

UNCITRAL

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

2012 Edition



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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

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

2012 Edition



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Introduction to the Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods

NOTE BY THE SECRETARIAT

1. The United Nations Convention on Contracts for the International Sale of Goods, 1980 (the Convention, or CISG) has become in over 30 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 30 September 2011, 77 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 2,500 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. Since 1988, UNCITRAL has established a reporting system for case law on UNCITRAL texts (CLOUT)⁷ in order to assist judges, arbitrators, lawyers, and parties to business transactions, by making available decisions of courts and

arbitral tribunals interpreting UNCITRAL texts (notably conventions and model laws); and in so doing, to further the uniform interpretation and application of those texts.

12. CLOUT currently includes cases referring to the CISG, the UNCITRAL Model Law on International Commercial Arbitration (1985 and 2006 amendments), the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958, so called “New York Convention”); the United Nations Convention on the Carriage of Goods by Sea (1978) (so called “Hamburg Rules”), the UNCITRAL Model Law on Electronic Commerce (1996), the UNCITRAL Model Law on Cross-Border Insolvency (1997), the Convention on the Limitation Period in the International Sale of Goods (1974).

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, in 2001 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, which has further supported the goal of uniform interpretation of CISG.

16. The Digest, published in 2004 for the first time, is meant to reflect the evolution of case law and, therefore, UNCITRAL is committed to periodic release of updates. This is the second revision, and a major one, which has resulted in hundreds of new cases being added to the text.

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. While the CLOUT system reports cases in the form of abstracts, the Digest makes reference also to the full text of the decision whenever this is useful to illustrate the point. Brief introductory notes at the beginning of each Part, Chapter and Section of the Digest help users understand the broader context of the individual articles and cases construing them. This new edition of the Digest includes improved information on Part IV of the Convention (“Final provisions”) which had not been extensively developed in the previous editions.

18. The Digest is the result of the cooperation between national correspondents, international experts and the UNCITRAL Secretariat.⁹ This current revision has greatly benefitted from the contribution of Professor Siegfried Eisele of the University of South Africa School of Law; Professor Franco Ferrari of New York University School of Law and Università degli Studi di Verona, Facoltà di Giurisprudenza; Professor Harry Flechtner of the University of Pittsburgh School of Law; Professor Alejandro Garro of Columbia University Law School; Professor Ulrich Magnus of the Universität Hamburg, Fakultät fuer Rechtswissenschaft; Vikki Rogers, Pace Law School, Institute of International Commercial Law; Professor Hiroo Sono of the Hokkaido University School of Law; Professor Pilar Perales Viscasillas of the Universidad Carlos III de Madrid, Facultad de Derecho; Professor Claude Witz of Saarland University and the University of Strasbourg, Faculties of Law.

Notes

¹United 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 www.uncitral.org/.

²UNCITRAL prepares yearly a *Bibliography of recent writings related to the work of UNCITRAL* (for the year 2011, see United Nations document A/CN.9/722 of 15 March 2011), available on UNCITRAL’s website at www.uncitral.org/uncitral/commission/sessions/44th.html.

³Article 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.”

⁴Article 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.”

⁵This 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, article 7 (1) (“regard is to be had to its ... international character”; UNCITRAL Model Law on Electronic Commerce, article 3 (“regard is to be had to its international origin”); UNCITRAL Model Law on Cross-border Insolvency, article 8 (“regard is to be had to its international origin”).

⁶UNCITRAL 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 www.uncitral.org/.

⁷Report 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, paragraphs 98-109. CLOUT reports are published as United Nations documents A/CN.9/SER.C/ABSTRACTS/1 to A/CN.9/SER.C/ABSTRACTS/112 (latest document available at the date of this Digest revision). The 112 CLOUT reports are also available on UNCITRAL’s website at www.uncitral.org/clout/showSearchDocument.do?lf=898&lng=en.

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

⁹The first draft of the Digest (in 2004) was prepared with the contribution of Professor Franco Ferrari (Università degli Studi di Verona); Professor Harry Flechtner (University of Pittsburgh); Professor Ulrich Magnus (Universität Hamburg); Professor Peter Winship (Southern Methodist University); and Professor Claude Witz (Universität des Saarlandes).

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 Preamble² 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 the Preamble, the Authentic Text and Witness Clause, and each of the various Parts, Chapters and Sections described in paragraphs 2-7 above), and sections for each of the individual articles that comprise the Convention.

Notes

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

²See the Digest for the Preamble.

³See the Digest for the Authentic Text and Witness Clause.

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

¹CLOUT case No. 433 [U.S. District Court, Northern District of California, United States, 27 July 2001, available on the Internet at <http://cisgw3.law.pace.edu/cases/010727u1.html> (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 [U.S. District Court, Southern District of New York, United States, May 10, 2002, available on the Internet at <http://cisgw3.law.pace.edu/cases/020510u1.html> (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 pre-empted contract claims based on internal domestic law). See also U.S. District Court, Northern District of Illinois, United States, 3 September 2008 (CAN Int’l, Inc. v. Guangdong Kelon Electronical Holdings), available on the Internet at <http://cisgw3.law.pace.edu/cases/080903u1.html> (“[T]he CISG drafters’ goal was to remove legal barriers to international trade”).

Part one

**SPHERE OF APPLICATION
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 the 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

¹See the Digest for article 1, paragraph 11.

²*Ibid.*

³See the Digest for Part II, paragraph 4.

⁴See the Digest for article 1, paragraph 17.

⁵See the Digest for article 1, paragraph 11.

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 sets forth some of the Convention's applicability requirements. To determine whether the Convention applies in a given case, it is, however, equally important to look to other provisions which also help to define the Convention's sphere of application. In this respect, it is worth pointing to articles 2 and 3, which respectively narrow and extend the Convention's substantive sphere of application. As for the Convention's temporal sphere of application, it is defined by article 100.

CONVENTION PREVAILS OVER RECOURSE TO PRIVATE INTERNATIONAL LAW

2. Whenever a contract for the sale of goods is international (in some sense of that term), courts cannot simply resort to their own substantive law to solve disputes arising out that contract. Rather, courts must determine which substantive rules to resort to in order to do so. Traditionally, when a situation is international, courts resort to the private international law rules in force in their country to determine which substantive rules to apply. In those countries, however, where international uniform substantive rules are in force, such as those set forth by the Convention, courts must determine whether those international uniform substantive rules apply before resorting to private international law rules at all.¹ This means that recourse to the Convention prevails over recourse to the forum's private international law rules.² This approach has been justified on the grounds that, as a set of uniform substantive law rules,³ the Convention is more specific insofar as its sphere of application is more limited and leads directly to a substantive solution,⁴ whereas resort to private international law requires a two-step approach—that is, the identification of the applicable law and the application thereof.⁵

INTERNATIONALITY AND PLACE OF BUSINESS

3. The Convention does not apply to every kind of contracts for the international sale of goods; rather, its sphere of application is limited to contracts for the sale of goods that meet a specific internationality requirement set forth in article 1 (1). Pursuant to that provision, a contract for the sale of goods is international when the parties have—at the moment of the conclusion of the contract⁶—their relevant places of business in different States.⁷ One court stated that the relevant places of business of the parties are their “principal places of business”.⁸

4. The concept of “place of business” is critical in the determination of internationality. The Convention, however, does not define it,⁹ 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).¹⁰

5. According to several courts, “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”.¹¹ Similarly, one tribunal stated that there is a place of business where there is “a permanent and stable business organisation and not the place where only preparations for the conclusion of a single contract have been made”.¹² According to one court, for there to be a “place of business”, “it suffices that there exists an organization of certain continuance”.¹³ A different court simply stated that the “[p]lace of business in the meaning of article 1 and 10 CISG is the actual place of business”.¹⁴ One court stated that the place where goods are merely stored does not constitute a “place of business” for the purpose of the Convention.¹⁵ The same is true as regards a booth at an exhibition.¹⁶ An arbitral tribunal stated that “[t]he mere place of contracting does not constitute a place of business; neither does the locality where the negotiations have taken place.”¹⁷ Another court

has concluded that a liaison office cannot be considered a “place of business” under the Convention.¹⁸

6. The internationality requirement is not met where the parties have their relevant places of businesses in the same country.¹⁹ 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”.²⁰ 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”.²¹ For the purposes of the Convention’s applicability, the parties’ civil or commercial character is also irrelevant.²²

7. 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,²³ 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 analysing whether the contract is international.²⁴

8. 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”.²⁵ 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.²⁶

AUTONOMOUS APPLICABILITY

9. The internationality of a contract for the sale of goods, by itself, is not sufficient to make the Convention applicable.²⁷ Article 1 (1) lists two additional alternative criteria for applicability, one of which has to be met in order for the Convention to apply as part of the law of the forum.²⁸ According to the criterion set forth in article 1 (1) (a), the Convention is “directly”²⁹ or “autonomously”³⁰ applicable, i.e., without the need to resort to the rules of private international law,³¹ when the States in which the parties have their relevant places of business are Contracting States.³² As the list of Contracting States grows, this criterion is leading to application of the Convention in an increasing number of cases.³³

10. 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.”³⁴ This is true, unless the parties have designated a given law with the intention

to exclude the Convention, which they are allowed to do pursuant to article 6.³⁵

11. 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 set forth 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 Convention, 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 contract.³⁶ The same is true *mutatis mutandis* if a party is located in a territory of a Contracting State in relation to which the State has declared, pursuant to article 93, that the Convention does not extend.³⁷ On the basis of article 93, some courts consider parties who have their place of business in Hong Kong as having their place of business in a non-Contracting State, thus making it impossible for them to apply the Convention pursuant to article 1 (1) (a), while other courts consider those parties to have their place of business in a Contracting State.³⁸

12. A Contracting State that declared an article 95 reservation is to be considered a full-fledged Contracting State for the purpose of article 1 (1) (a).³⁹ Thus, the Convention can apply pursuant to article 1 (1) (a) also in the courts of Contracting States that declared an article 95 reservation,⁴⁰ and this even where both parties have their place of business in a Contracting State that declared an article 95 reservation.⁴¹

13. According to some decisions, Hong Kong is not considered a Contracting State to the Convention, since China has not extended the applicability of the Convention to Hong Kong.⁴² It has been held, however, that the Convention extends to Hong Kong,⁴³ thus allowing the Convention to apply even pursuant to article 1 (1) (a).

INDIRECT APPLICABILITY

14. 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 a Contracting State,⁴⁴ as long as the rules of private international law lead to the law of a Contracting State.⁴⁵ Since the relevant rules of private international law are those of the forum,⁴⁶ 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 law designated by the rules of private international of the forum (*renvoi*), etc.

15. Where the private international law rules of the forum are based upon the 1980 Rome Convention on the Law Applicable to Contractual Obligations,⁴⁷ 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),⁴⁸ since article 3 of the Rome Convention recognizes party autonomy.⁴⁹

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,⁵⁰ as article 2⁵¹ of this Convention also obliges judges to apply the law designated by the parties.⁵²

16. In arbitral proceedings, the Convention may be selected by the parties to govern their dispute.⁵³ In state court proceedings, parties are not allowed to choose the Convention as the law applicable to their dispute where it would otherwise not apply, at least not in those courts that have to apply either the 1980 Rome Convention on the Law Applicable to Contractual Obligations or the 1955 Hague Convention on the Law Applicable to International Sales. This is due to the fact that these Conventions allow parties to choose only the law of a State to govern their dispute; non-State rules—as well as the Convention in cases where it would otherwise not apply—cannot be chosen. The choice of the Convention in cases where it would otherwise not apply amounts, however, to an incorporation by reference of the rules of the Convention into the contract. In this case, the rules of the Convention may not override the mandatory rules of the otherwise applicable law.

17. Where the parties did not make a choice of law or where their choice is not valid, one has to resort to the objective connecting factors of the rules of private international law of the forum to determine which law applies, and thus, whether the Convention is applicable by virtue of article 1 (1) (b). Pursuant to article 4 (1) of the 1980 Rome Convention on the Law Applicable to Contractual Obligations, absent a valid choice of law, one has to apply the law “most closely connected” to the contract;⁵⁴ 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, who is the party that has to effect the characteristic performance,⁵⁵ had its place of business in a Contracting State to the CISG.⁵⁶ Under the 1955 Hague Convention, absent a choice of law the law of the seller applies,⁵⁷ 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.⁵⁸

18. 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 (1) (b) would have on the application of their special legislation”.⁵⁹ As a consequence, article 95 was introduced to give Contracting States the opportunity to choose not to be bound by article 1 (1) (b).⁶⁰ Judges located in Contracting States that have declared an article 95 reservation will not apply the Convention by virtue of article 1 (1) (b); as mentioned earlier,⁶¹ this does not, however, affect the Convention’s applicability in such States by virtue of article 1 (1) (a).⁶²

19. A Contracting State which makes a declaration in accordance with article 92 (1) in respect of either Part II or Part III of the Convention is not to be considered a Contracting State within article 1 (1) of the Convention in respect of matters governed by the Part to which the declaration refers.⁶³

20. 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.⁶⁴

CONTRACTS GOVERNED BY THE CONVENTION

21. The Convention applies to contracts for the sale of goods—irrespective of the label given to the contract by the parties.⁶⁵ Although the Convention does not provide any definition of this type of contract,⁶⁶ an autonomous⁶⁷ description can be derived from articles 30 and 53.⁶⁸ 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.⁶⁹ One court has declared that the essence of the contract governed by the Convention lies in goods being exchanged for money.⁷⁰

22. The Convention covers contracts for the delivery of goods by instalments,⁷¹ 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.⁷² Pursuant to article 29, contracts modifying a sales contract also fall within the substantive sphere of application of the Convention.⁷³

23. 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.

24. Most courts considering the issue have concluded that the Convention does not apply to distribution agreements,⁷⁴ or framework agreements,⁷⁵ as these agreements focus on the “organization of the distribution” rather than the transfer of ownership of goods.⁷⁶ The various contracts for the sale of goods concluded in execution of a distribution agreement, can, however, be governed by the Convention,⁷⁷ even where the distribution agreement was concluded before the entry into force of the Convention.⁷⁸

25. Franchise agreements also fall outside the Convention’s sphere of application.⁷⁹ According to some arbitral tribunals, the Convention does not apply to barter transactions.⁸⁰ According to a different arbitral tribunal, the Convention does govern barter transactions.⁸¹

26. Turn-key contracts are not governed by the Convention.⁸²

GOODS

27. The Convention does not define “goods”. This does not mean one should resort to one’s domestic definition. In light of 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 referring to domestic law for a definition.⁸³

28. According to case law, “goods” in the sense of the Convention are items that are, at the moment of delivery,⁸⁴ “moveable and tangible”,⁸⁵ regardless of their shape⁸⁶ and whether they are solid,⁸⁷ used or new,⁸⁸ inanimate or alive.⁸⁹ Intangibles, such as intellectual property rights, goodwill,⁹⁰ an interest in a limited liability company,⁹¹ or an assigned debt,⁹² have been considered not to fall within the Convention’s concept of “goods”. The same is true for a market research study.⁹³ According to one court, however, the concept of “goods” is to be interpreted “extensively”,⁹⁴

perhaps suggesting that the Convention might apply to goods that are not tangible.

29. Whereas the sale of computer hardware clearly falls within the sphere of application of the Convention,⁹⁵ the issue is not so clear when it comes to software. Some courts consider only standard software to be “goods” under the Convention;⁹⁶ another court concluded that any kind of software, including custom-made software, should be considered “goods”.⁹⁷

Notes

¹Polimeles Protodikio Athinon, Greece, 2009 (docket No. 4505/2009), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/094505gr.html#ii2>; CLOUT case No. 867 [Tribunale di Forlì, Italy, 11 December 2008], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081211i3.html>; Tribunale di Padova, Italy, 31 March 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040331i3.html>; Tribunale di Padova, Italy, 25 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040225i3.html>; CLOUT case No. 608 [Tribunale di Rimini, Italy, 26 November 2002] (see full text of the decision); CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (see full text of the decision).

²For this view, see CLOUT case No. 867 [Tribunale di Forlì, Italy, 11 December 2008], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081211i3.html>; Oberlandesgericht Schleswig, Germany, 24 October 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081024g1.html>; CLOUT case No. 888 [Kantonsgericht Schaffhausen, Switzerland, 20 October 2003]; Obergericht Thurgau, Switzerland, 11 September 2003, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/1810.pdf>; Oberster Gerichtshof, Austria, 18 December 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021218a3.html>; CLOUT case No. 608 [Tribunale di Rimini, Italy, 26 November 2002] (see full text of the decision); CLOUT case No. 648 [Corte di Cassazione, Italy, 18 October 2002]; CLOUT case No. 380 [Tribunale di Pavia, Italy, 29 December 1999]; Landgericht Zwickau, Germany, 19 March 1999, available on the Internet at www.cisg-online.ch/cisg/urteile/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).

³For decisions stating that the Convention sets forth substantive rules, see U.S. District Court, Northern District of California, United States, 2 November 2005, available on the Internet at <http://cisgw3.law.pace.edu/cases/051102u1.html#iii>; CLOUT case No. 608 [Tribunale di Rimini, Italy, 26 November 2002] (see full text of the decision); CLOUT case No. 480 [Cour d’appel de Colmar, France, 12 June 2001] (see full text of the decision); CLOUT case No. 424 [Oberster Gerichtshof, Austria, 9 March 2000] (see full text of the decision); Tribunale d’appello, Lugano, Switzerland, 8 June 1999, Unilex.

⁴For this approach, see CLOUT case No. 867 [Tribunale di Forlì, Italy, 11 December 2008], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081211i3.html>; Tribunale di Padova, Italy, 31 March 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040331i3.html>; Tribunale di Padova, Italy, 25 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040225i3.html>; CLOUT case No. 608 [Tribunale di Rimini, Italy, 26 November 2002] (see full text of the decision); CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (see full text of the decision).

⁵CLOUT case No. 867 [Tribunale di Forlì, Italy, 11 December 2008], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081211i3.html>; Tribunale di Padova, Italy, 31 March 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040331i3.html>; Tribunale di Padova, Italy, 25 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040225i3.html>; CLOUT case No. 608 [Tribunale di Rimini, Italy, 26 November 2002] (see full text of the decision); CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (see full text of the decision).

⁶See CLOUT case No. 867 [Tribunale di Forlì, Italy, 11 December 2008], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081211i3.html>; Tribunale di Padova, Italy, 25 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040225i3.html>; CLOUT case No. 608 [Tribunale di Rimini, Italy, 26 November 2002] (see full text of the decision); Oberlandesgericht Dresden, Germany, 27 December 1999, available on the Internet at www.cisg-online.ch/cisg/urteile/511.htm.

⁷See Polimeles Protodikio Athinon, Greece, 2009 docket No. 4505/2009), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/094505gr.html#ii2>; Tribunale di Padova, Italy, 25 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040225i3.html>; CLOUT case No. 608 [Tribunale di Rimini, Italy, 26 November 2002] (see full text of the decision); 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 May 1996] (see full text of the decision); CLOUT case No. 106 [Oberster Gerichtshof, Austria, 10 November 1994].

⁸U.S. District Court, Eastern District of Pennsylvania, United States, 29 January 2010, available on the Internet at <http://cisgw3.law.pace.edu/cases/100129u1.html#ii>.

⁹For an express reference to the fact that the Convention does not define the concept of “place of business”, see CLOUT case No. 930 [Tribunal cantonal du Valais, Switzerland, 23 May 2006] (see full text of the decision).

¹⁰See CLOUT case No. 746 [Oberlandesgericht Graz, Austria, 29 July 2004].

¹¹Oberlandesgericht Hamm, Germany, 2 April 2009, available on the Internet at www.globalsaleslaw.com/content/api/cisg/urteile/1978.pdf; CLOUT case No. 867 [Tribunale di Forlì, Italy, 11 December 2008], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081211i3.html>; CLOUT case No. 651 [Tribunale di Padova, Italy, 11 January 2005] (see full text of the decision); CLOUT case No. 904 [Tribunal Cantonal Jura, Switzerland, 3 November 2004] (see full text of the decision); CLOUT case No. 746 [Oberlandesgericht Graz, Austria, 29 July 2004] (see full text of the decision); Tribunale di Padova, Italy, 25 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040225i3.html>; Oberlandesgericht Stuttgart, Germany, 28 February 2000, *Internationales Handelsrecht*, 2001, 66; CLOUT case No. 608 [Tribunale di Rimini, Italy, 26 November 2002] (see full text of the decision); for a similar definition see CLOUT case No. 930 [Tribunal cantonal du Valais, Switzerland, 23 May 2006]; 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 www.cisg.law.pace.edu/cisg/text/000413g1german.html.

¹²ICC Court of Arbitration, France, Arbitral award case No. 9781, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/009781i1.html>.

