 1997	(Kunsthaus Math. Lempertz v. Wilhelmina van der Geld)	1 7 36 Part II, Chap. IV 69	45 20 10 9 5	
Hof 's Hertogenbosch, 24 July 1997	(La Metallifera v. Bressers Metaal)	1	45	
Hoge Raad, 26 September 1997	(M.J.H.M. Foppen (h.o.d.n. Productions) v. Tissage Impression Mécanique TIM S.A.)	1 31	45 3, 10	
Hof 's Hertogenbosch, 2 October 1997	(Van Dongen Waalwijk Leder v. Conceria Adige)	1	45	
Hooge Raad, 7 November 1997	(J.T. Schuermans v. Boomsma Distilleerderij/Wijnkoperij))	1 8 11 12 Part II 14	51 19, 20, 21 19 7 33, 34 3	

Case	*Parties*	*Article*	*Footnote*	*Remarks*
Hof 's Hertogenbosch, 15 December 1997	(Nurka Furs v. Nertsenfokkerij de Ruiter)	38 39 44	40, 50 104, 130, 170 14, 18	
Hoge Raad, 20 February 1998	(Bronneberg v. Belvédère)	1 38 39	45 4, 24, 43, 53 69, 72, 90, 102, 110, 163	
Rechtbank 's Hertogenbosch, 2 October 1998	(Malaysia Dairy Industries v. Dairex Holland)	71 77 79	13, 26 14 9, 14, 27, 28, 43, 78	
Hof Arnhem, 9 February 1999	(Kunsthaus Mathias Lempertz v. Wilhelmina van der Geld)	36 Part III, Chap. IV 69	10 9 5	
Hof Arnhem, 27 April 1999	(G. Mainzer Raumzellen v. Van Keulen Mobielbouw Nijverdal BV)	1 3	12 9	
Rechtbank Rotterdam, 12 July 2001	(Hispafruit BV v. Amuyen S.A.)	11 12	18, 19 6, 7	
Rechtbank Rotterdam, 1 November 2001		1	6	
RUSSIAN FEDERATION				
Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, case No. 1/1993, 15 April 1994	n/a	81 84	25, 27 1, 2, 6, 13, 16	
Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, case No. 375/1993, 9 September 1994	n/a	85	3, 6, 8	
Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, case No. 251/1993, 23 November 1994	n/a	51 Part III, Chap. V, Sect. II	15 9	
Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry case No. 304/1993, 3 March 1995	n/a	14 55	34, 38 4	CLOUT case No. 139
Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, case No. 155/1994, 16 March 1995		45 74 75 76 79	2, 10 8 9, 28 7 14, 27, 39, 55, 57, 77, 83, 93	CLOUT case No. 140

Case	Parties	Article	Footnote	Remarks
Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, case No. 192/1994, 25 April 1995	n/a	37 52 85 87 88	3 4 1, 3, 6, 8 1 1	CLOUT case No. 141
Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, case No. 123/1992, 17 October 1995		54 79	3 16, 25, 38, 104	CLOUT case No. 142
Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, case No. 38/1996, 28 March 1997	n/a	7	18	
Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, case No. 387/1995, 4 April 1997	n/a	25 49	8 12	
Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Arbitration, case No. 2/1995, 11 May 1997	n/a	10	3	
International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, case No. 229/1996, 5 June 1997	n/a	9	45	
Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, case No. 255/1996, 2 September 1997	n/a	2	12	
Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, case No. 155/1996, 22 January 1997	n/a	79	15, 24, 34, 70, 81, 85, 100	
Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, case No. 82/1996, 3 March 1997	n/a	81	3, 4, 5	
Letter No. 29 of the High Arbitration Court of the Russian Federation, 16 February 1998	n/a	11 12 29 79	20 8 11 16, 25, 42, 69, 104	
Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, case No. 236/1997, 6 April 1998	n/a	2	11	

Case	*Parties*	*Article*	*Footnote*	*Remarks*
Russian Maritime Commission Arbitral Tribunal, 18 December 1998	n/a	2	14	
Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, case No. 302/1996, 27 July 1999		7	24	
		71	8, 34	
		Part III, Chap. V, Sect. II	9	
		74	6	
Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, case No. 54/1999, 24 January 2000		6	15	CLOUT case No. 474
		40	30	
		44	3, 6, 14, 22	
		Part III, Chap. V, Sect. II	12	
		74	18, 83	
		75	12	
		76	9	
		77	18, 38	
Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Arbitration, award in case No. 406/1998, 6 June 2000	n/a	9	43	
		74	67, 70, 82, 89	
		77	22	