¹³Tribunal Cantonal du Valais, Switzerland, 19 August 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030819s1.html>.

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

¹⁵CLOUT case No. 930 [Tribunal cantonal du Valais, Switzerland, 23 May 2006] (see full text of the decision).

¹⁶Ibid.

¹⁷ICC Court of Arbitration, France, Arbitral award case No. 9781, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/009781i1.html>.

¹⁸See CLOUT case No. 158 [Cour d’appel de Paris, France, 22 April 1992].

¹⁹See, e.g., CLOUT case No. 698 [Superior Court of Massachusetts, United States, 28 February 2005].

²⁰For references to the irrelevance of the parties’ nationality, see CLOUT case No. 746 [Oberlandesgericht Graz, Austria, 29 July 2004] (see full text of the decision); Rechtbank van Koophandel, Hasselt, 13 May 2003, Belgium, available on the Internet at www.law.kuleuven.be/ipr/eng/cases/2003-05-13.html; 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 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, Unilex.

²¹See Oberlandesgericht Köln, Germany, 27 November 1991, Unilex.

²²See CLOUT case No. 445 [Bundesgerichtshof, Germany, 31 October 2001], also in *Internationales Handelsrecht*, 2002, 16.

²³For 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, Unilex; 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].

²⁴See Oberlandesgericht Köln, Germany, 13 November 2000, available on the Internet at www.cisg.law.pace.edu/cisg/text/001113g1german.html.

²⁵For a reference to this provision in case law, see Landgericht Stuttgart, Germany, 29 October 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/091029g1.html>; Tribunale di Forlì, Italy, 16 February 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090216i3.html>; Polimeles Protodikio Athinon, Greece, 2009 (docket No. 4505/2009), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/094505gr.html#i2>; High Commercial Court of Belgrade, Serbia, 22 April 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080422sb.html>; CLOUT case No. 651 [Tribunale di Padova, Italy, 11 January 2005] (see full text of the decision); Tribunale di Padova, Italy, 25 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040225i3.html>; CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (see full text of the decision); CLOUT case No. 425 [Oberster Gerichtshof, Austria, 21 March 2000], also in *Internationales Handelsrecht* 2001, 40 f.; ICC Court of Arbitration, France, Arbitral award case No. 9781, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/009781i1.html>.

²⁶See CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (see full text of the decision).

²⁷See CLOUT case No. 867 [Tribunale di Forlì, Italy, 11 December 2008], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081211i3.html>; CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (see full text of the decision).

²⁸Federal Court of Australia, Australia, 28 September 2010, available on the Internet at <http://cisgw3.law.pace.edu/cases/060110i3.html> (“The Convention is not to be treated as a foreign law which requires proof as a fact”).

²⁹See Amtsgericht Sursee, Switzerland, 12 September 2008, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/1728.pdf>; Handelsgericht Aargau, Switzerland, 19 June 2007, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/1741.pdf>; Bundesgericht, Switzerland, 11 July 2000, available on the Internet at www.cisg.law.pace.edu/cisg/text/000711s1.html; CLOUT case No. 261 [Bezirksgericht der Sanne, Switzerland, 20 February 1997].

³⁰See Amtsgericht Sursee, Switzerland, 12 September 2008, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/1728.pdf>; 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).

³¹See Amtsgericht Sursee, Switzerland, 12 September 2008, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/1728.pdf>; CLOUT case No. 650 [Corte di Cassazione, Italy, 20 September 2004] (see full text of the decision); CLOUT case No. 268 [Bundesgerichtshof, Germany, 11 December 1996] (see full text of the decision).

³²See, however, U.S. District Court, Eastern District of Kentucky, United States, 18 March 2008, available on the Internet at <http://cisgw3.law.pace.edu/cases/080318u1.html>, stating that the Convention applies to contracts between “parties whose principal places of business are in different nations if those nations are signatories to the treaty”.

³³For recent court decisions applying the Convention by virtue of article 1 (1) (a), see U.S. District Court, Eastern District of California, United States, 21 January 2010, available on the Internet at <http://cisgw3.law.pace.edu/cases/100121u1.html#iii>; U.S. District Court, Eastern District of Arkansas, United States, 23 December 2009, available on the Internet at <http://cisgw3.law.pace.edu/cases/091223u1.html>; Bundesgericht, Switzerland, 17 December 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/091217s1.html>; Landgericht Stuttgart, Germany, 29 October 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/091029g1.html>; Hof van Cassatie, Belgium, 19 June 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090619b1.html>; Tribunale di Forlì, Italy, 16 February 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090216i3.html>; Tribunal Cantonal du Valais, Switzerland, 28 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090128s1.html>; 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³⁴United 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.

³⁵For an analysis of the issue of exclusion of the Convention, see the Digest for article 6.

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³⁷Upon 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.

³⁸See U.S. District Court, Eastern District of Arkansas, United States, 23 December 2009, available on the Internet at <http://cisgw3.law.pace.edu/cases/091223u1.html>.

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⁴⁰See, e.g., U.S. District Court, Southern District of New York, United States, 11 January 2011, unpublished; U.S. District Court, Eastern District of California, United States, 21 January 2010, available on the Internet at <http://cisgw3.law.pace.edu/cases/100121u1.html#iii>; U.S. District Court, Eastern District of Arkansas, United States, 23 December 2009, available on the Internet at <http://cisgw3.law.pace.edu/cases/091223u1.html>; U.S. District Court, Southern District of New York, United States, 29 May 2009, available on the Internet at <http://cisgw3.law.pace.edu/cases/090529u1.html#iii>; U.S. District Court, Southern District of Ohio, United States, 26 March 2009, available on the Internet at <http://cisgw3.law.pace.edu/cases/090326u1.html>; District Court in Komarno, Slovakia, 12 March 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090312k1.html>; U.S. District Court, New Jersey, United States, 7 October 2008, available on the Internet at <http://cisgw3.law.pace.edu/cases/081007u1.html>; 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CLOUT case No. 609 [U.S. District Court for Northern District of Illinois, United States, 6 October 2003]; CLOUT case No. 579 [U.S. District Court for the Southern District of New York, United States, 10 May 2002]; CLOUT case No. 447 [U.S. District Court for the Southern District of New York, United States, 26 March 2002]; CLOUT case No. 578 [U.S. District Court, Western District of Michigan, United States, 17 December 2001]; CLOUT case No. 433 [U.S. District Court, Northern District of California, United States, 27 July 2001]; CLOUT case No. 617 [U.S. District Court, Northern District of California, United States, 30 January 2001]; CLOUT case No. 417 [U.S. 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 [U.S. District Court, Northern District of Illinois, United States, 27 October 1998]; CLOUT case No. 222 [U.S. Court of Appeals (11th Circuit), United States, 29 June 1998]; CLOUT case No. 413 [U.S. District Court, Southern District of New York, United States, 6 April 1998]; CLOUT

case No. 187 [U.S. District Court, Southern District of New York, United States, 23 July 1997]; CLOUT case No. 138 [U.S. Court of Appeals (2nd Circuit), United States, 6 December 1995]; CLOUT case No. 86 [U.S. District Court, Southern District of New York, United States 22 September 1994]; CLOUT case No. 85 [U.S. District Court, Northern District of New York, United States, 9 September 1994]; CLOUT case No. 24 [U.S. Court of Appeals (5th Circuit), United States, 15 June 1993]; CLOUT case No. 23 [U.S. District Court, Southern District of New York, United States, 14 April 1992].

⁴¹District Court in Trnava, Slovakia, 17 September 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080917k1.html>; District Court in Nitra, Slovakia, 29 May 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080529k1.html>; U.S. District Court, Southern District of Florida, United States, 19 May 2008, available on the Internet at <http://cisgw3.law.pace.edu/cases/080519u2.html>; District Court in Nitra, Slovakia, 27 June 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060627k1.html>; U.S. District Court, Southern District, Texas, United States, 7 February 2006, available on the Internet at <http://cisgw3.law.pace.edu/cases/060207u1.html#iii>; Shanghai No. 1. Intermediate People's Court, People's Republic of China, 23 March 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040323c1.html>. For an application by an arbitral tribunal of the Convention pursuant to article 1 (1) (a) to a contract concluded between two parties both of whom had their place of business in a country that had declared an article 95 reservation, see China International Economic and Trade Arbitration Commission, People's Republic of China, 2003 (Arbitral award No. CISG/2003/02), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/031203c1.html>.

⁴²See U.S. District Court, Eastern District of Tennessee, United States, 20 October 2010 (America's Collectibles Network, Inc. v. Timlly (HK), 746 F. Supp. 2d 914), available on the Internet at <http://cisgw3.law.pace.edu/cases/101020u1.html>; U.S. District Court, Northern District of Georgia, United States, 17 December 2009 (Innotex Precision Ltd. v. Horei Image Prods., Inc., 679 F. Supp. 2d 1356), available on the Internet at <http://cisgw3.law.pace.edu/cases/091217u1.html#iii>; CLOUT case No. 958 [Federal Court of Australia, South Australia District Registry, Australia, 24 October 2008]; CLOUT case No. 1030 [Cour de Cassation, France, 2 April 2008]; CLOUT case No. 543 [Oberster Gerichtshof, Austria, 17 December 2003].

⁴³U.S. District Court, Northern District of Illinois, United States, 3 September 2008, available on the Internet at <http://cisgw3.law.pace.edu/cases/080903u1.html#i>.

⁴⁴United 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.

⁴⁵For cases referring to article 1 (1) (b), see Cámara Nacional de Apelaciones en lo Comercial de Buenos Aires, Argentina, 7 October 2010, available on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/2156.pdf; Landgericht Potsdam, Germany, 7 April 2009, available on the Internet at <http://cisgw3.law.pace.edu/cisg/text/090407german.pdf>; Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, Arbitral award No. T-8/08, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090128sb.html>; CLOUT case No. 631 [Supreme Court of Queensland, Australia, [2000] QSC 421 (17 November 2000)] (Malaysian and Australian parties chose law applying in Brisbane); CLOUT case No. 701 [Cámara Nacional de Apelaciones en lo Comercial, Argentina, 24 April 2000] (see full text of the decision); CLOUT case No. 400 [Cour d'appel de Colmar, France, 24 October 2000]; CLOUT case No. 380 [Tribunale di Pavia, Italy, 29 December 1999], also in *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. 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 de Grenoble, France, 23 October 1996], also in Unilex; Rechtbank Koophandel, Hasselt, Belgium, 9 October 1996, Unilex; CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, Arbitration, 21 June 1996], also in *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 www.cisg-online.ch/cisg/urteile/188.htm; Landgericht Bad Kreuznach, Germany, 12 March 1996, available on the Internet at www.cisg-online.ch/cisg/urteile/517.htm; CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (see full text of the decision); Landgericht Siegen, Germany, 5 December 1995, Unilex; Rechtbank Koophandel, Hasselt, Belgium, 8 November 1995, Unilex; Landgericht Hamburg, Germany, 23 October 1995, available on the Internet at www.cisg-online.ch/cisg/urteile/395.htm; Rechtbank Koophandel, Hasselt, Belgium, 18 October 1995, *Rechtskundig Weekblad* 1995, 1378 f.; Tribunal de commerce 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] (see full text of the decision); Landgericht Kassel, Germany, 22 June 1995, Unilex; CLOUT case No. 152 [Cour d'appel de Grenoble, France, 26 April 1995]; Amtsgericht Wangen, Germany, 8 March 1995, Unilex; 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 www.cisg-online.ch/cisg/urteile/382.htm; 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 de 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 de 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 de 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).

⁴⁶See CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (see full text of the decision).

⁴⁷For the text of this Convention, see *Official Journal* L 266, 9 October 1980, 1 et seq.

⁴⁸See Bundesgerichtshof, Germany, 11 May 2010, available on the Internet at www.globalsaleslaw.com/content/api/cisg/urteile/2125.pdf; CLOUT case No. 1017 [Hof Beroep, Ghent, Belgium, 15 May 2002], available in Dutch on the Internet at 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].

⁴⁹See 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."

⁵⁰1955 Hague Convention on the Law Applicable to International Sale of Goods, 510 U.N.T.S. 149, No. 7411 (1964).

⁵¹See 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."

⁵²For 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 1955 Hague Convention, see Tribunale commercial de Bruxelles, Belgium, 13 November 1992, Unilex.

⁵³See, for example, CLOUT case No. 720 [Netherlands Arbitration Institute, Arbitral Award, 15 October 2002], also available on Unilex.

⁵⁴For 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, Unilex; 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).

⁵⁵For cases expressly pointing out that the seller is the party that has to effect the characteristic performance, see Landgericht Berlin, Germany, 24 March 1998, Unilex; Landgericht München, Germany, 6 May 1997, available on the Internet at www.cisg-online.ch/cisg/urteile/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. 310 [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 www.cisg-online.ch/cisg/urteile/183.htm.

⁵⁶For cases applying the Convention on the basis of the presumption referred to in the text, see, e.g. Cour d'appel de Mons, Belgium, 8 March 2001, Unilex; Landgericht Bad Kreuznach, Germany, 12 March 1996, available on the Internet at www.cisg-online.ch/cisg/urteile/517.htm; Landgericht Frankfurt am Main, Germany, 6 July 1994, Unilex; CLOUT case No. 50 [Landgericht Baden-Baden, Germany, 14 August 1991] (see full text of the decision).

⁵⁷See Rechtbank Hasselt, Belgium, 9 October 1996, Unilex; Rechtbank Hasselt, Belgium, 8 November 1995, Unilex; CLOUT case No. 152 [Cour d'appel de Grenoble, France, 26 April 1995]; Rechtbank Hasselt, Belgium, 18 October 1995, *Rechtskundig Weekblad* 1995, 1378 f.; Tribunal commercial de Bruxelles, Belgium, 5 October 1994, Unilex; Tribunal Cantonal Vaud 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).

⁵⁸Cour de Cassation, France, 26 June 2001, available on the Internet at <http://witez.jura.uni-sb.de/CISG/decisions/2606011v.htm>; Tribunale di Verona, Italy, 19 December 1997, *Rivista Veronese di Giurisprudenza Economica e dell'Impresa* 1998, 22 ff.

⁵⁹United 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.

⁶⁰To date the following States have declared an article 95 reservation: People's Republic of 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).

⁶¹See *supra* subparagraph 12.

⁶²See *supra* subparagraphs 9 et seq.

⁶³See CLOUT case No. 999 [Ad hoc Arbitral Tribunal, Denmark, 10 November 2000].

⁶⁴See 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.; Tribunal de commerce Nivelles, Belgium, 19 September 1995, Unilex; Tribunal commercial de Bruxelles, Belgium, 5 October 1994, Unilex; Rechtbank Koophandel, Hasselt, Belgium, 16 March 1994, Unilex; Rechtbank Koophandel, Hasselt, Belgium, 23 February 1994, Unilex; Tribunal commercial de 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 www.cisg-online.ch/cisg/urteile/17.htm; 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, available on the Internet at www.cisg-online.ch/cisg/urteile/241.htm; Landgericht Frankfurt am Main, Germany, 2 May 1990, available on the Internet at www.cisg-online.ch/cisg/urteile/183.htm; 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].

⁶⁵For this statement, see Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, Arbitral award of 15 July 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080715sb.html>.

⁶⁶See CLOUT case No. 867 [Tribunale di Forlì, Italy, 11 December 2008], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081211i3.html>; CLOUT case N. 916 [High Commercial Court, Croatia, 19 December 2006]; CLOUT case No. 651 [Tribunale di Padova, Italy, 11 January 2005] (see full text of the decision); CLOUT case No. 608 [Tribunale di Rimini, Italy, 26 November 2002] (see full text of the decision); Kantonsgericht Schaffhausen, Switzerland, 25 February 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020225s1.html>; CLOUT case No. 480 [Cour d'appel de Colmar, France, 12 June 2001] (see full text of the decision); CLOUT case No. 106 [Oberster Gerichtshof, Austria, 10 November 1994] (see full text of the decision).

⁶⁷For the need to determine the concept of “sale” autonomously, see, e.g., Tribunale di Forlì, Italy, 16 February 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090216i3.html>.

⁶⁸See Tribunale di Forlì, Italy, 16 February 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090216i3.html>; CLOUT case No. 867 [Tribunale di Forlì, Italy, 11 December 2008], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081211i3.html>; CLOUT case N. 916 [High Commercial Court, Croatia, 19 December 2006]; CLOUT case No. 651 [Tribunale di Padova, Italy, 11 January 2005] (see full text of the decision); Tribunale di Padova, Italy, 25 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040225i3.html>; CLOUT case No. 608 [Tribunale di Rimini, Italy, 26 November 2002] (see full text of the decision); Kantonsgericht Schaffhausen, Switzerland, 25 February 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020225s1.html>; Rechtbank Rotterdam, Netherlands, 1 November 2001, *Nederlands Internationaal Privaatrecht*, 2002, No. 114; Tribunal Cantonal Vaud Wallis, Switzerland, 11 March 1996, Unilex.

⁶⁹For this definition, see Tribunale di Forlì, Italy, 16 February 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090216i3.html>; Tribunal Cantonal du Valais, Switzerland, 28 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090128s1.html>; CLOUT case No. 867 [Tribunale di Forlì, Italy, 11 December 2008], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081211i3.html>; CLOUT case No. 651 [Tribunale di Padova, Italy, 11 January 2005] (see full text of the decision); CLOUT case No. 608 [Tribunale di Rimini, Italy, 26 November 2002] (see full text of the decision); Kantonsgericht Schaffhausen, Switzerland, 25 February 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020225s1.html>; CLOUT case No. 480 [Cour d'appel de Colmar, France, 12 June 2001] (see full text of the decision); 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 van Koophandel Hasselt, Belgium, 2 May 1995, available on the Internet at www.law.kuleuven.be/ipr/eng/cases/1995-05-02.html.

⁷⁰CLOUT case No. 328 [Kantonsgericht des Kantons Zug, Switzerland, 21 October 1999] (see full text of the decision).

⁷¹See 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 de Grenoble, France, 22 February 1995].

⁷²See CLOUT case No. 269 [Bundesgerichtshof, Germany, 12 February, 1998] (see full text of the decision); CLOUT case No. 261 [Bezirksgericht der Sanne, Switzerland, 20 February 1997].

⁷³See CLOUT case No. 297 [Oberlandesgericht München, Germany, 21 January 1998]; CLOUT case No. 133 [Oberlandesgericht München, Germany, 8 February 1995]; CLOUT case No. 303 [Court of Arbitration—of the International Chamber of Commerce, 1994 (Arbitral award No. 7331 1994)], *Journal du droit international*, 1995, 1001ff.; CLOUT case No. 5 [Landgericht Hamburg, Germany, 26 September 1990].

⁷⁴See Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, Arbitral award of 28 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090128sb.html>; High Commercial Court of Belgrade, Serbia, 22 April 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080422sb.html>; Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, Arbitral award No. T-25/06 on 13 November 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071113sb.html>; U.S. District Court, Eastern District of Pennsylvania, United States, 13 April 2004, available on the Internet at <http://cisgw3.law.pace.edu/cases/040413u1.html>; CLOUT case No. 695 [U.S. District Court, Eastern District of Pennsylvania, United States, 29 March 2004]; ICC Court of Arbitration, France, Arbitral award in case No. 11849, available on the Internet at <http://cisgw3.law.pace.edu/cases/031849i1.html>; Kantonsgericht Schaffhausen, Switzerland, 23 April 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020423s1.html>; CLOUT case No. 420 [U.S. District Court, Eastern District of Pennsylvania, United States, 29 August 2000]; Hof Arnhem, Netherlands, 27 April 1999, *Nederlands Internationaal Privaatrecht* 1999, Nr. 245, available on Unilex; Rechtsbank s'Gravenhage, the Netherlands, 2 July 1997, *Nederlands Internationaal Privaatrecht* 1999, n. 68, 78-80, available on Unilex; 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. Some tribunals have applied the CISG to a distributorship agreement: see ICC Court of Arbitration, France, Arbitral award case No. 11849, available on the Internet at <http://cisgw3.law.pace.edu/cases/031849i1.html>; 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 [U.S. District Court, Southern District of New York, United States, 23 July 1997]. See also CLOUT case No. 480 [Cour d'appel de 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).

⁷⁵See Supreme Court of the People's Republic of China, People's Republic of China, 21 September 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050921c1.html>. But see ICC Court of Arbitration, France, Arbitral award No. 12713; English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/0412173i1.html> (holding that a framework agreement was governed by the CISG); CLOUT case No. 630 [Court of Arbitration of the International Chamber of Commerce, Zurich, Switzerland, July 1999 (Arbitral award No.9448)] (holding that a framework agreement was governed by the CISG, because the contract provided for future sales and deliveries) (see full text of the decision).

⁷⁶CLOUT case No. 192 [Obergericht des Kantons Luzern, Switzerland, 8 January 1997] (see full text of the decision).

⁷⁷See Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, Arbitral award No. T-8/08 on 28 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090128sb.html>; Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, Arbitral award No. T-25/06 on 13 November 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071113sb.html>; U.S. District Court, Eastern District of Pennsylvania, United States, 13 April 2004, available on the Internet at <http://cisgw3.law.pace.edu/cases/040413u1.html>; CLOUT case No. 695 [U.S. District Court, Eastern District of Pennsylvania, United States, 29 March 2004]; Kantonsgericht Schaffhausen, Switzerland, 23 April 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020423s1.html>; ICC Arbitral Award, Milan, Italy, December 1998, Arbitral award No. 8908, in *ICC International Court of Arbitration Bulletin*, vol. 10, no. 2, pp. 83-87 (Fall 1999), available on Unilex; 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); ICC Arbitral Award 1997, Paris, 23 January 1997, nr. 8611/HV/JK, available on Unilex; CLOUT case No. 169 [Oberlandesgericht Düsseldorf, Germany, 11 July 1996]; CLOUT case No. 204 [Cour d'appel de Grenoble, France, 15 May 1996]; CLOUT case No. 281 [Oberlandesgericht Koblenz, Germany, 17 September 1993] (see full text of the decision).

⁷⁸CLOUT case No. 281 [Oberlandesgericht Koblenz, Germany, 17 September 1993] (see full text of the decision).

⁷⁹See CLOUT case No. 192 [Obergericht des Kantons Luzern, Switzerland, 8 January 1997].

⁸⁰See Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 9 March 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040309r1.html>; Federal Arbitration Court for the Moscow Region, Russian Federation, 26 May 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030526r1.html>.

⁸¹Tribunal of International Commercial Arbitration at the Ukrainian Chamber of Commerce and Trade, Ukraine, 10 October 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/031010u5.html>.

⁸²CLOUT case No. 881 [Handelsgericht Zürich, Switzerland, 9 July 2002] (see full text of the decision).

⁸³See the Digest for article 7, paragraph 2.

⁸⁴See Tribunale di Forlì, Italy, 16 February 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090216i3.html>; Tribunale di Padova, Italy, 25 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040225i3.html>; CLOUT case No. 608 [Tribunale di Rimini, Italy, 26 November 2002] (see full text of the decision); CLOUT case No. 152 [Cour d'appel de Grenoble, France, 26 April 1995] (see full text of the decision).

⁸⁵See Tribunale di Forlì, Italy, 16 February 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090216i3.html>; CLOUT case No. 867 [Tribunale di Forlì, Italy, 11 December 2008], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081211i3.html>; CLOUT case No. 651 [Tribunale di Padova, Italy, 11 January 2005] (see full text of the decision); Tribunale di Padova, Italy, 25 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040225i3.html>; CLOUT case No. 608 [Tribunale di Rimini, Italy, 26 November 2002] (see full text of the decision); 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 May 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).

⁸⁶Tribunale di Forlì, Italy, 16 February 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090216i3.html>; CLOUT case No. 867 [Tribunale di Forlì, Italy, 11 December 2008], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081211i3.html>.

⁸⁷See CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (applying the Convention to the international sale of propane gas).

⁸⁸See Tribunale di Forlì, Italy, 16 February 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090216i3.html>; CLOUT case No. 867 [Tribunale di Forlì, Italy, 11 December 2008], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081211i3.html>; CLOUT case No. 168 [Oberlandesgericht Köln, Germany, 21 May 1996] (used car); Landgericht Köln, Germany, 16 November 1995, unpublished.

⁸⁹See Tribunale di Forlì, Italy, 16 February 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090216i3.html>; CLOUT case No. 867 [Tribunale di Forlì, Italy, 11 December 2008], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081211i3.html>; CLOUT case No. 992 [Retten i København, Denmark, 19 October 2007] (pony); CLOUT case No. 651 [Tribunale di Padova, Italy, 11 January 2005] (see full text of the decision) (chicks); Oberlandesgericht Schleswig-Holstein, Germany, 29 October 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021029g1.html> (horse); Landgericht Flensburg, Germany, 19 January 2001, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/010119g1.html> (live sheep); CLOUT case No. 280 [Oberlandesgericht Jena, Germany, 26 May 1998] (live fish); CLOUT case No. 312 [Cour d'appel de Paris, France, 14 January 1998] (circus elephants). Compare CLOUT case No. 106 [Oberster Gerichtshof, Austria, 10 November 1994] (chinchilla pelts); CLOUT case No. 100 [Rechtbank Arnhem, Netherlands, 30 December 1993] (live lambs).

⁹⁰Tribunal cantonal du Valais, Switzerland, 2 December 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021202s1.html>.

⁹¹See CLOUT case No. 161 [Arbitration—Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 20 December 1993].

⁹²See CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (see full text of the decision).

⁹³See CLOUT case No. 122 [Oberlandesgericht Köln, Germany, 26 August 1994].

⁹⁴CLOUT case No. 281 [Oberlandesgericht Koblenz, Germany, 17 September 1993] (see full text of the decision).

⁹⁵See Landgericht München, Germany, 29 May 1995, *Neue Juristische Wochenschrift* 1996, 401 f.; Landgericht Heidelberg, Germany, 3 July 1992, Unilex.

⁹⁶See 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].

⁹⁷See CLOUT case No. 281 [Oberlandesgericht Koblenz, Germany, 17 September 1993] (see full text of the decision).

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 an exhaustive list¹ of sales that are excluded from the Convention's sphere of application. This provision requires courts to determine whether the sale compares to one of the kinds excluded from the Convention's sphere of application before applying the Convention.²

2. The exclusions referred to in article 2 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.³

CONSUMER SALES

3. According to article 2 (a), a sale falls outside the Convention's sphere of application when it relates to goods which at the time of the conclusion of the contract are intended to be used exclusively⁴ for personal, family or household use.⁵ It is the buyer's intention at the time of the conclusion of the contract that is relevant,⁶ rather than the buyer's actual use of the goods.⁷ Thus, the purchase of a car,⁸ a motorcycle⁹ or a recreational trailer¹⁰ for exclusive personal use may fall outside the Convention's sphere of application¹¹ as may the sale of leisure boats¹² (which is also excluded pursuant to article 2 (e)).¹³ The same is true as regards "the purchases by tourists, border inhabitants, or by mail order for the purposes of personal, family or household use".¹⁴

4. If the goods are purchased for a commercial or professional purpose, such as furniture to be used in a law firm¹⁵ or a used car to be resold by a car retailer,¹⁶ the sale does not fall outside the Convention's sphere of application,¹⁷ even in those cases where the use to which the individual intends to put the goods is also a personal, household or family use,¹⁸ since only the intended exclusive personal, family or household use excludes the sale from 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 piece of 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.¹⁹

5. 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".²⁰ This means that the Convention does not apply only if the personal, family or household use was known to the seller or was apparent.²¹ To determine whether the intended personal, family or household use was apparent, resort is to be had, *inter alia*, to objective elements,²² such as the nature of the goods,²³ the quantity of the goods²⁴ and the delivery address.²⁵ In case law, it has been pointed out that the Convention does not impose upon the seller an obligation to make inquiries into the intended use of the goods.²⁶

6. 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.²⁷

OTHER EXCLUSIONS

7. The exclusion of sales by auction (article 2 (b)) covers auctions resulting from authority of law as well as private auctions.²⁸ Sales at commodity exchanges do not fall under the exclusion, since they merely constitute a particular way of concluding the contract.

8. 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.

9. 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.²⁹ Documentary sales do not fall within this exclusion. The sale of money is also excluded pursuant to article 2 (d). One arbitral tribunal applied the Convention to the sale of souvenir coins.³⁰

10. Under article 2 (e) sales of ships³¹ (including sail-boats³² and leisure boats³³), vessels, aircraft,³⁴ and hovercraft are also excluded from the Convention. However,

sales of parts of ships, vessels, aircraft, and hovercraft—including essential components, such as engines³⁵—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 virtue of article 2 (e).³⁶

11. Although the sale of electricity is excluded from the Convention's sphere of application (article 2 (f)), a court has applied the Convention to the sale of propane gas.³⁷

Notes

¹For an express reference to the list being exhaustive, see Oberlandesgericht Schleswig-Holstein, Germany, 29 October 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021029g1.html>.

²For a court decision referring to the lack of applicability of any of the exclusions listed in article 2 as a requirement for the Convention to apply, see U.S. District Court, Southern District of New York, United States, 29 May 2009, available on the Internet at <http://cisgw3.law.pace.edu/cases/090529u1.html>; Oberlandesgericht München, Germany, 14 January 2009, English translation available at <http://cisgw3.law.pace.edu/cases/090114g1.html>; Landgericht Landshut, Germany, 12 June 2008, English translation available at <http://cisgw3.law.pace.edu/cases/080612g2.html>; U.S. District Court, Southern District of New York, United States, 23 August 2006, available on the Internet at <http://cisgw3.law.pace.edu/cases/060823u1.html#ii1>; Landgericht Gera, Germany, 29 June 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060629g1.html>; CLOUT case No. 880 [Tribunal Cantonal de Vaud, Switzerland, 11 April 2002]; Oberlandesgericht Hamm, Germany, 12 November 2001, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/011112g1.html>; CLOUT case No. 480 [Cour d'appel de Colmar, France, 12 June 2001]; Landgericht Landshut, Germany, 5 April 1995, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/950405g1.html>; Amtsgericht Cloppenburg, Germany, 14 April 1993, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/930414g1.html>. For similar reasoning, albeit relating solely to the exclusion provided for in article 2 (a), see Oberlandesgericht Hamm, Germany, 2 April 2009, in *Internationales Handelsrecht*, 2010, 61; Obergericht Aargau, Switzerland, 3 March 2009, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/2013.pdf>; Hof s'Gravenhage, the Netherlands, 17 February 2009, unpublished; Polimeles Protodikio Athinon, Greece, 2009 (docket No. 4505/2009), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/094505gr.html>; Bundesgericht, Switzerland, 16 December 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081216s1.html>; Landgericht Bamberg, Germany, 23 October 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061023g1.html>; Rechtbank Arnhem, the Netherlands, 1 March 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060301n1.html>; Landgericht Neubrandenburg, Germany, 3 August 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050803g1.html>; Landgericht Kiel, Germany, 27 July 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040727g1.html>; CLOUT case No. 590 [Landgericht Saarbrücken, Germany, 1 June 2004]; CLOUT case No. 549 [Audiencia Provincial de Valencia, Spain, 7 June 2003]; Hof s'Hertogenbosch, the Netherlands, 25 February 2003, unpublished; Landgericht Saarbrücken, Germany, 25 November 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021125g1.html>; Landgericht Saarbrücken, Germany, 2 July 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020702g1.html>; Landgericht München, Germany, 20 February 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020220g1.html>; CLOUT case No. 341 [Ontario Superior Court of Justice, Canada, 31 August 1999]; CLOUT case No. 410 [Amtsgericht Alsfeld, Germany, 12 May 1995]; Landgericht Oldenburg, Germany, 15 February 1995, available on the Internet at www.cisg-online.ch/cisg/urteile/197.htm; Landgericht Oldenburg, Germany, 9 November 1994, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/941109g1.html>; CLOUT case No. 199 [Tribunal Cantonal du Valais, Switzerland, 29 June 1994]; CLOUT case No. 201 [Gerichtspräsident Laufen, Switzerland, 7 May 1993].

³United 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.

⁴For an express reference to the need for this requirement to be met to exclude the Convention's applicability pursuant to article 2 (a), see CLOUT case No. 992 [Rettin i København, Denmark, 19 October 2007].

⁵For this statement in case law, see Oberlandesgericht Hamm, Germany, 2 April 2009, in *Internationales Handelsrecht*, 2010, 61.

⁶See CLOUT case No. 445 [Bundesgerichtshof, Germany, 31 October 2001], also in *Internationales Handelsrecht*, 2002, 16.

⁷See CLOUT case No. 190 [Oberster Gerichtshof, Austria, 11 February 1997].

⁸See CLOUT case No. 190 [Oberster Gerichtshof, Austria, 11 February 1997]; CLOUT case No. 213 [Kantonsgericht Nidwalden, Switzerland, 5 June 1996].

⁹Rechtbank Harleem, the Netherlands, 15 December 2005, available on the Internet at www.cisg-online.ch/cisg/urteile/1696.pdf.

¹⁰See Rechtbank Arnhem, the Netherlands, 27 May 1993, *Nederlands Internationaal Privaatrecht*, 1994, No. 261.

¹¹See, however, Landgericht Düsseldorf, Germany, 11 October 1995, Unilex (applying the Convention to the sale of a generator destined for personal use).

¹²Efetiou Pireos, Greece, 2008 (docket number 520/2008), available on the Internet at <http://cisgw3.law.pace.edu/cisg/text/080000greek.pdf>.

¹³Ibid.

¹⁴See CLOUT case No. 904 [Tribunal Cantonal du Jura, Switzerland, 3 November 2004], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/041103s1.html>.

¹⁵Landgericht Bamberg, Germany, 13 April 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050413g1.html>.

¹⁶Landgericht Köln, Germany, 16 November 1995, available on the Internet at www.cisg-online.ch/cisg/urteile/265.htm.

¹⁷For an express statement to this effect, see See CLOUT case No. 904 [Tribunal Cantonal du Jura, Switzerland, 3 November 2004], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/041103s1.html>.

¹⁸See CLOUT case No. 843 [Korkein oikeus, Finland, 14 October 2005], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051014f4.html>.

¹⁹For these examples, 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.

²⁰See Oberlandesgericht Hamm, Germany, 2 April 2009, in *Internationales Handelsrecht*, 2010, 61; CLOUT case No. 445 [Bundesgerichtshof, Germany, 31 October 2001], also in *Internationales Handelsrecht*, 2002, 16.

²¹See Oberlandesgericht Stuttgart, Germany, 31 March 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080331g1.html>, applying the Convention to the sale of a car, since the intended personal use was not apparent.

²²For this statement, see Oberlandesgericht Hamm, Germany, 2 April 2009, in *Internationales Handelsrecht*, 2010, 61.

²³For an express reference to the nature of the goods as an element to be taken into account when determining whether the personal, family or household use was apparent, see Oberlandesgericht Hamm, Germany, 2 April 2009, in *Internationales Handelsrecht*, 2010, 61 (car); Oberster Gerichtshof, Austria, 10 September 2003, unpublished (Christmas decoration).

²⁴See CLOUT case No. 904 [Tribunal Cantonal du Jura, Switzerland, 3 November 2004], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/041103s1.html>.

²⁵Ibid.

²⁶Oberlandesgericht Hamm, Germany, 2 April 2009, in *Internationales Handelsrecht*, 2010, 61.

²⁷CLOUT case No. 445 [Bundesgerichtshof, Germany, 31 October 2001], also in *Internationales Handelsrecht*, 2002, 16.

²⁸For a court not applying the Convention due to the sale being a sale by private auction, see Bundesgerichtshof, Germany, 2 October 2002, available on the Internet at www.cisg-online.ch/cisg/urteile/700.htm.

²⁹For decisions excluding the Convention's applicability to the sale of shares, see CLOUT case No. 260 [Cour de Justice de Genève, Switzerland, 1998]; Zurich Chamber of Commerce Arbitral Tribunal, ZHK 273/95, *Yearbook Commercial Arbitration*, 1998, 128 ff.

³⁰CLOUT case No. 988 [China International Economic and Trade Arbitration Commission, People's Republic of China, 2000 (Arbitral award No. CISG/2000/17)], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/000000c1.html>.

³¹For 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, 6 April 1998, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/980406r1.html>; Foreign Trade Court of Arbitration attached to the Yugoslav Chamber of Commerce, Serbia, 15 April 1999, available on the Internet at <http://cisgw3.law.pace.edu/cases/990415sb.html>.

³²See Rechtbank Middleburg, the Netherlands, 2 April 2008, Unilex.

³³Efetio Pireos, Greece, 2008 (docket number 520/2008), available on the Internet at <http://cisgw3.law.pace.edu/cisg/text/080000greek.pdf>. See Hof Leeuwarden, the Netherlands, 31 August 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050831n1.html>, applying the Convention to the sale of a boat.

³⁴For 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, 2 September 1997, available on the Internet at <http://cisgw3.law.pace.edu/cases/970902r1.html>.

³⁵See CLOUT case No. 53 [Legfelsőbb Biróság, Hungary, 25 September 1992].

³⁶See Russian Maritime Commission Arbitral Tribunal, 18 December 1998, available on the Internet at <http://cisgw3.law.pace.edu/cisg/text/draft/981218case.html>.

³⁷See 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 extends to 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. Pursuant to paragraph 1 of article 3, the Convention extends to contracts for the sale of goods to be manufactured or produced.² This means that the sale of such goods is subject to the provisions of the Convention as much 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 (1) does not provide specific criteria for determining when the materials supplied by the buyer constitute a "substantial part". Some courts have resorted to a purely quantitative test to determine whether the materials supplied by the buyer constitute a "substantial part" of the material necessary.⁵ One court also considered—on the basis of the French version of the Convention—the quality of the goods.⁶

3. A different—albeit related—issue is whether providing instructions, designs or specifications used for producing goods is equivalent to 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.⁷ 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).⁸

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 documents⁹—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.¹⁰ 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).¹¹ 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,¹² as if two separate contracts had been made.¹³ Thus, where the obligation regarding the supply of labour or services amounts to more than 50 per cent of the seller's obligations, the Convention is inapplicable.¹⁴ Some courts require that the value of the service obligation "clearly" exceeds that of the goods.¹⁵ On the basis of this reasoning, several courts stated that a contract for the delivery of goods providing also for the "seller's" obligation to install the goods is generally covered by the Convention, since the installation obligation is generally minor in value compared to the more traditional "sale" obligations.¹⁶ Similarly, a contract for the delivery of goods obliging the seller to also assemble the goods does not generally fall under the article 3 (2) exclusion.¹⁷ The same holds true for contracts for the delivery of goods that also contain an obligation to train personnel,¹⁸ to provide maintenance services,¹⁹ or to design the goods,²⁰ if these additional obligations are only ancillary to the primary obligation to make delivery. On the basis of very similar reasoning, one court decided that a contract for a market study did not fall under the Convention's sphere of application.²¹ 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.²²

5. While one court stated that turn-key contracts are governed by the Convention except when the obligations

other than that of delivering the goods prevail from an economic value point of view,²³ several courts stated that turn-key contracts are generally not covered by the Convention,²⁴ because turn-key contracts “do not so much provide for an exchange of goods against payment, but rather for a network of mutual duties to collaborate with and assist the other party”.²⁵

6. It has also been stated that factors other than purely economic ones—such as the circumstances surrounding the conclusion of the contract,²⁶ the purpose of the contract²⁷ and the interest of the parties in the various

performances²⁸—should also be taken into account in evaluating whether the obligation to supply labour or services is preponderant.²⁹ Another court referred to the essential purpose of the contract as a criterion relevant to determining whether the Convention was applicable.³⁰

7. The party who relies on article 3 (2) to exclude the application of the Convention to a contract in which the party who has to furnish the goods also has to supply labour or other services bears the burden of proving that the supply of labour or services constitutes the preponderant part of the obligations.³¹

Notes

¹See 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.