SPAIN

Case	*Parties*	*Article*	*Footnote*	*Remarks*
Audiencia Provincial de Barcelona, 4 February 1997	(Manipulados del Papel y Cartón SA v. Sugem Europa SL)	1	45	CLOUT case No. 396
Audiencia Provincial Barcelona, 20 June 1997	n/a	4	21	CLOUT case No. 210
		33	12	
Audiencia Provincial de Córdoba, 31 October 1997	n/a	1	45	CLOUT case No. 247
		31	15, 31	
		Part III, Chap. IV	10, 24	
		67	3	
Audiencia Provincial de Barcelona, 3 November 1997	(T, SA v. E)	1	45	CLOUT case No. 246
		47	15	
		49	42	
		73	6, 21, 26	
Audiencia Provincial de Barcelona, sección 17ª, 7 June 1999	n/a	57	5	CLOUT case No. 320
Tribunal Supremo, 28 January 2000	(Internationale Jute Maatschappi BV v. Marin Palomares SL)	1	45	CLOUT case No. 395
		18	11	
		23	4	
		75	31	
		77	33	
Audiencia Provincial de Navarra,* Spain, 27 March 2000	(EMC v. C de AB SL)	1	45	CLOUT case No. 397

*Cited in CLOUT as Audiencia Provincial de Pamplona (Pamplona is a city in the Province of Navarra).

Case	Parties	Article	Footnote	Remarks
Audiencia Provincial de Alicante, 16 November 2000	(BSC Footwear Supplies v. Brumby St)	6	11, 17	CLOUT case No. 483
Audiencia Provincial de La Coruña, 21 June 2002	n/a	35 39	44, 52 56, 100, 136, 167	CLOUT case No. 486
Audiencia Provincial de Navarra, 22 January 2003	(Gimex, S.A v. Basque Imagen Grafica y Textil, S.L.)	88	7	CLOUT case No. 485
SWEDEN				
1998 Arbitration Institute of the Stockholm Chamber of Commerce, 5 June 1998		1 7 35 38 39 40	45 53 14, 19, 49 5 1, 37, 192 1, 4, 6, 9, 11, 13, 16, 17, 18, 21, 29, 32, 33, 38, 42	CLOUT case No. 237
SWITZERLAND				
Canton of Ticino: Pretore della giurisdizione di Locarno Campagna, 16 December 1991*	n/a	1 59 78	51 3 6, 19, 29	CLOUT case No. 55
Canton of Ticino: Pretore della giurisdizione di Locarno Campagna, 27 April 1992	n/a	1 7 38 39 50 78	51, 63 48 4, 41, 44, 49 172 6, 12 28	CLOUT case No. 56
Des Zivilgerichts des Kantons Basel-Stadt, 21 December 1992	n/a	1 3 4 9 11 Part II 78	37, 51 2 5 38 3 29, 34 29	CLOUT case No. 95
Richteramt Laufen des Kantons Berne, 7 May 1993	n/a	1 3 7	51, 63 9 2, 3	CLOUT case No. 201
Handelsgericht des Kantons Zurich, 9 September 1993	n/a	3 4 7 35 38 39 78	2 4, 9, 13 18, 31, 32 42, 53 21 13, 16 20, 29, 36	CLOUT case No. 97

*Cited as 15 December 1991 in CLOUT 55.