²See Kantonsgericht Zug, Switzerland, 14 December 2009, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/2026.pdf>; Obergericht Aargau, Switzerland, 3 March 2009, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/2013.pdf>; Oberlandesgericht Oldenburg, Germany, 20 December 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071220g1.html>; Oberlandesgericht Innsbruck, Austria, 18 December 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071218a3.html>; Oberlandesgericht Linz, Austria, 24 September 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070924a3.html>; Kantonsgericht Aargau, Switzerland, 20 September 2007, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/1742.pdf>; CLOUT case No. 935 [Handelsgericht des Kantons Zürich, Switzerland, 25 June 2007], also available in *Internationales Handelsrecht*, 2008, 31; Cour de Justice de Genève, Switzerland, 20 January 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060120s1.html>; China International Economic and Trade Arbitration Commission, People’s Republic of China, 2005 (Arbitral award No. CISG/2005/12), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050613c1.html>; Handelsgericht Aargau, Switzerland, 25 January 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050125s1.html>; Rechtbank van Koophandel Hasselt, Belgium, 14 September 2004, available on the Internet at www.law.kuleuven.be/ipr/eng/cases/2005-09-14%20Hasselt.html; Handelsgericht St. Gallen, Switzerland, 29 April 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040429s1.html>; Oberster Gerichtshof, Austria, 21 April 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040421a3.html>; CLOUT case No. 892 [Kantonsgericht Schaffhausen, Switzerland, 27 January 2004]; Szegedi Ítéletábla, Hungary, 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030000h1.html>; CLOUT case No. 886 [Handelsgericht St. Gallen, Switzerland, 3 December 2002]; CLOUT case No. 882 [Handelsgericht Aargau, Switzerland, 5 November 2002]; CLOUT case No. 1017 [Hof van Beroep Gent, Belgium, 15 May 2002], available in Dutch on the Internet at 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)]; Landgericht Hamburg, Germany, 21 December 2001, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/011221g1.html>; Oberster Gerichtshof, 18 April 2001, available on the Internet at www.cisg.at/7_7601d.htm; CLOUT case No. 446 [Oberlandesgericht Saarbrücken, Germany, 14 February 2001], also in *Internationales Handelsrecht*, 2001, 64; Landgericht München, Germany, 16 November 2000, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/001116g1.html>; Oberlandesgericht Stuttgart, Germany, 28 February 2000, available on the Internet at www.cisg-online.ch/cisg/urteile/583.htm; CLOUT case No. 430 [Oberlandesgericht München, Germany, 3 December 1999]; CLOUT case No. 313 [Cour d’Appel de Grenoble, France, 21 October 1999]; Court of Arbitration of the International Chamber of Commerce, 1999 (Arbitral award No. 9083), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/99083i1.html>; CLOUT case No. 630 [Court of Arbitration of the International Chamber of Commerce, July 1999 (Arbitral award No. 9448)]; Hof Arnhem, the Netherlands, 27 April 1999, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/990427n1.html>; 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 [Court of Arbitration of the International Chamber of Commerce, 23 August 1994 (Arbitral award 7660/JK)], see also *ICC Court of Arbitration Bulletin*, 1995, 69 ff.; Court of Arbitration of the International Chamber of Commerce, 1994 (Arbitral award No. 7844), *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).

³See 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.

⁴For the applicability of the CISG in cases where reference was made to article 3 (1), but where the courts expressly stated that the “substantial part of the materials necessary” was not provided by the seller, see Landgericht München, 27 February 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020227g1.html>; Tribunal de commerce Namur, Belgium, 15 January 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020115b1.html>; CLOUT case No. 313 [Cour d’appel de Grenoble, France, 21 October 1999]; Landgericht Berlin, Germany, 24 March 1998, Unilex. For a case where the issue was touched upon by the court, but was not decided, since the court determined that the Convention was not applicable for temporal reasons, see Oberster Gerichtshof, Austria, 18 April 2001, available on the Internet at www.cisg.at/7_7601d.htm.

⁵See CLOUT case No. 325 [Handelsgericht des Kantons Zürich, Switzerland, 8 April 1999]; CLOUT case No. 164 [Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 5 December 1995] (see full text of the decision).

⁶CLOUT case No. 430 [Oberlandesgericht München, Germany, 3 December 1999].

⁷See CLOUT case No. 157 [Cour d’appel de Chambéry, France, 25 May 1993].

⁸See 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).

⁹For a definition of a contract for the sale of goods under the Convention, see the Digest for article 1.

¹⁰For references in case law to article 3 (2) of the Convention as an element to be looked into for the purpose of deciding whether the Convention applies, see Landgericht Landshut, Germany, 12 June 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080612g2.html>; Cour d’Appel de Colmar, France, 26 February 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080226f1.html>; U.S. District Court, Southern District of New York, United States, 23 August 2006, available on the Internet at <http://cisgw3.law.pace.edu/cases/060823u1.html#ii1>; Handelsgericht Zürich, Switzerland, 17 February 2000, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/000217s1.html>; Hof Arnhem, Netherlands, 27 April 1999, *Nederlands Internationaal Privaatrecht*, 1999, No. 245; CLOUT case No. 327 [Kantonsgericht 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 de Grenoble, France, 26 April 1995]; CLOUT case No. 105 [Oberster Gerichtshof, Austria, 27 October 1994]; CLOUT case No. 201 [Richteramt Laufen des Kantons Bern, 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, Belgium, 19 September 2001, available on the Internet at www.law.kuleuven.ac.be/int/tradelaw/WK/2001-09-19.htm. For decisions in which the courts did not apply the Convention on the grounds that the service obligations were preponderant, see Hof van Beroep Antwerpen, Belgium, 3 January 2005, available on the Internet at www.law.kuleuven.be/ipr/eng/cases/2005-01-03.html (repairs to a cutting machine); Hof van Beroep Ghent, Belgium, 24 November 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/041124b1.html> (contract for the delivery of computer equipment, with specifically designed software programs); Hof van Beroep Ghent, Belgium, 29 October 2003, available on the Internet at www.law.kuleuven.be/ipr/eng/cases/2003-10-29.html (contract for the delivery of cooling installations that also included the provision of services and labor considered to be the preponderant part of the obligations); CLOUT case No. 728 [Corte di Cassazione, Italy, 6 June 2002] (the obligation to assemble the machinery sold and to train workers were considered to be the preponderant compared to the obligation to deliver the machinery).

¹¹Oberlandesgericht Karlsruhe, Germany, 12 June 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080612g1.html>; Cour d’Appel de Colmar, France, 26 February 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080226f1.html>; CLOUT case No. 481 [Court d’appel de Paris, France, 14 June 2001]; see also CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002 (see full text of the decision) (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)].

¹²See, for the application of the economic value test referred to in the text, Obergericht Aargau, Switzerland, 3 March 2009, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/2013.pdf>; Hof van Beroep Ghent, Belgium, 14 November 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081114b1.html>; Bundesgerichtshof, Germany, 9 July 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080709g1.html>; Court of Arbitration of the International Chamber of Commerce, 2000 (Arbitral award No. 9781), available on the Internet at <http://cisgw3.law.pace.edu/cases/009781i1.html>; Oberlandesgericht Wien, Austria, 1 June 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040601a3.html>; Rechtbank van Koophandel Hasselt, Belgium, 4 February 2004, available on the Internet at www.law.kuleuven.be/ipr/eng/cases/2004-02-04f.html; Handelsgericht Zürich, Switzerland, 17 February 2000, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/000217s1.html>; CLOUT case No. 430 [Oberlandesgericht München, Germany, 3 December 1999]; CLOUT case No. 327 [Kantonsgericht Zug, Switzerland, 25 February 1999]; CLOUT case No. 346 [Landgericht Mainz, Germany, 26 November 1998]; CLOUT case No. 152 [Cour d’Appel de Grenoble, France, 26 April 1995]; CLOUT case No. 26 [Court of Arbitration of the International Chamber of Commerce, 1992 (Arbitral award No. 7153)].

¹³For an express reference in case law to the principle mentioned in the text, see Kantonsgericht Zug, Switzerland, 14 December 2009, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/2026.pdf>; for an implicit affirmation of the principle referred to in the text, see CLOUT case No. 26 [Court of Arbitration of the International Chamber of Commerce, 1992 (Arbitral award no. 7153)].

¹⁴Kantonsgericht Zug, Switzerland, 14 December 2009, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/2026.pdf>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russia, Award No. 5/1997, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/980305r1.html>; Bundesgericht, Switzerland, 18 May 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090518s1.html> (applying the Convention to a purchase of a packaging machine consisting of ten individual devices as well as several transportation and inter-connection systems, which also imposed upon the seller the obligation to install the packaging machine and prepare its operation at the buyer’s works).

¹⁵CLOUT case No. 327 [Kantonsgericht Zug, Switzerland, 25 February 1999]; Kreisgericht Bern-Laupen, Switzerland, 29 January 1999, available on the Internet at www.cisg-online.ch/cisg/urteile/701.htm.

¹⁶Kantonsgericht Zug, Switzerland, 14 December 2009, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/2026.pdf>; Tribunale di Padova, Italy, 10 January 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060110i3.html>; CLOUT case No. 890 [Tribunale d'appello Lugano, Switzerland, 29 October 2003]; Kantonsgericht Schaffhausen, Switzerland, 25 February 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020225s1.html>; Landgericht München, Germany, 16 November 2000, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/001116g1.html>. For a case where the installation obligation was preponderant and thus led to the Convention's inapplicability, see Foreign Trade Court of Arbitration attached to the Yugoslav Chamber of Commerce, Serbia, 9 May 2003, available on the Internet at <http://cisgw3.law.pace.edu/cisg/text/030509serbian.pdf>.

¹⁷See Tribunale di Forlì, Italy, 16 February 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090216i3.html>; Hof van Beroep Ghent, Belgium, 14 November 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081114b1.html>; Obergericht Zug, Switzerland, 19 December 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061219s1.html>; Zivilgericht Basel-Stadt, Switzerland, 8 November 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061108s1.html>; CLOUT case No. 430 [Oberlandesgericht München, Germany, 3 December 1999].

¹⁸Zivilgericht Basel-Stadt, Switzerland, 8 November 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061108s1.html>.

¹⁹Ibid.

²⁰Oberster Gerichtshof, Austria, 8 November 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051108a3.html#i>.

²¹See CLOUT case No. 122 [Oberlandesgericht Köln, Germany, 26 August 1994].

²²See CLOUT case No. 152 [Cour d'appel de Grenoble, France, 26 April 1995] (see full text of the decision).

²³Kantonsgericht Zug, Switzerland, 14 December 2009, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/2026.pdf>.

²⁴Obergericht Aargau, Switzerland, 3 March 2009, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/2013.pdf>.

²⁵CLOUT case No. 881 [Handelsgericht Zürich, Switzerland, 9 July 2002].

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

²⁷CLOUT case No. 346 [Landgericht Mainz, Germany, 26 November 1998]; see also Oberster Gerichtshof, Austria, 8 November 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051108a3.html#i> (referring to the intentions of the parties as an element to be taken into account when determining whether the contracts falls into the sphere of application of the Convention).

²⁸Oberlandesgericht Innsbruck, Austria, 18 December 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071218a3.html>; Kreisgericht Bern-Laupen, Switzerland, 29 January 1999, available on the Internet at www.cisg-online.ch/cisg/urteile/701.htm. See also Oberlandesgericht Dresden, Germany, 11 June 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070611g1.html>. See also CLOUT case No. 430 [Oberlandesgericht München, Germany, 3 December 1999], referring to the interest of the buyer as an element to be taken into account when determining whether the service obligation constitutes the preponderant part of the obligations of the party having to deliver the goods.

²⁹See CLOUT case No. 346 [Landgericht Mainz, Germany, 26 November 1998].

³⁰See Corte di Cassazione, Italy, 9 June 1995 (no. 6499, *Foro padano*, 1997, 2 ff.), Unilex.

³¹Oberlandesgericht Oldenburg, Germany, 20 December 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071220g1.html>; Oberster Gerichtshof, Austria, 8 November 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051108a3.html#i>.

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 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 expressly provided otherwise, the Convention 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. Some courts state that the Convention is exhaustive.³ Still, there are matters not governed by the Convention. These matters are to be settled either in conformity with the applicable uniform rules⁴ or the applicable domestic law to be identified on the basis of the rules of private international law of the forum.⁵

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.⁶ The issue of whether a contract is validly formed, however, is subject to the applicable national rules, except for those issues as to which the Convention provides exhaustive rules.⁷ Thus, issues such as capacity to contract⁸ and the consequences of mistake,⁹ duress and fraud¹⁰ are left to the applicable domestic law,¹¹ as are those of misrepresentation¹² and negligence.¹³ 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 expressly mention the issue as one governed by the Convention, some courts¹⁴ (albeit not all)¹⁵ have concluded that burden of proof questions come within the scope of the Convention.¹⁶ This view is based on the fact that the Convention includes at least one provision, article 79, which expressly deals with the burden of proof.¹⁷ Outside of situations governed by article 79 or any other provision that expressly addresses the issue, the issue is therefore governed by the Convention albeit not expressly settled by it. Thus, article 7 (2) requires the

question to be resolved in conformity with the general principles on which the Convention is based.¹⁸ 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;¹⁹ the party claiming an exception has to prove the factual prerequisites of that exception.²⁰

5. The foregoing principles have led courts to conclude that the party claiming that a contract is not governed by the Convention pursuant to its article 3 (2) bears the burden of proof.²¹

6. The aforementioned general principles have led courts also to state that a buyer who asserts that goods are non-conforming has the burden of proving the non-conformity²² as well as the existence of a proper notice of non-conformity.²³ Similarly, various courts have 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.²⁴ 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 to the seller.²⁵

7. 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. Several 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.²⁶

8. The Convention's general principles on burden of proof were also the basis of several decisions dealing with issues on damages. 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".²⁷ Other cases have stated more generally that the party claiming damages has to prove the losses suffered.²⁸ It is not clear, however, whether the Convention itself establishes the degree of evidence necessary to prove the damages or whether that degree is to be derived from the *lex fori*.²⁹

VALIDITY OF THE CONTRACT AND OF USAGES

9. Although the Convention generally leaves issues concerning the validity of the contract, defined as “any issue by which the ‘domestic law would render the contract void, voidable, unenforceable’,”³⁰ and of individual contract clauses,³¹ such as a disclaimer,³² a liquidated damages clause³³ or a non-competition clause³⁴ to the applicable national law,³⁵ in at least one respect the Convention’s provisions may contradict domestic validity rules.³⁶ 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.³⁷ 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.

10. The issue of whether a contract is validly concluded by a third person acting on behalf of one of the parties is left to the applicable national law,³⁸ since agency is not governed by the Convention.³⁹ The same is true for the validity of standard contract terms,⁴⁰ although the issue of whether they become part of the contractual agreement is to be determined pursuant to the rules of the CISG,⁴¹ at least according to some courts.⁴²

11. The validity of usages—which is not dealt with by the Convention,⁴³ but is left to the applicable domestic law⁴⁴—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 9.⁴⁵

EFFECT ON THE PROPERTY IN THE GOODS SOLD

12. The Convention makes clear that it does not govern the passing of the property in the goods sold.⁴⁶ During the drafting process, it was deemed impossible to unify the rules on this point.⁴⁷ 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.

13. The Convention does not govern the validity of a retention of title clause,⁴⁸ nor does it deal with the right of retention.⁴⁹

OTHER ISSUES NOT DEALT WITH BY THE CONVENTION

14. The Convention itself expressly lists several examples of issues with which it is not concerned.⁵⁰ 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,⁵¹ the validity (and scope) of a penalty clause,⁵² the validity of a settlement agreement,⁵³ an assignment of receivables,⁵⁴ assignment of a contract,⁵⁵ set-off⁵⁶ (at least where the receivables do not all arise from contracts governed by the Convention),⁵⁷ the theory of *imprévision* known in Belgium law,⁵⁸ the statute of limitations,⁵⁹ the issue of whether a court has jurisdiction⁶⁰ and, generally, any other issue of procedural law,⁶¹ an assumption of debts,⁶² an acknowledgement of debts,⁶³ the effects of the contract on third parties⁶⁴ as well as the issue of whether one is jointly liable.⁶⁵ According to some courts, the Convention does not deal with tort claims;⁶⁶ one court expressly stated that a “tortious interference with business expectancy claim is not pre-empted by the CISG”.⁶⁷ That same court held that the Convention pre-empted unjust enrichment⁶⁸ and restitution claims.⁶⁹ According to a different court, the admissibility of claims based on unjust enrichment is left to the applicable domestic law.⁷⁰

15. Some courts have found that estoppel issues are not governed by the Convention,⁷¹ but other courts have concluded that estoppel should be regarded as a general principle of the Convention.⁷² 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 is, under article 4, beyond the scope of the Convention and is governed instead by applicable national law, under which the third party creditor prevailed.⁷³

16. 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,⁷⁴ is left to applicable domestic law.⁷⁵ 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 by article 57.⁷⁶

17. One court expressly stated that the Convention does not identify the place of conclusion of the contract.⁷⁷

Notes

¹For mere references to the text of article 4 (1) in case law, see U.S. District Court, Eastern District of California, United States, 21 January 2010, available on the Internet at <http://cisgw3.law.pace.edu/cases/100121u1.html#iii>; Tribunal Cantonal du Valais, Switzerland, 28 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090128s1.html>; District Court in Nitra, Slovakia, 29 May 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080529k1.html>; U.S. District Court, Southern District of Florida, United States, 19 May 2008, available on the Internet at <http://cisgw3.law.pace.edu/cases/080519u2.html>; CLOUT case No. 490 [Cour d’appel de Paris, France, 10 September 2003]; CLOUT case No. 241 [Cour de Cassation, France, 5 January 1999].

²See 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, paragraphs 48-51, 66, 69.

³Bundesgericht, Switzerland, 15 September 2000, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/000915s2.html>.

⁴See CLOUT case No. 202 [Cour d'appel de 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).

⁵See Tribunal Cantonal du Valais, Switzerland, 28 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090128s1.html>; CLOUT case No. 97 [Handelsgericht des Kantons Zürich, Switzerland, 9 September 1993].

⁶See CLOUT case No. 95 [Zivilgericht Basel-Stadt, Switzerland, 21 December 1992] (see full text of the decision).

⁷See 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.

⁸See CLOUT case No. 907 [Tribunal Cantonal du Valais, Switzerland, 27 May 2005]; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 9 June 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040609r1.html>; CLOUT case No. 985 [China International Economic and Trade Arbitration Commission, People's Republic of China, 2002 (Arbitral award No. CISG/2002/19)]; CLOUT case No. 605 [Oberster Gerichtshof, Austria, 22 October 2001], also available on the Internet at www.cisg.at/1_4901i.htm; CLOUT case No. 5 [Landgericht Hamburg, Germany, 26 September 1990].

⁹See Bundesgerichtshof, Germany, 27 November 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071127g1.html>; CLOUT case No. 877 [Bundesgericht, Switzerland, 22 December 2000]; Bundesgericht, Switzerland, 11 December 2000, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/001211s1.html>; CLOUT case No. 426 [Oberster Gerichtshof, Austria, 13 April 2000].

¹⁰U.S. District Court, Eastern District of Arkansas, United States, 23 December 2009, available on the Internet at <http://cisgw3.law.pace.edu/cases/091223u1.html>; U.S. District Court, Southern District of Ohio, United States, 26 March 2009, available on the Internet at <http://cisgw3.law.pace.edu/cases/090326u1.html>; China International Economic and Trade Arbitration Commission, People's Republic of China, 2005 (Arbitral award No. CISG/2005/03), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051021c1.html>; Quebec Superior Court, District of Montreal, Canada, 29 July 2005, available on the Internet at <http://cisgw3.law.pace.edu/cases/050729c4.html>; U.S. District Court, Northern District of Alabama, United States, 27 April 2005, available on the Internet at <http://cisgw3.law.pace.edu/cases/050427u1.html>.

¹¹See Schiedsgericht der Handelskammer Zürich, Switzerland, 31 May 1996, Unilex.

¹²U.S. District Court, Eastern District of Arkansas, United States, 23 December 2009, available on the Internet at <http://cisgw3.law.pace.edu/cases/091223u1.html>; U.S. District Court, Southern District of Ohio, United States, 26 March 2009, available on the Internet at <http://cisgw3.law.pace.edu/cases/090326u1.html>; CLOUT case No. 579 [U.S. District Court for the Southern District of New York, United States, 10 May 2002], Unilex.

¹³CLOUT case No. 579 [U.S. District Court for the Southern District of New York, United States, 10 May 2002], Unilex.

¹⁴See Tribunal Cantonal du Valais, Switzerland, 28 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090128s1.html>; CLOUT case No. 906 [Kantonsgericht Nidwalden, Switzerland, 23 May 2005], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050523s1.html>; CLOUT case No. 907 [Tribunal Cantonal du Valais, Switzerland, 27 May 2005]; CLOUT case No. 894 [Bundesgericht, Switzerland, 7 July 2004]; Appellationshof Bern, Switzerland, 11 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040211s1.html>; CLOUT case No. 885 [Kantonsgericht Schaffhausen, Switzerland, 13 November 2003]; Bundesgerichtshof, Germany, 9 January 2002, English translation available at <http://cisgw3.law.pace.edu/cases/020109g1.html>; CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000]; CLOUT case No. 80 [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].

¹⁵See Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, 21 February 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050221sb.html>; CLOUT case No. 261 [Berzirksgericht der Sanne, Switzerland, 20 February 1997]; CLOUT case No. 103 [Court of Arbitration of the International Chamber of Commerce, 1993 (Arbitral award no. 6653)].

¹⁶For 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].

¹⁷For this line of argument, see Appellationshof Bern, Switzerland, 11 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040211s1.html>; Bundesgerichtshof, Germany, 9 January 2002, English translation available at <http://cisgw3.law.pace.edu/cases/020109g1.html>; CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000]; CLOUT case No. 380 [Tribunale di Pavia, Italy, 29 December 1999].

¹⁸See CLOUT case No. 97 [Handelsgericht des Kantons Zürich, Switzerland, 9 September 1993].

¹⁹For references to this principle, see Tribunal Cantonal du Valais, Switzerland, 28 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090128s1.html>; CLOUT case No. 885 [Kantonsgericht Schaffhausen, Switzerland, 13 November 2003]; Bundesgerichtshof, Germany, 9 January 2002, English translation available at <http://cisgw3.law.pace.edu/cases/020109g1.html>; CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000]; Landgericht Frankfurt, 6 July 1994, Unilex; CLOUT case No. 107 [Oberlandesgericht Innsbruck, Austria, 1 July 1994] (see full text of the decision); CLOUT case No. 608 [Tribunale di Rimini, Italy, 26 November 2002], also in *Guirisprudenza italiana*, 2003, 896 ff.

²⁰Tribunal Cantonal du Valais, Switzerland, 28 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090128s1.html>; CLOUT case No. 608 [Tribunale di Rimini, Italy, 26 November 2002], also in *Guirisprudenza italiana*, 2003, 896 ff.

²¹ See Oberlandesgericht Oldenburg, Germany, 20 December 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071220g1.html>.

²² CLOUT case No. 885 [Kantonsgericht Schaffhausen, Switzerland, 13 November 2003].

²³ See U.S. District Court, Western District of Pennsylvania, United States, 25 July 2008, available on the Internet at <http://cisgw3.law.pace.edu/cases/080725u1.html>; CLOUT case No. 549 [Audiencia Provincial de Valencia, Spain, 7 June 2003]; 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).

²⁴ See Landgericht Düsseldorf, Germany, 25 August 1994, Unilex; CLOUT case No. 107 [Oberlandesgericht Innsbruck, Austria, 1 July 1994].

²⁵ See Rechtbank von Koophandel Hasselt, Belgium, 21 January 1997, Unilex.

²⁶ 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.

²⁷ 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).

²⁸ See CLOUT case No. 549 [Audiencia Provincial de Valencia, Spain, 7 June 2003]; CLOUT case No. 380 [Tribunale di Pavia, Italy, 29 December 1999]; CLOUT case No. 210 [Audiencia Provincial Barcelona, Spain, 20 June 1997]; Landgericht Düsseldorf, Germany, 25 August 1994, Unilex.

²⁹ For a court referring to both approaches mentioned in the text without, however, taking a position, see Bundesgericht, Switzerland, 17 December 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/091217s1.html>; for a court stating that resort is to be had to the rules of the lex fori, see CLOUT case No. 906 [Kantonsgericht Nidwalden, Switzerland, 23 May 2005], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050523s1.html>.

³⁰ United States District Court, Western District of Washington, United States, 13 April 2006, available on the Internet at <http://cisgw3.law.pace.edu/cases/060413u1.html>.

³¹ Tribunale di Padova, Italy, 31 March 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040331i3.html>.

³² U.S. District Court, Western District of Pennsylvania, United States, 25 July 2008, available on the Internet at <http://cisgw3.law.pace.edu/cases/080725u1.html>.

³³ Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, 15 July 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080715sb.html>.

³⁴ CLOUT case No. 578 [U.S. District Court, Western District of Michigan, United States, 17 December 2001].

³⁵ See U.S. District Court, Eastern District of California, United States, 26 October 2009, 2009 U.S. Dist. LEXIS 104580 (Rice Corp. v. Grain Board of Iraq, et al.); Tribunal Cantonal du Valais, Switzerland, 28 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090128s1.html>; Rechtbank Arnhem, the Netherlands, 14 November 2007, unpublished; United States District Court, Western District of Washington, 13 April 2006, available on the Internet at <http://cisgw3.law.pace.edu/cases/060413u1.html>; China International Economic and Trade Arbitration Commission, People's Republic of China, 2004 (Arbitral award No. CISG/2004/08), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040600c1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 3 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040203r1.html>; China International Economic and Trade Arbitration Commission, People's Republic of China, 2003 (Arbitral award No. CISG/2003/02), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/031203c1.html>; Cour d'appel de Liège, Belgium, 28 April 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030428b1.html>; CLOUT Case No. 579 [Southern District Court for New York, United States of America, 10 May 2002], Unilex; CLOUT case No. 445 [Bundesgerichtshof, Germany, 31 October 2001]; CLOUT case No. 433 [U.S. Northern District Court for California, 27 July 2001], also in 2001 U.S. Dist. LEXIS 16000, 2001 Westlaw 1182401 (Asante Technologies, Inc. v. PMC-Sierra, Inc.), also available at www.cisg.law.pace.edu/cisgw/wais/db/cases/2/010727u1.html; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 30 May 2001, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/010530r2.html>; CLOUT case No. 428 [Oberster Gerichtshof, Austria, 7 September 2000], Unilex; Hof van Beroep Antwerpen, Belgium, 18 June 1996, available on the Internet at www.law.kuleuven.ac.be/int/tradelaw/WK/1996-06-18.htm.

³⁶ 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.

³⁷ See Tribunale di Padova, Italy, 31 March 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040331i3.html>.

³⁸ See Amtsgericht Sursee, Switzerland, 12 September 2008, available on the Internet at <http://cisgw3.law.pace.edu/cases/080912s1.html>.

³⁹ See Oberlandesgericht Schleswig, Germany, 24 October 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081024g1.html>; Landgericht Landshut, Germany, 12 June 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080612g2.html>; China International Economic and Trade Arbitration Commission, People's Republic of China, 2007 (Arbitral award No. CISG/2007/01), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071210c1.html>; Cour d'appel de Versailles, France, 13 October 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051013f1.html>; China International Economic and Trade Arbitration Commission, People's Republic of China, 2005 (Arbitral award No. CISG/2005/24), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051000c1.html>; CLOUT case No. 907 [Tribunal Cantonal du Valais, Switzerland, 27 May 2005]; China International Economic and Trade Arbitration Commission, People's Republic of China, 2005 (Arbitral award No. CISG/2005/22), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051000c1.html>.

cases/050400c1.html; China International Economic and Trade Arbitration Commission, People's Republic of China, 2005 (Arbitral award No. CISG/2005/06), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050228c1.html>; China International Economic and Trade Arbitration Commission, People's Republic of China, 2004 (Arbitral award No. CISG/2004/07), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040900c1.html>; Shanghai No. I. Intermediate People's Court, People's Republic of China, 23 March 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040323c1.html>; China International Economic and Trade Arbitration Commission, People's Republic of China, 2004 (Arbitral award No. CISG/2004/04), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040312c1.html>; Tribunale di Padova, Italy, 25 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040225i3.html>; China International Economic and Trade Arbitration Commission, People's Republic of China, 2002 (Arbitral award No. CISG/2002/01), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020307c1.html>; 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, Unilex; 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 [Cantone del Ticino, Tribunale d'appello, 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).

⁴⁰See Landgericht Landshut, Germany, 12 June 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080612g2.html>; CLOUT case No. 428 [Oberster Gerichtshof, Austria, 7 September 2000], Unilex; Rechtbank Zutphen, Netherlands, 29 May 1997, *Nederlands Internationaal Privaatrecht*, 1998, No. 110; Amtsgericht Nordhorn, Germany, 14 June 1994, Unilex.

⁴¹Oberlandesgericht Linz, Austria, 23 March 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050323a3.html>; CLOUT case No. 831 [Hoge Raad, the Netherlands, 28 January 2005]; Oberlandesgericht Düsseldorf, Germany, 21 April 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040421g3.html>; CLOUT case No. 592 [Oberlandesgericht Düsseldorf, Germany, 30 January 2004]; CLOUT case No. 819 [Landgericht Trier, Germany, 8 January 2004].

⁴²For a different position, see Rechtbank Arnhem, the Netherlands, 17 March 2004, (stating that issue of the applicability of seller's standard terms and conditions is governed by gap-filling domestic law), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040317n1.html>.

⁴³See CLOUT case No. 425 [Oberster Gerichtshof, 21 March 2000], Unilex.

⁴⁴Ibid.

⁴⁵See CLOUT case No. 240 [Oberster Gerichtshof, Austria, 15 October 1998].

⁴⁶See China International Economic and Trade Arbitration Commission, People's Republic of China, 2008 (Arbitral award No. CISG/2008/01), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080418c1.html>; Oberlandesgericht München, Germany, 5 March 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080305g1.html>; Landgericht Freiburg, Germany, 22 August 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020822g1.html>; CLOUT case No. 613 [U.S. District Court, Northern District for Illinois, United States, 28 March 2002], Unilex; CLOUT case No. 447 [U.S. District Court, Southern District of New York, United States, 26 March 2002]. But see CLOUT case No. 632 [U.S. Bankruptcy Court, United States 10 April 2001] (citing CISG article 53 in support of the proposition that payment or non-payment of the price is significant in determining whether title to goods had passed to the buyer).

⁴⁷See 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.

⁴⁸See Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, 15 July 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080715sb.html>; *Efetiö Athinon*, Greece, 2006 (docket No. 4861/2006), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060000gr.html>; CLOUT case No. 613 [U.S. District Court, Northern District of Illinois, United States, 28 March 2002], Unilex; CLOUT case No. 308 [Federal Court, South Australian District, Adelaide, Australia, 28 April 1995]; CLOUT case No. 226 [Oberlandesgericht Koblenz, Germany, 16 January 1992].

⁴⁹Oberlandesgericht Stuttgart, Germany, 20 December 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/041220g1.html>.

⁵⁰In addition to the issues listed in article 4, article 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 the Digest for article 5.

⁵¹See Cámara Nacional de los Apelaciones en lo Comercial, Argentina, 14 October 1993, Unilex.

⁵²See Oberlandesgericht Hamburg, Germany, 25 January 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080125g1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 1 March 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060301r1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 13 January 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060113r1.html>; China International Economic and Trade Arbitration Commission, People's Republic of China, 2005 (Arbitral award No. CISG/2005/05), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051207c1.html>; China International Economic and Trade Arbitration Commission, People's Republic of China, 2005 (Arbitral award No. CISG/2005/04), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051109c1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 27 April 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050427r1.html>; China International Economic and Trade Arbitration Commission, People's Republic of China, 2004 (Arbitral award No. CISG/2004/07), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040900c1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 9 June 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040609r1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 24 May 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040524r1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 20 April 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040420r1.html>;

Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 19 March 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040319r1.html>; Tribunale di Padova, Italy, 25 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040225i3.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 19 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040219r1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 16 April 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030416r1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 4 April 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030404r1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 18 February 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020218r1.html>; Rechtbank van Koophandel Hasselt, Belgium, 17 June 1998, available on the Internet at 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 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 [Court of Arbitration of the International Chamber of Commerce, 1992 (Award no. 7197)].

⁵³See CLOUT case No. 47 [Landgericht Aachen, Germany, 14 May 1993] (see full text of the decision).

⁵⁴See Handelsgericht Aargau, Switzerland, 26 November 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081126s1.html>; District Court in Trnava, Slovakia, 17 September 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080917k1.html>; Oberlandesgericht Hamburg, Germany, 25 January 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080125g1.html>; Regional Court in Kosice, Slovakia, 22 May 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070522k1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 27 May 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050527r1.html>; Tribunale di Padova, Italy, 25 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040225i3.html>; Bundesgerichtshof, Germany, 9 January 2002, English translation available at <http://cisgw3.law.pace.edu/cases/020109g1.html>; CLOUT case No. 428 [Oberster Gerichtshof, Austria, 7 September 2000], Unilex; Oberster Gerichtshof, Austria, 25 June 1998, *Zeitschrift für Rechtsvergleichung*, 2000, 77; Oberlandesgericht Graz, Austria, 15 June 2000, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/000615a3.html>; 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]; Tribunal de commerce Nivelles, Belgium, 19 September 1995, Unilex; CLOUT case No. 132 [Oberlandesgericht Hamm, Germany, 8 February 1995]; Bezirksgericht Arbon, Switzerland, 9 December 1994, Unilex.

⁵⁵See CLOUT case No. 124 [Bundesgerichtshof, Germany, 15 February 1995] (see full text of the decision).

⁵⁶See Bundesgerichtshof, Germany, 23 June 2010, in *Internationales Handelsrecht*, 2010, 217, 221; Appellationsgericht Basel-Stadt, Switzerland, 26 September 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080926s1.html>; Oberlandesgericht Köln, Germany, 19 May 2008, Unilex; *Monomeles Protodikio Thessalonikis*, Greece, 2007 (docket No. 43945/2007), English abstract available on the Internet at <http://cisgw3.law.pace.edu/cases/080002gr.html>; CLOUT case No. 823 [Oberlandesgericht Köln, Germany, 13 February 2006], also in *Internationales Handelsrecht*, 2006, 145 ff.; CLOUT case No. 908 [Handelsgericht Zürich, Switzerland, 22 December 2005]; Oberlandesgericht Linz, Austria, 23 March 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050323a3.html>; Oberlandesgericht Stuttgart, Germany, 20 December 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/041220g1.html>; Oberlandesgericht Düsseldorf, Germany, 22 July 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040722g1.html>; CLOUT case No. 894 [Bundesgericht, Switzerland, 7 July 2004]; Tribunale di Padova, Italy, 25 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040225i3.html>; Landgericht Bielefeld, Germany, 12 December 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/031212g1.html>; Oberlandesgericht Düsseldorf, Germany, 25 July 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030725g1.html>; Landgericht Mönchengladbach, Germany, 15 July 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030715g1.html>; Bundesgerichtshof, Germany, 9 January 2002, English translation available at <http://cisgw3.law.pace.edu/cases/020109g1.html>; CLOUT case No. 605 [Oberster Gerichtshof, Austria, 22 October 2001], also in *Internationales Handelsrecht*, 2002, 27; CLOUT case No. 727 [Chamber of National and International Arbitration of Milan, Italy, 28 September 2001]; Oberlandesgericht Köln, Germany, 28 May 2001, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/010528g1.html>; 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], Unilex; 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 www.cisg-online.ch/cisg/urteile/311.htm; Landgericht München, Germany, 6 May 1997, available on the Internet at www.cisg-online.ch/cisg/urteile/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, Unilex; CLOUT case No. 289 [Oberlandesgericht Stuttgart, Germany, 21 August 1995]; Landgericht München, Germany, 20 March 1995, Unilex; Rechtbank Middelburg, Netherlands, 25 January 1995, Unilex; Amtsgericht Mayen, Germany, 6 September 1994, available on the Internet at www.cisg-online.ch/cisg/urteile/382.htm; 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].

⁵⁷See CLOUT case No. 821 [Oberlandesgericht Karlsruhe, Germany, 20 July 2004]; CLOUT case No. 591 [Oberlandesgericht Düsseldorf, Germany, 28 May 2004]; CLOUT case No. 605 [Oberster Gerichtshof, Austria, 22 October 2001], also available on the Internet at www.cisg.at/1_4901i.htm. For the application of the Convention to set-off in respect of receivables arising out of contracts governed by the Convention, see Kantonsgericht Zug, Switzerland, 14 December 2009, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/2026.pdf>; Landgericht Stuttgart, Germany, 29 October 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/091029g1.html>; CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000], Unilex; CLOUT case No. 273 [Oberlandesgericht München, Germany, 9 July 1997] (see full text of the decision).

⁵⁸Hof van Cassatie, Belgium, 19 June 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090619b1.html>.

⁵⁹See Bundesgericht, Switzerland, 18 May 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090518s1.html>; Appellationsgericht Basel-Stadt, Switzerland, 26 September 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080926s1.html>; Supreme Court, Slovakia, 30 April 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080430k1.html>; CLOUT case No. 823 [Oberlandesgericht Köln, Germany, 13 February 2006], also in *Internationales Handelsrecht*, 2006, 145 ff.; Cour d'appel de Versailles, France, 13 October 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051013f1.html>; CLOUT case No. 946 [Krajský súd v Bratislave, Slovakia, 11 October 2005], available on the Internet at <http://cisgw3.law.pace.edu/cases/051011k1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 2 June 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050602r1.html>; CLOUT case No. 906 [Kantonsgericht Nidwalden, Switzerland, 23 May 2005], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050523s1.html>; Hof van Beroep Ghent, Belgium, 4 October 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/041004b1.html>; CLOUT case No. 821 [Oberlandesgericht Karlsruhe, Germany, 20 July 2004]; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 9 June 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040609r1.html>; Hof van Beroep Ghent, Belgium, 17 May 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040517b1.html>; Tribunal of International Commercial Arbitration at the Ukrainian Chamber of Commerce and Trade, Ukraine, 15 April 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040415u5.html>; Tribunale di Padova, Italy, 25 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040225i3.html>; CLOUT case No. 892 [Kantonsgericht Schaffhausen, Switzerland, 27 January 2004]; CLOUT case No. 635 [Oberlandesgericht Karlsruhe, Germany, 10 December 2003]; Oberlandesgericht Zweibrücken, Germany, 26 July 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020726g1.html>; Court of Arbitration of the International Chamber of Commerce. France, 2002 (Arbitral award No. 11333), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021333i1.html>; CLOUT case No. 879 [Handelsgericht Bern, Switzerland, 19 January 2002]; Rechtbank van Koophandel Ieper, Belgium, 29 January 2001, available on the Internet at www.law.kuleuven.ac.be/int/tradelaw/WK/2001-01-29.htm; CLOUT case No. 428 [Oberster Gerichtshof, Austria, 7 September 2000], Unilex; CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (see full text of the decision); CLOUT case No. 476 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 6 June 2000]; 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 www.cisg-online.ch/cisg/urteile/180.htm; CLOUT case No. 125 [Oberlandesgericht Hamm, Germany, 9 June 1995]; CLOUT case No. 302 [Court of Arbitration of the International Chamber of Commerce, 1994 (Arbitral award No. 7660/KJ)], see also *ICC Court of Arbitration Bulletin*, 1995, 69 ff. But see CLOUT case No. 482 (Cour d'appel de Paris, France, 6 November 2001) (stating that the limitation period is a matter governed by but not expressly settled in the Convention, but resolving the issue by reference to applicable domestic law).

⁶⁰See Bundesgericht, Switzerland, 11 July 2000, Unilex; CLOUT case No. 196 [Handelsgericht des Kantons Zürich, Switzerland, 26 April 1995] (see full text of the decision).

⁶¹Tribunal Cantonal du Valais, Switzerland, 21 February 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050221s1.html>; Cour de Justice de Genève, Switzerland, 15 November 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021115s1.html>; Bundesgericht, Switzerland, 11 July 2000, Unilex.

⁶²See Landgericht Hamburg, Germany, 2 November 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051102g1.html>; Oberster Gerichtshof, Austria, 24 April 1997, Unilex.

⁶³See Bundesgericht, Switzerland, 17 October 2000, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/001017s1.html>; CLOUT case No. 338 [Oberlandesgericht Hamm, Germany, 23 June 1998].

⁶⁴See CLOUT case No. 848 [U.S. District Court, Middle District of Pennsylvania, United States, 6 January 2006], also in 2006 U.S. Dist. LEXIS 1569 (*American Mint LLC, Goede Beteiligungsgesellschaft, and Michael Goede v. GOSoftware, Inc.*); U.S. District Court, Middle District of Pennsylvania, United States, 16 August 2005, available on the Internet at <http://cisgw3.law.pace.edu/cases/050816u1.html#ii>; U.S. District Court, Northern District of Illinois, United States, 30 March 2005, available on the Internet at <http://cisgw3.law.pace.edu/cases/050330u1.html>; CLOUT case No. 613 [U.S. District Court, Northern District of Illinois, United States, 28 March 2002], Unilex; CLOUT case No. 269 [Bundesgerichtshof, Germany, 12 February 1998].

⁶⁵See Landgericht München, Germany, 25 January 1996, Unilex.

⁶⁶CLOUT Case No. 579 [U.S. District Court, Southern District Court of New York, United States, 10 May 2002], Unilex; CLOUT case No. 420 [U.S. District Court, Eastern District of Pennsylvania, United States, 29 August 2000].

⁶⁷U.S. District Court, Eastern District of Arkansas, United States, 23 December 2009, available on the Internet at <http://cisgw3.law.pace.edu/cases/091223u1.html>.

⁶⁸U.S. District Court, Eastern District of Arkansas, United States, 23 December 2009, available on the Internet at <http://cisgw3.law.pace.edu/cases/091223u1.html>; see also U.S. District Court, Southern District of Ohio, United States, 26 March 2009, available on the Internet at <http://cisgw3.law.pace.edu/cases/090326u1.html>.

⁶⁹U.S. District Court, Eastern District of Arkansas, United States, 23 December 2009, available on the Internet at <http://cisgw3.law.pace.edu/cases/091223u1.html>.

⁷⁰CLOUT case No. 894 [Bundesgericht, Switzerland, 7 July 2004].