Case	*Parties*	*Article*	*Footnote*	*Remarks*
Kantonsgericht Wallis,* Switzerland, 6 December 1993	n/a	1 78	63 29	
Tribunal cantonal de Vaud, 17 May 1994	n/a	85 87 88	2, 3, 11 6 10, 13	CLOUT case No. 96 and No. 200**
Tribunal cantonal du Valais, 29 June 1994	n/a	6 74	1, 4 57	CLOUT case No. 199
Kantonsgericht Zug, 1 September 1994	n/a	78	29	
BG Arbon, 9 December 1994	n/a	4 78	36 2, 30	
Kantonsgericht Zug, 15 December 1994	n/a	78	29	
Tribunal cantonal du Valais, 20 December 1994	n/a	58 59	1 1	CLOUT case No. 197
Kantonsgericht des Kantons Zug, 16 March 1995	n/a	6	19	CLOUT case No. 326
Handelsgericht des Kantons Zürich, 26 April 1995	n/a	3 4 5 7 39 46 49 74	9 9, 16, 20, 41 1, 3, 4 31 7, 13, 16, 97, 169 16 4, 26 17, 22	CLOUT case No. 196
Kanton St. Gallen, Gerichtskommission Oberrheintal, 30 June 1995	n/a	1 3 38 39	51 2 41 104, 141	CLOUT case No. 262
Handelsgericht des Kantons Zürich, 21 September 1995	n/a	74 78	9 11, 12, 29	CLOUT case No. 195
Handelsgericht des Kantons St. Gallen, 5 December 1995	n/a	8 11 Part II 14 78	4 6, 12 34 3, 8, 14, 35 29	CLOUT case No. 330
Obergericht des Kantons Thurgau, 19 December 1995	n/a	1 4 8 Part II 14	37 24, 36 4 33, 35, 36 3, 5	CLOUT case No. 334
Bundesgericht, 18 January 1996	n/a	57 58	6 4	CLOUT case No. 194

*Also indicated as Tribunal Cantonal Vaud.

**Both abstracts deal with the same case.

Case	*Parties*	*Article*	*Footnote*	*Remarks*
Canton Ticino, seconda Camera civile del Tribunale d'appello, 12 February 1996	n/a	1	37	CLOUT case No. 335
		4	24	
		78	29	
Tribunal cantonal de Vaud, 11 March 1996	n/a	1	6	
		53	2	
		78	6, 33	
Tribunal cantonal de Vaud, 11 March 1996	n/a	6	1	CLOUT case No. 211
Tribunal de la Glane, 20 May 1996	n/a	78	29	
Arbitration award No. 273/95, Zürich Handelskammer, Switzerland, 31 May 1996	n/a	2	10	
		4	8	
		39	14	
		71	12, 24	
		72	4, 13, 16	
		73	2, 5, 11, 12, 16, 18	
		80	7, 15, 27, 31	
		81	10, 11, 13, 15	
Kantonsgericht Nidwalden, 5 June 1996	n/a	2	4	CLOUT case No. 213
Handelsgericht des Kantons Zürich, 10 July 1996	n/a	1	45	CLOUT case No.193
		Part II	2	
		18	2, 14, 18, 25	
		19	3	
		23	4	
		79	9	
Obergericht des Kantons Luzern, 8 January 1997	n/a	1	13, 16, 45	CLOUT case No. 192
		3	9	
		38	34, 35, 47, 69, 92	
		39	117, 145	
		44	11, 14, 22	
		74	17	
Handelsgericht des Kantons Zürich, 5 February 1997	n/a	1	51	CLOUT case No. 214
		4	20	
		6	20	
		25	11	
		45	13	
		49	13	
		73	2, 6, 14, 17	
		Part II, Chap. V, Sect. III	18	
		74	29, 67	
		78	1, 7	
		81	8, 15, 25, 27	

Case	*Parties*	*Article*	*Footnote*	*Remarks*
Bezirksgericht der Sanne (Zivilgericht), 20 February 1997	n/a	1	10, 42, 45	CLOUT case No. 261
		4	10	
		7	36	
		10	7	
		14	17	
		32	2	
		61	4	
		63	4	
		64	11	
		72	14	
		Part III, Chap. V, Sect. II	18	
		74	2, 92	
		75	35	
		81	7, 10, 31	
		84	1, 3, 6, 7, 8, 13	
Bezirksgericht St. Gallen, 3 July 1997	n/a	1	45	CLOUT case No. 215
		8	13, 14, 21, 23, 34, 45, 46	
		11	1	
		14	6, 7, 41	
		55	6	
Kantonsgericht St. Gallen, 12 August 1997	n/a	1	45	CLOUT case No. 216
		34	2, 4	
		58	6, 8	
Handelsgericht des Kantons Aargau, 26 September 1997	n/a	1	45	CLOUT case No. 217
		7	4, 48	
		14	11	
		25	1, 28	
		49	5, 34	
		61	4	
		64	6, 9	
		Part III, Chap. V, Sect. II	16	
		74	73, 87	
		75	28, 29, 34	
		78	3, 6	
Cour de Justice Genève, 10 October 1997	n/a	4	40	CLOUT case No. 249
		39	188	
Kantonsgericht Zug, 16 October 1997	n/a	1	45	CLOUT case No. 218
Tribunal cantonal du Valais, 28 October 1997	n/a	1	45	CLOUT case No. 219
		33	12	
		35	1, 37	
		39	138	
		45	13	
		Part III, Chap. IV	8	
		67	13	
Kantonsgericht Nidwalden, 3 December 1997	n/a	1	45	CLOUT case No. 220
		6	20	
		39	28, 78	
		78	32	
Zivilgericht des Kantons Basel-Stadt, 3 December 1997	n/a	1	45	CLOUT case No. 221
		9	15, 28	
		57	6	

Case	*Parties*	*Article*	*Footnote*	*Remarks*
Handelsgericht des Kantons Aargau, 19 December 1997	n/a	1 78	45 4	CLOUT case No. 254
Tribunal cantonal du Vaud, 24 December 1997	n/a	1	45	CLOUT case No. 257
Cantone del Ticino Tribunale d'appello, 15 January 1998	n/a	1 4 7 35 36 38 Part III, Chap. IV 67 74 81 84	45 11 36 41, 42 6, 7, 9, 13 20 19, 20 5, 17 38 15, 27 1, 2, 6, 7, 8, 13	CLOUT case No. 253
Kantonsgericht Freiburg, 23 January 1998	n/a	1 4 7	45 38 46	CLOUT case No. 259
Tribunal cantonal du Valais (IIe Cour Civile), 29 June 1998	n/a	1 35 39	45 1, 38 106, 142, 175	CLOUT case No. 256
Kantonsgericht Kanton Wallis (Zivilgerichtshof I), 30 June 1998	n/a	1 4 54	45 52 5	CLOUT case No. 255
Kanton St. Gallen, Bezirksgericht Unterrheintal, 16 September 1998	n/a	1 39 44	45 141 14	CLOUT case No. 263
Handelsgericht des Kantons Zürich, 21 September 1998	n/a	1 3 35 39 78	45 2 20 67, 68, 74 2	CLOUT case No. 252
Canton de Genève, Cour de Justice (Chambre civile), 9 October 1998	n/a	2	10	CLOUT case No. 260
Schweizerisches Bundesgericht (I. Zivilabteilung), 28 October 1998	n/a	1 7 25 39 45 46 49 50 78	45 50 17, 18 129 2 10, 11 19, 20 11 11, 12, 17, 29	CLOUT case No. 248

Case	*Parties*	*Article*	*Footnote*	*Remarks*
Handelsgericht des Kantons Zürich, 30 November 1998	n/a	1	2, 9, 51	CLOUT case No. 251
		4	16, 24, 52	
		7	20	
		8	29, 48	
		Part II	2	
		18	2	
		19	2	
		35	3, 44	
		38	18, 21, 33, 38, 45, 70	
		39	13, 16, 44, 95, 105, 121	
		40	3, 24	
		73	6, 7	
Handelsgericht des Kantons Zürich, 10 February 1999	n/a	1	45	CLOUT case No. 331
		3	2, 7	
		4	9	
		6	8	
		31	13, 30	
		74	23	
		79	12, 13, 21, 36, 76, 81, 85, 99, 100	
Kantonsgericht des Kantons Zug, 25 February 1999	n/a	1	45	CLOUT case No. 327
		3	9, 11	
		53	4	
		74	55	
		78	15, 29	
Handelsgericht des Kantons Zürich, 8 April 1999	n/a	1	45	CLOUT case No. 325
		3	2	
Canton Ticino, seconda Camera civile del Tribunale d'appello, 8 June 1999	n/a	1	45	CLOUT case No. 336
		39	33, 74	
Handelsgericht des Kantons Aargau, 11 June 1999	n/a	1	45	CLOUT case No. 333
		4	24	
		7	4, 18	
OG Kanton Basel-Landschaft, 5 October 1999	n/a	1	45	CLOUT Case No. 332
		29	3, 4	
Kantonsgericht des Kantons Zug, 21 October 1999	n/a	1	8, 19, 45	CLOUT case No. 328
		76	19	
		78	1, 7, 29	
Bundesgericht, 11 July 2000	n/a	1	42	
		4	42	
Bundesgericht, 15 September 2000	(FCF S.A. v. Adriafil Commerciale s.r.l)	11	2	
		Part III, Chap. V, Sect. II	16, 18	
		75	27, 34, 35	
		77	42	
Bundesgericht, 22 December 2000	(Roland Schmidt GmbH v. Textil-Werke Blumenegg AG)	8	10, 19, 25	