⁷¹U.S. District Court, Northern District of Illinois, United States, 30 March 2005, available on the Internet at <http://cisgw3.law.pace.edu/cases/050330u1.html>; Arrondissementsrechtbank Amsterdam, Netherlands, 5 October 1994, *Nederlands Internationaal Privaatrecht*, 1995, No. 231.

⁷²See CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997] (see full text of the decision); CLOUT case No. 94 [Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft—Wien, Austria, 15 June 1994]; CLOUT case No. 93 [Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft—Wien, Austria, 15 June 1994] (see full text of the decision); Hof s'Hertogenbosch, Netherlands, 26 February 1992, Unilex.

⁷³CLOUT case No. 613 [U.S. District Court, Northern District of Illinois, United States, 28 March 2002] 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>.

⁷⁴For 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).

⁷⁵See CLOUT case No. 907 [Tribunal Cantonal du Valais, Switzerland, 27 May 2005]; Tribunal Cantonal du Valais, Switzerland, 19 August 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030819s1.html>; Juzgado Comercial No. 26 Secretaria No. 51, Buenos Aires, Argentina, 2 July 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030702a1.html>; Juzgado Comercial No. 26 Secretaria No. 52, Buenos Aires, Argentina, 17 March 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030317a1.html>; CLOUT case No. 605 [Oberster Gerichtshof, Austria, 22 October 2001], also available on the Internet at 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).

⁷⁶CLOUT case No. 80 [Kammergericht Berlin, Germany, 24 January 1994]; see, however, Landgericht Berlin, 24 March 1998, Unilex (describing an alternative view that the Convention does not contain a general principle to address this issue).

⁷⁷*Monomeles Protodikio Thessalonikis*, Greece, 2008 (docket No. 16319/2007), English abstract available on the Internet at <http://cisgw3.law.pace.edu/cases/080001gr.html>.

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”.² 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.³

3. According to part of the case law, any claims for damage to property caused by non-conforming goods are governed by the Convention and do not fall within scope of the article 5 exclusion.⁴ This excludes any concurrent domestic remedies for damage to property. Consequently, in those cases where the Convention applies, it requires a buyer to notify the seller of the lack of conformity that caused the damage to property in order for the buyer not to lose its claim.⁵ 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.

4. According to some courts, however, the Convention does not deal with concurrent tort claims⁶ or claims based on the seller’s negligent or fraudulent misrepresentation,⁷ thus not pre-empting any such claim, but rather leaving it to the applicable domestic law to determine the prerequisites of any such claim.

Notes

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

²CLOUT case No. 196 [Handelsgericht des Kantons Zürich, Switzerland, 26 April 1995].

³See CLOUT case No. 49 [Oberlandesgericht Düsseldorf, Germany, 2 July 1993] (see full text of the decision).

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

⁵See CLOUT case No. 280 [Thüringer Oberlandesgericht, Germany, 26 May 1998]; CLOUT case No. 196 [Handelsgericht des Kantons Zürich, Switzerland, 26 April 1995].

⁶U.S. District Court, Eastern District of Arkansas, United States, 23 December 2009, available on the Internet at <http://cisgw3.law.pace.edu/cases/091223u1.html>; CLOUT Case No. 579 [U.S. Southern District Court for New York, United States, 10 May 2002], Unilex; CLOUT case No. 420 [U.S. District Court, Eastern District of Pennsylvania, United States, 29 August 2000].

⁷U.S. District Court, Eastern District of Arkansas, United States, 23 December 2009, available on the Internet at <http://cisgw3.law.pace.edu/cases/091223u1.html>; U.S. District Court, Southern District of Ohio, United States, 26 March 2009, available on the Internet at <http://cisgw3.law.pace.edu/cases/090326u1.html>; U.S. District Court, Southern District of Ohio, United States, 10 October 2006, available on the Internet at <http://cisgw3.law.pace.edu/cases/061010u1.html>; CLOUT case No. 579 [U.S. District Court, Southern District of New York, United States, 10 May 2002], Unilex.

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, courts must determine that the parties have not excluded the Convention nor derogated from its provisions,¹ thus elevating the lack of an exclusion to an applicability requirement of the Convention.

2. According to several courts, opting-out requires a clear,² unequivocal³ and affirmative⁴ agreement of the parties.⁵ According to one court, however, for the Convention not to apply it suffices that the "contract contains a choice-of-law provision."⁶ A different court even stated that for the Convention not to apply it suffices that "there is an objection to the application of the Convention" by one party.⁷

3. 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.⁸ Thus the drafters clearly acknowledged the Convention's non-mandatory nature⁹ and the central role that party autonomy plays in international commerce—specifically, in international sales.¹⁰

DEROGATION

4. Article 6 distinguishes between excluding application of the Convention entirely and derogating from some of its provisions.¹¹ 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 96,¹² the parties may not derogate from or vary the effect of article 12.¹³ 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' right to derogate from any provision of the Convention.

5. 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.¹⁴ One court also stated that article 28 of the Convention cannot be derogated from.¹⁵

6. One court acknowledged, for instance, that parties can derogate from the "reasonable time" period for notice set forth in article 39 (1) by stating, for example, that notice must be given "within five working days from the delivery."¹⁶ One arbitral tribunal stated that the parties can derogate from the two-year cut-off period provided in article 39 (2).¹⁷ A different tribunal stated that the parties are allowed to derogate from the concept of "delivery" as found in the Convention.¹⁸ Yet another court affirmed that article 55, relating to open-price contracts, is only applicable where the parties have not agreed to the contrary.¹⁹ The Austrian Supreme Court²⁰ concluded that article 57 also can be derogated from. An arbitral tribunal stated that article 6 of the Convention allows parties to derogate from the Convention's rules on liability.²¹

EXPRESS EXCLUSION

7. The parties can expressly exclude application of the Convention²² through, *inter alia*, the incorporation of standard contract terms containing a clause expressly excluding the Convention.²³ 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,²⁴ the law applicable will be that designated by the rules of private international law of the forum,²⁵ resulting (in most countries)²⁶ in application of the law chosen by the parties.²⁷ 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.

8. One court stated that the Convention was applicable, despite the express exclusion in the applicable standard contract terms, of the Convention's antecedents—namely, the Uniform Law on the Formation of Contracts for the International Sale of Goods and the Convention relating to a Uniform Law on the International Sale of Goods.²⁸

IMPLICIT EXCLUSION

9. A number of decisions have considered whether application of the Convention can be excluded implicitly. Many tribunals expressly admit the possibility of an implicit exclusion,²⁹ as long as the parties' intent to exclude the

Convention is clear³⁰ and real.³¹ 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”.³² 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”.³³ According to some court decisions³⁴ and an arbitral award,³⁵ however, the Convention cannot be excluded implicitly, based on the fact that the Convention does not expressly provide for that possibility.

10. Although the Convention’s exclusion is to be evaluated on a case-by-case basis,³⁶ a variety of ways in which the parties can implicitly exclude the Convention—for example, by choosing the law³⁷ of a non-Contracting State as the law applicable to their contract³⁸—have been recognized.

11. More difficult problems are posed if the parties choose the law of a Contracting State to govern their contract. Some arbitral awards³⁹ and several court decisions⁴⁰ suggest that such a choice amounts to an implicit exclusion of the Convention, at least when the parties refer to the “exclusive” applicability of the law of a Contracting State.⁴¹ Most court decisions⁴² and arbitral awards,⁴³ however, take a different view. They mainly reason that the Convention is part of the law of the Contracting State whose law the parties chose;⁴⁴ and that the parties’ choice remains meaningful because it identifies the national law to be used for filling gaps in the Convention.⁴⁵ 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,⁴⁶ not even where the law chosen is that of a State within a Federal State,⁴⁷ at least not according to some courts.⁴⁸ Of course, if the parties clearly chose the domestic law of a Contracting State, the Convention must be deemed excluded.⁴⁹ According to one court, for the Convention to be considered implicitly excluded, it suffices that the Contract contains a clause making “Australian law applicable under exclusion of UNCITRAL law”.⁵⁰

12. According to some courts, the Convention is implicitly excluded by the parties’ choice of “the law of a contracting state insofar as it differs from the law of the national law of another Contracting State.”⁵¹

13. The choice of a forum may also lead to the implicit exclusion of the Convention’s applicability.⁵² However, an exclusion of the application of the Convention cannot be inferred solely from the fact that the standard terms provided for the jurisdiction of the courts of a “Contracting State.”⁵³

14. 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. Pursuant to various decisions, the mere fact that the parties based their arguments on domestic law does not by itself lead to the exclusion of the Convention.⁵⁴ According to different courts, 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.⁵⁵ According to yet other courts, the Convention is excluded where the parties argued their case solely under the domestic law of the forum.⁵⁶ Similarly, some arbitral tribunals disregarded the Convention where the parties had based their pleadings solely on domestic law.⁵⁷ Where the parties each base their pleadings on their respective domestic law, the Convention cannot be considered to have been excluded by the parties.⁵⁸

15. According to some courts, the fact that the parties incorporated an Incoterm into their agreement does not constitute an implicit exclusion of the Convention.⁵⁹ According to a different court, the Convention can be excluded if the parties agree on terms that are incompatible with the Convention.⁶⁰

16. One arbitral tribunal expressly stated that “[w]hen a contractual clause governing a particular matter is in contradiction with the Convention, the presumption is that the parties intended to derogate from the Convention on that particular question. It does not affect the applicability of the Convention in general. The parties’ specific agreement to reduce, to 12 months, the two-year time limit provided for in article 39 [of the Convention] does not lead the Arbitral Tribunal to another finding.”⁶¹

17. The party alleging exclusion of the Convention bears the burden of proof regarding the existence of an agreement on the exclusion of the Convention.⁶²

OPTING-IN

18. 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 conference⁶³ 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 discussion, 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

¹For this approach see, e.g., Gerechtshof Arnhem, the Netherlands, 9 March 2010 (docket No. 104.002.936, unpublished); Kantonsgericht St. Gallen, Switzerland, 15 January 2010, available on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/2159.pdf; Oberlandesgericht Hamm, Germany, 2 April 2009, available on the Internet at www.globalsaleslaw.com/content/api/cisg/urteile/1978.pdf; Tribunale di Forlì, Italy, 16 February 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090216i3.html>; Rechtbank Breda, the Netherlands, 16 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090116n1.html>; *Polymeles Protodikio Athinon*, Greece, 2009 (docket No. 2282/2009), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/092282gr.html>; *Polimeles Protodikio Athinon*, Greece, 2009 (docket No. 4505/2009), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/094505gr.html#ii2>; CLOUT case No. 867 [Tribunale di Forlì, Italy, 11 December 2008], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081211i3.html>; Kantonsgericht Zug, Switzerland, 27 November 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081127s1.html>; Hof van Beroep Ghent, Belgium, 14 November 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081114b1.html>; U.S. District Court, New Jersey, United States, 7 October 2008, available on the Internet at <http://cisgw3.law.pace.edu/cases/081007u1.html>; U.S. District Court, Southern District of Florida, United States, 19 May 2008, available on the Internet at <http://cisgw3.law.pace.edu/cases/080519u2.html>; Oberlandesgericht Innsbruck, Austria, 18 December 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071218a3.html>; Oberlandesgericht Linz, Austria, 24 September 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070924a3.html>; Handelsgericht Kanton Aargau, Switzerland, 20 September 2007, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/1742.pdf>; Audiencia Provincial de Valencia, sección 1ª, Spain, 13 March 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070313s4.html>; CLOUT case No. 933 [Bundesgericht, Switzerland, 20 December 2006]; CLOUT case No. 824 [Oberlandesgericht Köln, Germany, 24 May 2006]; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 13 April 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060413r1.html>; Oberlandesgericht Köln, Germany, 3 April 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060403g1.html>; CLOUT case No. 749 [Oberster Gerichtshof, Austria, 21 June 2005]; CLOUT case No. 748 [Oberster Gerichtshof, Austria, 24 May 2005]; CLOUT case No. 905 [Tribunal cantonal du Valais, Switzerland, 21 February 2005]; CLOUT case No. 651 [Tribunale di Padova, Italy, 11 January 2005]; Oberster Gerichtshof, Austria, 21 April 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040421a3.html>; Tribunale di Padova, Italy, 25 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040225i3.html>; Bundesgericht, Switzerland, 19 February 2004, available on the Internet at www.cisg-online.ch/cisg/urteile/839.pdf; CLOUT case No. 596 [Oberlandesgericht Zweibrücken, Germany, 2 February 2004] (see full text of the decision); CLOUT case No. 534 [Oberster Gerichtshof, Austria, 17 December 2003] (see full text of the decision); China International Economic and Trade Arbitration Commission, People's Republic of China, 10 December 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/031210c1.html>; CLOUT case No. 889 [Handelsgericht Zürich, Switzerland, 24 October 2003]; Obergericht Thurgau, Switzerland, 11 September 2003, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/1810.pdf>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 15 August 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030815r1.html>; Landgericht Köln, Germany, 25 March 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030325g1.html>; Kantonsgericht Schaffhausen, Switzerland, 23 April 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020423s1.html>; CLOUT case No. 880 [Tribunal cantonal du Vaud, Switzerland, 11 April 2002] (see full text of the decision); Rechtbank van Koophandel Veurne, Belgium, 25 April 2001, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/010425b1.html>; Højesteret, Denmark, 15 February 2001, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/010215d1.html>; 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 de 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 de 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).

²CLOUT case No. 1025 [Cour de Cassation, France, 3 November 2009], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/091103f1.html>; Oberlandesgericht Linz, Austria, 23 January 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060123a3.html>; CLOUT case No. 904 [Tribunal Cantonal du Jura, Switzerland, 3 November 2004]; CLOUT case No. 575 [U.S. Court of Appeals (5th Circuit), United States, 11 June 2003, corrected on 7 July 2003] (see full text of the decision); CLOUT case No. 433 [U.S. District Court, Northern District of California, United States, 27 July 2001], *Federal Supplement (2nd Series)* vol. 164, p. 1142 (*Asante Technologies v. PMC-Sierra*), also available on the Internet at www.cisg.law.pace.edu/cisg/wais/db/cases2/010727u1.html; Tribunal de Commerce Namur, Belgium, 15 January 2002, available on the Internet at www.law.kuleuven.ac.be/int/tradelaw/WK/2002-01-15.htm.

³U.S. District Court, Southern District of New York, United States, 11 January 2011, unpublished; Oberster Gerichtshof, Austria, 4 July 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070704a3.html>; Oberlandesgericht Linz, Austria, 23 January 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060123a3.html>.

⁴U.S. District Court, Middle District of Pennsylvania, United States, 16 August 2005, available on the Internet at <http://cisgw3.law.pace.edu/cases/050816u1.html>.

⁵CLOUT case No. 828 [Hof's-Hertogenbosch, the Netherlands, 2 January 2007].

⁶U.S. District Court, Eastern District of California, United States, 21 January 2010, available on the Internet at <http://cisgw3.law.pace.edu/cases/100121u1.html#iii>.

⁷Shanghai High People's Court, People's Republic of China, 17 May 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070517c1.html>.

⁸For a reference to this principle, see CLOUT case No. 229 [Bundesgerichtshof, Germany, 4 December 1996] (see full text of the decision).

⁹For an express reference to the Convention's non-mandatory nature, see Obergericht Kanton Bern, Switzerland, 19 May 2008, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/1738.pdf>; Shanghai High People's Court, People's Republic of China, 17 May 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070517c1.html>; Tribunal cantonal de Vaud, Switzerland, 24 November 2004, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/1842.pdf>; CLOUT case No. 904 [Tribunal Cantonal du Jura, Switzerland, 3 November 2004]; CLOUT case No. 880 [Tribunal cantonal de Vaud, Switzerland, 11 April 2002] (see the text of the decision); 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, Austria, 4 March 1997, unpublished; CLOUT case No. 199 [Kantonsgericht Wallis, Switzerland, 29 June 1994], also in *Zeitschrift für Walliser Rechtsprechung*, 1994, 126.

¹⁰CLOUT case No. 432 [Landgericht Stendal, Germany, 12 October 2000], also in *Internationales Handelsrecht*, 2001, 32.

¹¹For decisions referring to the fact that parties may exclude the application of the Convention or derogate from or vary the effect of most of its provisions, see Zivilgericht Basel-Stadt, Switzerland, 8 November 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061108s1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 30 June 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060630r1.html>; Oberlandesgericht Linz, Austria, 23 January 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060123a3.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 16 March 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050316r1.html>; Handelsgericht St. Gallen, Switzerland, 11 February 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030211s1.html>; CLOUT case No. 574 [U.S. District Court, Northern District of Illinois, United States, 29 January 2003]; CLOUT case No. 880 [Tribunal cantonal de Vaud, Switzerland, 11 April 2002] (see the full text of the decision).

¹²See 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."

¹³For an express reference in case law to the fact that the parties are not allowed to exclude article 12, see Oberlandesgericht Linz, Austria, 23 January 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060123a3.html>.

¹⁴CLOUT case No. 651 [Tribunale di Padova, Italy, 11 January 2005].

¹⁵Ibid.

¹⁶Rechtbank Arnhem, the Netherlands, 11 February 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090211n1.html>; see also Landgericht Gießen, Germany, 5 July 1994, *Neue Juristische Wochenschrift Rechtsprechungs-Report*, 1995, 438.

¹⁷Court of Arbitration of the International Chamber of Commerce, France, 2002 (Arbitral award No. 11333), available on the Internet at <http://cisgw3.law.pace.edu/cases/021333i1.html>.

¹⁸Zivilgericht Basel-Stadt, Switzerland, 8 November 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061108s1.html>.

¹⁹CLOUT case No. 151 [Cour d'appel de Grenoble, France, 26 April 1995].

²⁰CLOUT case No. 106 [Oberster Gerichtshof, Austria, 10 November 1994].

²¹Tribunal of International Commercial Arbitration at the Ukraine Chamber of Commerce and Trade, Ukraine, 2005 (Arbitral award No. 48), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050000u5.html>.

²²For cases in which the Convention was expressly excluded, see Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, 17 August 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090817sb.html>; Rechtbank Utrecht, the Netherlands, 15 April 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090415n1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 5 November 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/041105r1.html>. For cases in which reference was made to the parties' undisputed possibility of excluding the Convention expressly, see, e.g., CLOUT case No. 1057 [Oberster Gerichtshof, Austria, 2 April 2009], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090402a3.html>; Oberlandesgericht Hamm, Germany, 2 April 2009, available on the Internet at www.globalsaleslaw.com/content/api/cisg/urteile/1978.pdf; CLOUT case No. 867 [Tribunale di Forlì, Italy, 11 December 2008], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081211i3.html>.

²³Oberlandesgericht Oldenburg, Germany, 20 December 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071220g1.html>; Oberster Gerichtshof, Austria, 4 July 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070704a3.html>. For a simple reference to the possibility of excluding the Convention expressly by resorting to standard contract terms, see CLOUT case No. 904 [Tribunal Cantonal du Jura, Switzerland, 3 November 2004].

²⁴This 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, Switzerland, 10 February 1999], also in *Schweizerische Zeitschrift für Internationales und Europäisches Recht*, 2000, 111.

²⁵See CLOUT case No. 231 [Bundesgerichtshof, Germany, 23 July 1997] (see full text of the decision); Oberlandesgericht Frankfurt, Germany, 15 March 1996, available on the Internet at www.cisg-online.ch/cisg/urteile/284.htm.

²⁶Where 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), in the Rome I Regulation, 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 www.oas.org/juridico/english/Treaties/b-56.html), the law chosen by the parties will govern.

²⁷Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, 17 August 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090817sb.html>.

²⁸CLOUT case No. 826 [Oberlandesgericht München, Germany, 19 October 2006].