Case	Parties	Article	Footnote	Remarks
UNITED STATES				
U.S. [Federal] Court of International Trade, 24 October, 1989	(Orbisphere Corp. v. United States)	6	14	
U.S. [Federal] District Court for the Southern District of New York, 14 April 1992	(Filanto, s.p.a. v. Chilewich International Corp)	1 8	67 42, 47	CLOUT case No. 23
U.S. Court of Appeals, Fifth Circuit, 15 June 1993	(Beijing Metals & Minerals Import/ Export Corporation v. American Business Center, Inc., et al.)	1 8	67 38	CLOUT case No. 24
U.S. District Court for the Northern District of New York, 9 September 1994	(Delchi Carrier, s.p.a. v. Rotorex Corp.)	1 45 74 75 77 78 86 87	67 2 2, 19, 32, 34, 35, 45, 67, 71, 75, 92 14, 18 10 34 4 5	CLOUT case No. 85
U.S. District Court Southern District, New York, 6 April 1994	(S.V. Braun Inc. v. Alitalia Linee Aeree Italiane, s.p.a.)	50	1, 2	
U.S. [Federal] District Court, Southern District of New York, 22 September 1994	(Graves Import Co. Ltd. and Italian Trading Company v. Chilewich Int'l Corp.)	1 29	67 1, 15	CLOUT case No. 86
Oregon Court of Appeals, 12 April, 1995	(GPL Treatment Ltd. v. Louisiana-Pacific Group)	6	27	
U.S.Federal Court of Appeals, Second Circuit, 6 December 1995	(Delchi Carrier s.p.a. v. Rotorex Corp)	1 7 25 35 45 46 49 74 75 77 86 87	67 5, 2 21 31 2 14 23 2, 4, 19, 31, 34, 35, 45, 67, 68, 71, 75, 92 14, 18 10 4 5	CLOUT case No. 138
Oregon Supreme Court, 11 April 1996	(GPL Treatment, Ltd. v. Louisiana-Pacific Corp.)	11	1	CLOUT case No. 137
U.S. [Federal] District Court, Southern District of New York, 23 July 1997	(Helen Kaminski Pty. Ltd. v. Marketing Australian Products, Inc. doing business as Fiona Waterstreet Hats)	1 14 25 61 63	12, 45, 67 28 10 9 4	CLOUT case No. 187