²⁹See CLOUT case No. 1057 [Oberster Gerichtshof, Austria, 2 April 2009], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090402a3.html>; Oberlandesgericht Hamm, Germany, 2 April 2009, available on the Internet at www.globalsaleslaw.com/content/api/cisgw/urteile/1978.pdf; Obergericht des Kantons Aargau, Switzerland, 3 March 2009, at <http://global-saleslaw.com/content/api/cisgw/urteile/2013.pdf>; Tribunale di Forlì, Italy, 16 February 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090216i3.html>; CLOUT case No. 1020 [Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, 28 January 2009], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090128sb.html>; *Polimeles Protodikio Athinon*, Greece, 2009 (docket No. 4505/2009), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/094505gr.html#ii2>; CLOUT case No. 867 [Tribunale di Forlì, Italy, 11 December 2008], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081211i3.html>; Obergericht Kanton Bern, Switzerland, 19 May 2008, available on the Internet at <http://globalsaleslaw.com/content/api/cisgw/urteile/1738.pdf>; Oberster Gerichtshof, Austria, 4 July 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070704a3.html>; Oberlandesgericht Linz, Austria, 23 January 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060123a3.html>; CLOUT case No. 651 [Tribunale di Padova, Italy, 11 January 2005]; Tribunale di Padova, Italy, 25 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040225i3.html>; CLOUT case No. 534 [Oberster Gerichtshof, Austria, 17 December 2003] (see full text of the decision); CLOUT case No. 886 [Handelsgericht St. Gallen, Switzerland, 3 December 2002]; CLOUT case No. 880 [Tribunal cantonal du Val de Saane, Switzerland, 11 April 2002] (see the text of the decision); Court of Arbitration of the International Chamber of Commerce, France, 2002 ((Arbitral award No. 11333), available on the Internet at <http://cisgw3.law.pace.edu/cases/021333i1.html>; CLOUT case No. 605 [Oberster Gerichtshof, Austria, 22 October 2001], also available on the Internet at www.cisg.at/1_7701g.htm; Cour de Cassation, France, 26 June 2001, Unilex; CLOUT case No. 483 [Rechtbank van Koophandel Kortrijk, Belgium, 19 April 2001], available on the Internet at www.law.kuleuven.be/ipr/eng/cases/2001-04-19.html; 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, Unilex; 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). See also the decisions cited in the following notes.

³⁰Oberlandesgericht Linz, Austria, 23 January 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060123a3.html>; CLOUT case No. 904 [Tribunal Cantonal du Jura, Switzerland, 3 November 2004]; CLOUT case No. 575 [U.S. Court of Appeals (5th Circuit), United States, 11 June 2003, corrected on 7 July 2003] (see full text of the decision); CLOUT case No. 605 [Oberster Gerichtshof, Austria, 22 October 2001], also available on the Internet at www.cisg.at/1_7701g.htm.

³¹CLOUT case No. 904 [Tribunal Cantonal du Jura, Switzerland, 3 November 2004].

³²*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.

³³*Ibid.* article 17.

³⁴See U.S. District Court, New Jersey, United States, 7 October 2008, available on the Internet at <http://cisgw3.law.pace.edu/cases/081007u1.html>; CLOUT case No. 845 [U.S. District Court, Eastern District Michigan, United States, 28 September 2007]; CLOUT case No. 847 [U.S. District Court, Minnesota, United States, 31 January 2007]; U.S. District Court, Southern District of New York, United States, 23 August 2006, available on the Internet at <http://cisgw3.law.pace.edu/cases/060823u1.html>; U.S. District Court, Middle District of Pennsylvania, United States, 16 August 2005, available on the Internet at <http://cisgw3.law.pace.edu/cases/050816u1.html>; U.S. District Court, New Jersey, United States, 15 June 2005, available on the Internet at <http://cisgw3.law.pace.edu/cases/050615u1.html>; Kantonsgericht Zug, Switzerland, 11 December 2003, available on the Internet at www.cisg-online.ch/cisgw/urteile/958.pdf; Landgericht Landshut, Germany, 5 April 1995, Unilex; 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>.

³⁵See CLOUT case No. 474 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 24 January 2000], also referred to on the Internet at www.cisg.law.pace.edu/wais/db/cases2/000124r1.html.

³⁶For this statement, see Oberlandesgericht Linz, Austria, 23 January 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060123a3.html>; CLOUT case No. 904 [Tribunal Cantonal du Jura, Switzerland, 3 November 2004] (see full text of decision).

³⁷Whether such a choice is to be acknowledged at all depends on the rules of private international law of the forum.

³⁸See Oberlandesgericht Linz, Austria, 23 January 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060123a3.html>; CLOUT case No. 651 [Tribunale di Padova, Italy, 11 January 2005] (see full text of the decision); CLOUT case No. 904 [Tribunal Cantonal du Jura, Switzerland, 3 November 2004] (see full text of decision); CLOUT case No. 574 [U.S. District Court, Northern District of Illinois, United States, 29 January 2003]; CLOUT case No. 49 [Oberlandesgericht Düsseldorf, Germany, 2 July 1993] (see full text of the decision); see also 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 defense, and counterclaims in accordance with the domestic law of the forum (a Contracting State)).

³⁹See Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 16 March 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050316r1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 12 April 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040412r1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 11 October 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021011r1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 6 September 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020906r1.html>; CLOUT case No. 92 [Ad Hoc Arbitration Tribunal, Italy, 19 April 1994].

⁴⁰See Hof 's-Hertogenbosch, the Netherlands, 13 November 2007, unpublished; CLOUT case No. 904 [Tribunal Cantonal du Jura, Switzerland, 3 November 2004] (see full text of decision); Cour d'appel de Colmar, France, 26 September 1995, Unilex; CLOUT case No. 326 [Kantonsgericht Zug, Switzerland, 16 March 1995]; CLOUT case No. 54 [Tribunale Civile de Monza, Italy, 14 January 1993].

⁴¹Hof's-Hertogenbosch, the Netherlands, 13 November 2007, unpublished.

⁴²Bundesgerichtshof, Germany, 11 May 2010, available on the Internet at www.globalsaleslaw.com/content/api/cisg/urteile/2125.pdf; CLOUT case No. 1057 [Oberster Gerichtshof, Austria, 2 April 2009], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090402a3.html>; Obergericht des Kantons Aargau, Switzerland, 3 March 2009, at <http://globalsaleslaw.com/content/api/cisg/urteile/2013.pdf>; *Polimeles Protodikio Athinon*, Greece, 2009 (docket No. 4505/2009), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/094505gr.html#ii2>; Rechtbank Rotterdam, the Netherlands, 5 November 2008, unpublished; Oberlandesgericht Stuttgart, Germany, 31 March 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080331g1.html>; CLOUT case No. 845 [U.S. District Court, Eastern District Michigan, United States, 28 September 2007]; Hof van Beroep Antwerpen, Belgium, 24 April 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060424b1.html>; Rechtbank van Koophandel Hasselt, Belgium, 15 February 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060215b1.html>; Oberlandesgericht Linz, Austria, 23 January 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060123a3.html>; Oberlandesgericht Linz, Austria, 8 August 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050808a3.html>; Oberster Gerichtshof, Austria, 26 January 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050126a3.html>; CLOUT case No. 651 [Tribunale di Padova, Italy, 11 January 2005] (see full text of the decision); Tribunal cantonal de Vaud, Switzerland, 24 November 2004, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/1842.pdf>; Hof van Beroep Ghent, Belgium, 20 October 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/041020b1.html>; Landgericht Kiel, Germany, 27 July 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040727g1.html>; CLOUT case No. 534 [Oberster Gerichtshof, Austria, 17 December 2003] (see full text of the decision); CLOUT case No. 575 [U.S. Court of Appeals (5th Circuit), United States, 11 June 2003, corrected on 7 July 2003]; CLOUT case No. 574 [U.S. District Court, Northern District of Illinois, United States, 29 January 2003]; CLOUT case No. 886 [Handelsgericht St. Gallen, Switzerland, 3 December 2002]; Oberlandesgericht Zweibrücken, Germany, 26 July 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020726g1.html>; CLOUT case No. 881 [Handelsgericht Zürich, Switzerland, 9 July 2002] (see full text of the decision); Hof van Beroep Ghent, 15 May 2002, available on the Internet at www.law.kuleuven.be/ipr/eng/cases/2002-05-15.html; CLOUT case No. 447 [U.S. District Court, Southern District of New York, United States, 26 March 2002]; CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002 (see full text of the decision approving lower appeals court reasoning)]; CLOUT case No. 482 [Cour d'appel de Paris, France, 6 November 2001]; CLOUT case No. 605 [Oberster Gerichtshof, Austria, 22 October 2001], also available on the Internet at www.cisg.at/1_7701g.htm; CLOUT case No. 631 [Supreme Court of Queensland, Australia, 17 November 2000]; 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>; 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].

⁴³See Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 22 October 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/041022r1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 17 September 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030917r1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 25 June 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030625r1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 16 June 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030616r1.html>; Court of Arbitration of the International Chamber of Commerce, France, 2002 (Arbitral award No. 11333), available on the Internet at <http://cisgw3.law.pace.edu/cases/021333i1.html>; Court of Arbitration of the International Chamber of Commerce, 1999 (Arbitral award No. 9187), Unilex; CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 21 March, 21 June 1996]; Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 17 November 1995, Unilex; Court of Arbitration of the International Chamber of Commerce, France, 1995 (Arbitral award No. 8324), *Journal du droit international*, 1996, 1019 ff.; Court of Arbitration of the International Chamber of Commerce, France, 1994 (Arbitral award No. 7844), Unilex; CLOUT case No. 302 [Court of Arbitration of the International Chamber of Commerce, France, 1994 (Arbitral award No. 7660)], Unilex; CLOUT case No. 300 [Court of Arbitration of the International Chamber of Commerce, France, 1994 (Arbitral award No. 7565)], *Journal du droit international*, 1995, 1015 ff.; CLOUT case No. 103 [Court of Arbitration of the International Chamber of Commerce, 1993 (Arbitral award No. 6653)]; CLOUT case No. 93 [Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft—Wien, Austria, 15 June 1994].

⁴⁴See, e.g., CLOUT case No. 1057 [Oberster Gerichtshof, Austria, 2 April 2009], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090402a3.html>; Oberster Gerichtshof, Austria, 26 January 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050126a3.html>; Oberster Gerichtshof, Austria, 21 April 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040421a3.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 20 April 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040420r1.html>; Oberlandesgericht Zweibrücken, Germany, 26 July 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020726g1.html>; Oberlandesgericht Rostock, Germany, 10 October 2001, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/011010g1.html>.

⁴⁵CLOUT case No. 575 [U.S. Court of Appeals (5th Circuit), United States, 11 June 2003, corrected on 7 July 2003] (B.P. Petroleum International Ltd. v. Empresa Estatal Petroleos de Ecuador (Petroecuador)), U.S. App. LEXIS 12013, June 11, 2003, available on the Internet at <http://cisgw3.law.pace.edu/cases/030611u1.html>.

⁴⁶Oberlandesgericht Rostock, Germany, 10 October 2001, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/011010g1.html>. One court stated that, even though the choice of the law of a Contracting State without any reference to its domestic law may not per se amount to an implicit exclusion of the Convention, it may be looked at as one factor from which to derive the parties' intention to exclude it, when the law chosen is that of a Contracting State different from those where the parties have their place of business; Tribunal cantonal de Vaud, Switzerland, 24 November 2004, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/1842.pdf>.

⁴⁷CLOUT case No. 847 [U.S. District Court, Minnesota, United States, 31 January 2007]; U.S. District Court, Middle District of Pennsylvania, United States, 16 August 2005, available on the Internet at <http://cisgw3.law.pace.edu/cases/050816u1.html>; U.S. District Court, New Jersey, United States, 15 June 2005, available on the Internet at <http://cisgw3.law.pace.edu/cases/050615u1.html>; CLOUT case No. 574 [U.S. District Court, Northern District of Illinois, United States, 29 January 2003].

⁴⁸*Contra* United States District Court, Rhode Island, United States, 30 January 2006, available on the Internet at <http://cisgw3.law.pace.edu/cases/060130u1.html> (the choice of the law of Rhode Island excludes the applicability of the Convention).

⁴⁹U.S. District Court, Southern District of New York, United States, 29 May 2009, available on the Internet at <http://cisgw3.law.pace.edu/cases/090529u1.html#iii>; Obergericht des Kantons Aargau, Switzerland, 3 March 2009, at <http://globalsaleslaw.com/content/api/cisg/urteile/2013.pdf>; Oberster Gerichtshof, Austria, 4 July 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070704a3.html>; Landgericht Kiel, Germany, 27 July 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040727g1.html>; 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 www.cisg-online.ch/cisg/urteile/284.htm.

⁵⁰CLOUT case No. 956 [Federal Court of Australia, Australia, 20 May 2009].

⁵¹CLOUT case No. 1057 [Oberster Gerichtshof, Austria, 2 April 2009], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090402a3.html>; Oberlandesgericht Linz, Austria, 23 January 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060123a3.html>.

⁵²Oberlandesgericht Stuttgart, Germany, 31 March 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080331g1.html>; Oberlandesgericht Linz, Austria, 23 January 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060123a3.html>.

⁵³Oberlandesgericht Stuttgart, Germany, 31 March 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080331g1.html>.

⁵⁴See Landgericht Bamberg, Germany, 23 October 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061023g1.html>; Landgericht Saarbrücken, Germany, 2 July 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020702g1.html>; 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.

⁵⁵See Oberlandesgericht Linz, Austria, 23 January 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060123a3.html>; Tribunale di Padova, Italy, 25 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040225i3.html>; CLOUT case No. 596 [Oberlandesgericht Zweibrücken, Germany, 2 February 2004] (see full text of the decision); CLOUT case No. 136 [Oberlandesgericht Celle, Germany, 24 May 1995] (see full text of the decision).

⁵⁶Corte Suprema, Chile, 22 September 2008, English summary available on the Internet at <http://cisgw3.law.pace.edu/cases/080922ch.html>; Tribunal Supremo, Spain, 24 February 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060224s4.html>; CLOUT case No. 837 [Cour de Cassation, France, 25 October 2005]; High Commercial Court, Serbia, 9 July 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040709sb.html>; Cour de Cassation, France, 26 June 2001, Unilex; Oregon [State] Court of Appeals, United States, 12 April 1995, 133 Or. App. 633.

⁵⁷China International Economic and Trade Arbitration Commission, People's Republic of China, 2006 (Arbitral award No. CISG/2006/17), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060500c3.html>; Court of Arbitration of the International Chamber of Commerce, October 1995 (Arbitral award No. 8453), *ICC Court of Arbitration Bulletin*, 2000, 55.

⁵⁸CLOUT case No. 590 [Landgericht Saarbrücken, Germany, 1 June 2004] (see full text of the decision).

⁵⁹CLOUT case No. 605 [Oberster Gerichtshof, Austria, 22 October 2001], also available on the Internet at www.cisg.at/1_7701g.htm; Rechtbank van Koophandel Kortrijk, Belgium, 19 April 2001, available on the Internet at www.law.kuleuven.be/ipr/eng/cases/2001-04-19.html.

⁶⁰Obergericht Kanton Bern, Switzerland, 19 May 2008, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/1738.pdf>.

⁶¹Court of Arbitration of the International Chamber of Commerce, France, 2002 (Arbitral award No. 11333), available on the Internet at <http://cisgw3.law.pace.edu/cases/021133i1.html>; see also CLOUT case No. 237 [Arbitration Institute of the Stockholm Chamber of Commerce, Sweden, 5 June 1998], also available on the Internet at <http://cisgw3.law.pace.edu/cases/980605s5.html>.

⁶²Oberlandesgericht Linz, Austria, 23 January 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060123a3.html>; CLOUT case No. 482 [Cour d'appel de Paris, France, 6 November 2001].

⁶³See *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

General provisions (articles 7-13)

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

1. Article 7, which “constitutes already a standard reflecting the present tendency in international commercial law”,¹ 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

2. 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.² 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”.³

3. One court pointed out that the “[Convention] was drafted in Arabic, English, French, Spanish, Russian and Chinese. It was also translated into German, among other languages. In the case of ambiguity in the wording, reference is to be made to the original versions, whereby the English version, and, secondarily, the French version are given a higher significance as English and French were the official languages of the Conference and the negotiations were predominantly conducted in English”.⁴

THE CONVENTION’S INTERNATIONAL CHARACTER

4. According to a number of courts, article 7 (1)’s reference to the Convention’s international character forbids fora from interpreting the Convention on the basis of national law;⁵ instead, courts must interpret the Convention “autonomously”.⁶ According to one court, this requires that “[m]aterial for interpretation of the Convention unless [the Convention] expressly provides otherwise, must be taken from the Convention itself”.⁷ According to a different court, this makes it necessary for courts to free themselves from

“any ethnocentric approaches [. . .] and of methods that usually follow for the interpretation of domestic provisions, since otherwise that may result in the application of institutions and provisions of domestic laws and furthermore, in undesired lack of uniformity in its application.”⁸ According to a different court, interpreting the Convention autonomously “means [that] the Convention must be applied and interpreted exclusively on its own terms, having regard to the principles of the Convention and Convention-related decisions in overseas jurisdictions. Recourse to domestic case law is to be avoided.”⁹ Some courts even expressly state that their domestic solutions are to be disregarded, as they differ from those of the Convention.¹⁰

5. According to some courts, however, not all expressions used in the Convention have to be interpreted autonomously. While, for instance, the expressions “sale”,¹¹ “goods”,¹² “place of business”¹³ and “habitual residence”¹⁴ are to be interpreted autonomously, the expression “private international law” used in articles 1 (1) (b) and 7 (2) is not; rather, that expression is to be understood as referring to the forum’s understanding of “private international law.”¹⁵

6. Nevertheless, some courts have stated that case law interpreting domestic sales law, although “not per se applicable,”¹⁶ 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.¹⁷ According to case law, reference to the Convention’s legislative history,¹⁸ as well as to international scholarly writing, is admissible in interpreting the treaty.¹⁹ Also, “[i]n deciding issues under the treaty, courts generally look to its language.”²⁰

PROMOTING UNIFORM APPLICATION

7. The mandate imposed by article 7 (1) to have regard to the need to promote uniform application of the Convention has been construed by some tribunals²¹ to require fora interpreting the CISG to take into account foreign decisions that have applied the Convention.²² More and more courts refer to foreign court decisions.²³

8. Several courts have expressly stated that foreign court decisions have merely persuasive, non-binding authority.²⁴

OBSERVANCE OF GOOD FAITH IN INTERNATIONAL TRADE

9. Article 7 (1) also requires that the Convention be interpreted in a manner that promotes the observance of good faith in international trade.²⁵ 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.²⁶ Although good faith is expressly referred to only in article 7 (1), insofar as it relates 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.²⁷

GAP-FILLING

10. Under article 7 (2),²⁸ gaps in the Convention—i.e. questions the Convention governs but for which it does not expressly provide answers (which some courts consider to be “internal gaps”)²⁹—are filled, if possible, without resorting to domestic law, but rather in conformity with the Convention’s general principles,³⁰ so as to ensure uniformity in the application of the Convention.³¹ Only where no such general principles can be identified does article 7 (2) permit reference to the applicable national law to solve those questions,³² an approach to be resorted to “only as a last resort”.³³ Thus, the Convention “imposes first an intro-interpretation with respect to interpretation issues or gaps (i.e. solutions are first to be sought within the [Convention] system itself).”³⁴ Matters the Convention does not govern at all, which some courts label “external gaps”,³⁵ are resolved on the basis of the domestic law applicable pursuant to the rules of private international law of the forum,³⁶ or, where applicable, other uniform law conventions.³⁷ Such matters are discussed in the Digest for article 4.