Case	*Parties*	*Article*	*Footnote*	*Remarks*
U.S. [Federal] District Court for the Southern District of New York, 6 April 1998	(Calzaturificio Claudia s.n.c. v. Olivieri Footwear Ltd.)	1 7 8 Part II 19 29	45, 67 3 43 33 6 9	CLOUT case No. 413
U.S. Court of Appeals, Eleventh Circuit, 29 June 1998	(MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, s.p.a.)	1 7 8 11 Part II 39	46, 67 3 11, 12, 17, 19, 38, 44 4 16 18, 36	CLOUT case No. 222
U.S. [Federal] District Court, Northern District of Illinois, 27 October 1998	(Mitchell Aircraft Spares, Inc. v. European Aircraft Service AB)	1 8 Part II	45, 67 39 5	CLOUT case No. 419
Federal District Court, Eastern District of Louisiana, 17 May 1999	(Medical Marketing International, Inc. v. Internazionale Medico Scientifica, s.r.l.)	1 7 25 35 49	46 2 2 26 6	CLOUT case No. 418
U.S. [Federal] District Court, Northern District of Illinois, 7 December 1999	(Magellan International Corp. v. Salzgitter Handel GmbH)	1 Part II 14 18 19 28 72	67 33 12 15 3 1, 2, 3, 4 6, 8	CLOUT case No. 417
Minnesota State District Court for the County of Hennepin, 14 December 1999	(KSTP-FM, LLC v. Specialized Communications, Inc. and Adtronics Signs, Ltd.)	1 Part II 18	45, 67 35 25	CLOUT case No. 416
U.S. [Federal] District Court, Southern District of New York, 8 August 2000	(Fercus, s.r.l. v. Palazzo)	11	13	CLOUT case No. 414
U.S. [Federal] District Court, Eastern District of Pennsylvania, 29 August 2000	(Viva Vino Import Corporation v. Farnese Vini s.r.l.)	4 74	47 15	CLOUT case No. 420
[Federal] Bankruptcy Court, United States, 10 April 2001	(Victoria Alloys, Inc. v. Fortis Bank SA/NV)	4 53	29 4	CLOUT case No. 632
[Federal] Northern District Court for California, 27 July 2001	(Asante Technologies, Inc. v. PMC-Sierra, Inc.)	Preamble 6 10	1 2 3	CLOUT case No. 433
Western District Court for Michigan, United States, 17 December 2001	(Shuttle Packaging Systems, L.L.C. v. Tsonakis, Ina S.A. and Ina Plastics Corporation)	8 64 71 73	39 3 14 4	CLOUT case No. 578
U.S. [Federal] District Court, Southern District of New York, 26 March 2002	(St. Paul Guardian Insurance Co. & Travelers Insurance Co. v. Neuro-med Medical Systems & Support)	9 Part III, Chap. IV 67	41 2, 19 1, 2	CLOUT case No. 447

Case	Parties	Article	Footnote	Remarks
U.S.[Federal] District Court, Northern District of Illinois, 27 March 2002	(Usinor Industeel v. Leeco Steel Products, Inc.)	4 7 81	29, 45, 50 11 41	CLOUT case No. 613
[Federal] District Court, Southern District of New York, 10 May 2002	(Geneva Pharmaceuticals Tech. Corp. v. Barr Labs. Inc.)	Preamble 4 9 14 16 18	1 22, 47 19 26 4 17	CLOUT case No. 579
U.S. [Federal] Court of Appeals, Fourth Circuit), 21 June 2002	(Schmitz-Werke GmbH + Co. v. Rockland Industries, Incorporated)	7	5	CLOUT case No. 580
U.S.[Federal] Court of Appeals Fifth Circuit, 7 July 2003	(BP Oil International, Ltd. and BP Exploration & Oil, Inc. v. Empresa Estatal Petroleos de Ecuador et al.)	6	22	CLOUT case No. 575

ARBITRATION

Case	Parties	Article	Footnote	Remarks
ICC, Court of Arbitration, case No. 5713/1989	n/a	38 39 40	8, 65 178 4, 25	CLOUT case No. 45
ICC, Court of Arbitration, 26 August 1989, case No. 6281/1989		75 79	3 9, 14, 27, 52, 61, 63, 68, 81	CLOUT case No. 102
ICC, Court of Arbitration, case No. 7585/1992		Part II 25 63 Part III, Chap. V, Sect. II 74 75 77 78	6 12, 16 4 10 51, 52, 60, 67 10, 28 30 6, 14, 17, 22	CLOUT case No. 301
ICC, Court of Arbitration, case No. 7197/1992		4 53 54 61 62 69 Part III, Chap. V, Sect. II 74 77 78 79 85 87	34 4 3 4 3 4, 9 15 9, 50 17 11 16, 26, 51, 80, 87, 93 3, 4, 7, 10 3	CLOUT case No. 104
ICC, Court of Arbitration, case No. 7153/1992		3 53	12 4	CLOUT case No. 26

Case	*Parties*	*Article*	*Footnote*	*Remarks*
ICC, Court of Arbitration, case No. 6653/1993		4 6 7 35 78 81 84	10 21 36 41 23, 27 27 1, 2, 5, 10, 15	CLOUT case No. 103
ICC, Court of Arbitration, case No. 7565/1994		6 39 78	21 189, 191, 193 29	CLOUT case No. 300
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United Nations publication
ISBN 978-92-1-133790-7
Sales No. E.08.V.15

FOR UNITED NATIONS USE ONLY

Printed in Austria
V.08-51939—September 2008—680