11. A court has stated that the internal gaps of the Convention can also be filled through analogy.³⁸ A different court stated expressly that, general principles of domestic law cannot be used to fill the internal gaps of the Convention, as this would go against a uniform application of the Convention.³⁹

GENERAL PRINCIPLES OF THE CONVENTION

Party autonomy

12. According to several courts, one of the general principles upon which the Convention is based is party autonomy.⁴⁰ According to one court, “the fundamental principle of private autonomy is confirmed [in article 6;] it allows the parties to agree upon provisions which derogate from the provisions of the Convention or even to completely exclude its application with express and/or tacit agreement”.⁴¹

Good faith

13. Good faith has also been found to be a general principle of the Convention.⁴² 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.⁴³ 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.⁴⁴ In a different case, a court stated that in light of the general principle of good faith set forth in the Convention, “it is not sufficient for the applicability of general terms and conditions to refer to the general terms and conditions in the offer to conclude a contract, without providing the text of the general terms and conditions preceding or during the closing of the agreement.”⁴⁵ In yet another case, one court stated that “the jurisdictional clause is invalid pursuant to the principle of good faith contained in article 7 of The United Nations Convention on Contracts for the International Sale of Goods. This principle indicates that a contract shall provide for its content in a manner the parties would reasonably expect. In this sense, the principle of good faith would be violated if this Court were to give validity to the jurisdictional clause on the backside of the contract, to which the [Seller] did not consent.”⁴⁶ Similarly, one court “referred to the principle of good faith, pointing out that the Convention ascribed considerable importance to that principle ‘in that the content of a contract should be as anticipated by the parties, in accordance with the principle of reasonable expectation, which would be gravely undermined if, as the defendant claims, the clause on referral to arbitration contained in the contract of guarantee should be applied.’”⁴⁷

14. In other cases, courts 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.⁴⁸

15. Several courts stated that the prohibition of *venire contra factum proprium* must be considered an established principle of good faith.⁴⁹

Estoppel

16. 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.⁵⁰ According to one court, however, the Convention is not concerned with estoppel.⁵¹

Place of payment of monetary obligations

17. 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.”⁵² 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.”⁵³ Other courts identified 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.”⁵⁴ One court reached the same result by resorting to analogy.⁵⁵ One decision, however, denies the existence of a Convention general principle for determining the place for performance of all monetary obligations.⁵⁶

Currency of payment

18. One court has observed that the question of the currency of payment is governed by, although not expressly settled in, the Convention.⁵⁷ The court noted that according to one view, 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 that there is a view pursuant to which no pertinent general principle is to be found in the Convention, and thus applicable domestic law has to govern 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). Other courts held that the issue of the currency is not at all governed by the Convention and, therefore, is governed by the applicable domestic law.⁵⁸

Burden of proof

19. According to many decisions,⁵⁹ 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.⁶⁰ According to various decisions, article 79 (1)⁶¹ 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;⁶² a party claiming an exception has to prove the factual prerequisites of that exception.⁶³ According to some tribunals, for the allocation of the burden of proof, “it must be taken into account how close each party is to the relevant facts at issue, i.e., a party’s ability to gather and submit evidence for that point.”⁶⁴ According to some courts, however, burden of proof is a matter not at all governed by the Convention, and is instead left to domestic law.⁶⁵

Full compensation

20. According to some decisions the Convention is also based upon a principle of full compensation for losses in the event of breach.⁶⁶ One court restricted this general principle to cases in which, as a result of a breach, a contract is avoided.⁶⁷ One court stated that the limitation of damages to foreseeable ones constitutes a general principle of the Convention.⁶⁸

Informality

21. Several tribunals have stated that the principle of informality, evidenced in article 11, constitutes a general principle upon which the Convention is based,⁶⁹ 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,⁷⁰ and it has been held that a written contract may be modified orally.⁷¹ Also, according to various courts, the principle of informality allows one to state that “a notice [of non-conformity] need not be evidenced in writing and can thus be given orally or via telephone.”⁷² One court, however, reached the opposite result when it stated that “the [Convention] does not specify the form of the notice of non-conformity, but the fact that the notice has to be sent, as well as the provisions on its content logically suggest that the notice should be in the written form.”⁷³ Thus, according to that court, “a notice specifying the nature of the lack of conformity should be sent by registered mail, by telegram or by other reliable means.”⁷⁴

Dispatch of communications

22. 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 (articles 39, 43); to demands for specific performance (article 46), price

reduction (article 50), damages (article 45, paragraph 1 (*b*)) or interest (article 78); to a declaration of avoidance (articles 49, 64, 72, 73); to a notice fixing an additional period for performance (articles 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,⁷⁵ 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.⁷⁶

Mitigation of damages

23. 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.⁷⁷

Binding usages

24. Another general principle, recognized by case law, is the one 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.⁷⁸

Set-off

25. 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 permits reciprocal claims arising under the Convention (in the case at issue, the buyer's claims for damages and the seller's claim for the balance of the sale proceeds) to be offset.⁷⁹ According to other courts, however, the issue of set-off is not governed by the Convention at all and is, thus, left to the applicable domestic law.⁸⁰

Right to withhold performance and the principle of simultaneous exchange of performances

26. According to some courts, the Convention provides for a general right of the buyer to withhold performance of its payment obligation where the seller does not perform its obligation.⁸¹ According to some courts, "the principle of simultaneous exchange of performances also underlies the Convention."⁸²

Right to interest

27. Some tribunals stated that entitlement to interest on all sums in arrears (see article 78) also constitutes a general principle of the Convention.⁸³ 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.⁸⁴ Other decisions, however, state that interest on sums in arrears is due only if a formal notice has been given to the debtor.⁸⁵

28. According to some courts, the determination of the rate of interest, a matter not specifically addressed in the Convention, is to be solved through resort to the general principles of the Convention. According to the majority of the opinions, however, the interest rate is not governed by the Convention at all; thus, its determination is left to the law applicable to be identified by means of the rules of private international law of the forum, as per article 7 (2).⁸⁶

Costs of one's own obligations

29. According to one court, the Convention is based upon the principle pursuant to which "each party has to bear the costs of its obligation."⁸⁷

Changed circumstances and right to renegotiate

30. According to one court, pursuant to the general principles upon which the Convention is based, "the party who invokes changed circumstances that fundamentally disturb the contractual balance [. . .] is also entitled to claim the renegotiation of the contract."⁸⁸

Favor contractus

31. 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 has also been adopted in case law. One court expressly referred to the principle of *favor contractus*,⁸⁹ while one stated that the Convention's general principles "provide a preference for performance".⁹⁰ A different court merely stated that avoidance of the contract constitutes an "*ultima ratio*" remedy.⁹¹

32. Several decisions have identified article 40 as embodying a general principle of the Convention applicable to resolve unsettled issues under the Convention.⁹² 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".⁹³ 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)⁹⁴ even if the buyer could not have been unaware of the lack of conformity at the time of the conclusion of the contract.⁹⁵

UNIDROIT PRINCIPLES AND PRINCIPLES OF EUROPEAN CONTRACT LAW

33. According to one court, the general principles of the Convention are incorporated, *inter alia*, in the UNIDROIT Principles of International Commercial Contracts.⁹⁶ According to one arbitral tribunal, the UNIDROIT “Principles are principles in the sense of article 7 (2) CISG”.⁹⁷

34. One arbitral tribunal,⁹⁸ 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 former Principles of European Contract Law, arguing that such rules had to be considered general principles upon which the Convention is based. In other cases,⁹⁹ 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.¹⁰⁰ According to another court, the UNIDROIT Principles can help determine the precise meaning of general principles upon which the CISG is based.¹⁰¹

35. In a decision relating to article 76 of the Convention, an arbitral tribunal stated that the equivalent provision to be found in the “UNIDROIT Principles uses simpler language and condenses parts of CISG article 76 into a more readable form. It can be argued therefore that it would be advantageous if the Principle were read before the counterpart provision of the CISG is applied. It would allow the court or arbitral tribunal to get a ‘feeling’ of what the CISG attempts to achieve.”¹⁰²

Notes

¹CLOUT case No. 549 [Audiencia Provincial de Valencia, Spain, 7 June 2003] (see full text of the decision).

²See 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.

³For references in case law to the need to take the Convention’s international character into account in the interpretation of the Convention, see U.S. Court of Appeals (3rd Circuit), United States, 21 July 2010, available on the Internet at <http://cisgw3.law.pace.edu/cases/100721u1.html>; Hof van Cassatie, Belgium, 19 June 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090619b1.html>; Rechtbank Breda, the Netherlands, 27 February 2008, Unilex; CLOUT case No. 946 [Regional Court in Bratislava, Slovakia, 11 October 2005]; CLOUT case No. 774 [Bundesgerichtshof, Germany, 2 March 2005] (see full text of the decision); U.S. District Court, Northern District of Illinois, United States, 21 March 2004, available on the Internet at <http://cisgw3.law.pace.edu/cases/040521u1.html> (citing seven foreign court decisions); CLOUT case No. 720 [Netherlands Arbitration Institute, the Netherlands, Arbitration, 15 October 2002] (see full text of the decision); CLOUT case No. 418 [U.S. District Court, Eastern District of Louisiana, United States, 17 May 1999] (see full text of the decision); CLOUT case No. 138 [U.S. Court of Appeals (2nd 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).

⁴CLOUT case No. 885 [Bundesgericht, Switzerland, 13 November 2003] (see full text of the decision).

⁵See CLOUT case No. 222 [U.S. Court of Appeals (11th Circuit), United States, 29 June 1998] (see full text of the decision); CLOUT case No. 413 [U.S. 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).

⁶High Court of New Zealand, New Zealand, 30 July 2010, available on the Internet at <http://cisgw3.law.pace.edu/cases/100730n6.html>; Tribunale di Forlì, Italy, 16 February 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090216i3.html>; Polimeles Protodikio Athinon, Greece, 2009 (docket No. 4505/2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/094505gr.html#ii2>); CLOUT case No. 842 [Tribunale di Modena, Italy, 9 December 2005] (see full text of the decision); CLOUT case No. 747 [Oberster Gerichtshof, Austria, 23 May 2005] (see full text of the decision); CLOUT case No. 774 [Bundesgerichtshof, Germany, 2 March 2005] (see full text of the decision); CLOUT case No. 651 [Tribunale di Padova, Italy, 11 January 2005] (see full text of the decision); CLOUT case No. 595 [Oberlandesgericht München, Germany, 15 September 2004]; Tribunale di Padova, Italy, 25 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040225i3.html>; CLOUT case No. 892 [Kantonsgericht Schaffhausen, Switzerland, 27 January 2004]; 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).

⁷American Arbitration Association, United States, 23 October 2007, available on the Internet at <http://cisgw3.law.pace.edu/cases/071023a5.html>.

⁸Polimeles Protodikio Athinon, Greece, 2009 (docket No. 4505/2009), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/094505gr.html#ii2>.

⁹High Court of New Zealand, New Zealand, 30 July 2010, available on the Internet at <http://cisgw3.law.pace.edu/cases/100730n6.html>; see also Tribunale di Forlì, Italy, 16 February 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090216i3.html>; CLOUT case No. 842 [Tribunale di Modena, Italy, 9 December 2005] (see full text of the decision); CLOUT case No. 774 [Bundesgerichtshof, Germany, 2 March 2005] (see full text of the decision); see also CLOUT case No. 720 [Netherlands Arbitration Institute, the Netherlands, 15 October 2002] (see full text of the decision).

¹⁰Oberlandesgericht München, Germany, 14 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090114g1.html>; CLOUT case No. 747 [Oberster Gerichtshof, Austria, 23 May 2005] (see full text of the decision); CLOUT case No. 774 [Bundesgerichtshof, Germany, 2 March 2005] (see full text of the decision); Oberlandesgericht Düsseldorf, Germany, 25 July 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030725g1.html>; CLOUT case No. 434 [U.S. District Court, Northern District of Illinois, United States, 28 August 2001].

¹¹See Tribunale di Forlì, Italy, 16 February 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090216i3.html>; CLOUT case No. 867 [Tribunale di Forlì, Italy, 11 December 2008], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081211i3.html>; CLOUT case No. 774 [Bundesgerichtshof, Germany, 2 March 2005] (see full text of the decision); CLOUT case No. 651 [Tribunale di Padova, Italy, 11 January 2005] (see full text of the decision); Tribunale di Padova, Italy, 25 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040225i3.html>.

¹²CLOUT case No. 867 [Tribunale di Forlì, Italy, 11 December 2008], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081211i3.html>; CLOUT case No. 651 [Tribunale di Padova, Italy, 11 January 2005] (see full text of the decision); Tribunale di Padova, Italy, 25 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040225i3.html>.

¹³CLOUT case No. 867 [Tribunale di Forlì, Italy, 11 December 2008], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081211i3.html>; CLOUT case No. 651 [Tribunale di Padova, Italy, 11 January 2005] (see full text of the decision); Tribunale di Padova, Italy, 25 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040225i3.html>.

¹⁴CLOUT case No. 867 [Tribunale di Forlì, Italy, 11 December 2008], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081211i3.html>; CLOUT case No. 651 [Tribunale di Padova, Italy, 11 January 2005] (see full text of the decision); Tribunale di Padova, Italy, 25 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040225i3.html>.

¹⁵CLOUT case No. 651 [Tribunale di Padova, Italy, 11 January 2005] (see full text of the decision); Tribunale di Padova, Italy, 25 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040225i3.html>.

¹⁶U.S. District Court, Southern District of New York, United States, 20 August 2008, available on the Internet at <http://cisgw3.law.pace.edu/cases/080820u1.html>; U.S. District Court, Southern District of New York, United States, 16 April 2008, available on the Internet at <http://cisgw3.law.pace.edu/cases/080416u1.html>; U.S. Court of Appeals (7th Circuit), United States, 23 May 2005, available on the Internet at <http://cisgw3.law.pace.edu/cases/050523u1.html#ii>; CLOUT case No. 699 [U.S. District Court, Eastern District Court of New York, United States, 19 March 2005] (see full text of the decision); U.S. District Court, Northern District of Illinois, United States, 21 March 2004, available on the Internet at <http://cisgw3.law.pace.edu/cases/040521u1.html> (citing seven foreign court decisions); CLOUT case No. 579 [U.S. District Court, Southern District of New York, United States, 10 May 2002].

¹⁷U.S. District Court, Southern District of New York, United States, 20 August 2008, available on the Internet at <http://cisgw3.law.pace.edu/cases/080820u1.html>; U.S. District Court, Southern District of New York, United States, 16 April 2008, available on the Internet at <http://cisgw3.law.pace.edu/cases/080416u1.html>; American Arbitration Association, United States, 23 October 2007, available on the Internet at <http://cisgw3.law.pace.edu/cases/071023a5.html>; CLOUT case No. 699 [U.S. District Court, Eastern District Court of New York, United States, 19 March 2005] (see full text of the decision); U.S. District Court, Northern District of Illinois, United States, 21 March 2004, available on the Internet at <http://cisgw3.law.pace.edu/cases/040521u1.html> (citing seven foreign court decisions); CLOUT Case No. 580 [U.S. Court of Appeals (4th Circuit), 21 June 2002]; CLOUT case No. 138 [U.S. Court of Appeals (2nd Circuit), United States, 6 December 1995] (see full text of the decision).

¹⁸See CLOUT case No. 720 [Netherlands Arbitration Institute, the Netherlands, 15 October 2002] (see full text of the decision); Landgericht Aachen, Germany, 20 July 1995, available on the Internet at www.cisg-online.ch/cisg/urteile/169.htm (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).

¹⁹CLOUT case No. 426 [Oberster Gerichtshof, Austria, 13 April 2000], also available on the Internet at www.cisg.at/2_10000w.htm.

²⁰CLOUT case No. 699 [U.S. District Court, Eastern District Court of New York, United States, 19 March 2005] (see full text of the decision); see also CLOUT case No. 580 [U.S. Circuit Court of Appeals (4th Circuit), United States, 21 June 2002]; CLOUT case No. 434 [U.S. District Court, Northern District of Illinois, United States, 28 August 2001].

²¹Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, 15 July 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080715sb.html> (expressly stating that “foreign judicial practice [. . .] should be taken into consideration for the purpose of achieving uniform application of the Convention, pursuant to article 7(1) of the Convention”).

²²See, for example, CLOUT case No. 1029 [Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, 28 January 2009], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090128sb.html>; Tribunale di Padova, Italy, 25 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040225i3.html>; CLOUT case No. 549 [Audiencia Provincial de Valencia, Spain, 7 June 2003]; CLOUT case No. 608 [Tribunale di Rimini, Italy, 26 November 2002] (see full text of the decision); CLOUT case No. 613 [U.S. District Court for the Northern District of Illinois, United States, 28 March 2002] (see full text of the decision).

²³High Court of New Zealand, New Zealand, 30 July 2010, available on the Internet at <http://cisgw3.law.pace.edu/cases/100730n6.html> (citing decisions from three different foreign jurisdictions); U.S. District Court, Northern District of Georgia, United States, 17 December 2009, available on the Internet at <http://cisgw3.law.pace.edu/cases/091217u1.html#iii> (citing a French and a Chinese decision); Rechtbank Arnhem, the Netherlands, 29 July 2009, unpublished (citing an Austrian decision); Rechtbank Amsterdam, the Netherlands, 3 June 2009 (docket No. 403763 / HA ZA 08-2073) unpublished (citing a decision by the German Supreme Court); Oberlandesgericht Hamm, Germany, 2 April 2009, available on the Internet at www.globalsaleslaw.com/content/api/cisg/urteile/1978.pdf (citing a decision rendered by a court from the United States); Rechtbank Rotterdam, the Netherlands, 25 February 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090225n1.html> (citing a decision rendered by the German Supreme Court); Tribunale di Forlì, Italy, 16 February 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090216i3.html> (citing more than 30 foreign court decisions); Rechtbank Utrecht, the Netherlands, 21 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090121n1.html> (citing a German decision); CLOUT case No. 867 [Tribunale di Forlì, Italy, 11 December 2008], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081211i3.html> (citing 47 foreign

court decisions); CLOUT case No. 958 [Federal Court of Australia, South Australia District Registry, Australia, 24 October 2008] (citing a French Supreme Court decision); U.S. District Court, Northern District of Illinois, United States, 3 September 2008, available on the Internet at <http://cisgw3.law.pace.edu/cases/080903u1.html#i> (citing a French decision); Oberlandesgericht Stuttgart, Germany, 31 March 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080331g1.html> (citing a Finnish and a Dutch decision); Tribunale di Rovereto, Italy, 21 November 2007, Unilex (citing two German decisions); Supreme Court, Poland, 11 May 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070511p1.html> (citing an Austrian decision); U.S. District Court, Western District Washington, United States, 13 April 2006, available on the Internet at <http://cisgw3.law.pace.edu/cases/060413u1.html> (citing a Swiss court decision); CLOUT case No. 721 [Oberlandesgericht Karlsruhe, Germany, 8 February 2006] (see full text of the decision) (citing both a Swiss and a U.S. decision); Landgericht Neubrandenburg, Germany, 3 August 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050803g1.html> (citing a Russian arbitral award); CLOUT case No. 774 [Bundesgerichtshof, Germany, 2 March 2005] (see full text of the decision) (citing two Austrian Supreme Court decisions); CLOUT case No. 651 [Tribunale di Padova, Italy, 11 January 2005] (see full text of the decision) (citing 13 foreign court decisions); CLOUT case No. 773 [Bundesgerichtshof, Germany, 30 June 2004] (see full text of the decision) (citing two foreign court decisions as well as two arbitral awards); U.S. District Court, Northern District of Illinois, United States, 21 March 2004, available on the Internet at <http://cisgw3.law.pace.edu/cases/040521u1.html> (citing seven foreign court decisions); Tribunale di Padova, Italy, 31 March 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040331i3.html> (citing 17 foreign court decisions); CLOUT case No. 695 [U.S. District Court, Eastern District of Pennsylvania, United States, 29 March 2004] (see full text of the decision) (citing two German decisions); Tribunale di Padova, Italy, 25 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040225i3.html> (citing 30 foreign decisions and arbitral awards); Landgericht Mannheim, Germany, 16 February 2004, IHR 2006, 106, 107 (citing a Swiss decision and U.S. decision); CLOUT case No. 819 [Landgericht Tier, Germany, 8 January 2004] (citing a decision rendered by a U.S. court); CLOUT case No. 885 [Bundesgericht, Switzerland, 13 November 2003] (see full text of the decision) (citing a Belgium and a Swiss decision); CLOUT case No. 889 [Handelsgericht Kanton Zürich, Switzerland, 24 October 2003] (see full text of the decision) (citing a decision of the German Supreme Court); CLOUT case No. 549 [Audiencia Provincial Valencia, Spain, 7 June 2003] (see full text of the decision) (citing three foreign decisions); CLOUT case No. 608 [Tribunale di Rimini, Italy, 26 November 2002] (see full text of the decision) (citing 37 foreign cases and arbitral awards); CLOUT case No. 882 [Handelsgericht Aargau, Switzerland, 5 November 2002] (see full text of the decision) (citing a German decision); CLOUT case No. 613 [U.S. District Court, Northern District of Illinois, United States, 28 March 2002] (see full text of the decision) (citing an Australian decision); CLOUT case No. 447 [U.S. District Court, Southern District of New York, United States, 26 March 2002] (see full text of the decision) (citing three German decisions); Rechtbank van Koophandel Hasselt, Belgium, 6 March 2002, available on the Internet at www.law.kuleuven.be/ipr/eng/cases/2002-03-06s.html (citing a Swiss decision); CLOUT case No. 631 [Supreme Court of Queensland, Australia, 17 November 2000] (see full text of the decision) (citing one foreign decision); CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (see full text of the decision) (citing 40 foreign cases and arbitral awards); CLOUT case No. 426 [Oberster Gerichtshof, Austria, 13 April 2000] (see full text of the decision) (citing one foreign decision); CLOUT case No. 380 [Tribunale di Pavia, Italy, 29 December 1999] (see full text of the decision) (citing one foreign decision); CLOUT case No. 418 [U.S. District Court, Eastern District of Louisiana, United States, 17 May 1999] (see full text of the decision) (citing one German case); Rechtbank Koophandel Hasselt, Belgium, 2 December 1998, available on the Internet at www.law.kuleuven.ac.be/int/tradelaw/WK/1998-12-02.htm (citing two foreign decisions); CLOUT case No. 205 [Cour d'appel de Grenoble, France, 23 October 1996] (see full text of the decision) (citing one foreign decision); Tribunale di Cuneo, Italy, 31 January 1996, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/960131i3.html> (citing two foreign decisions).

²⁴U.S. District Court, Northern District of Illinois, United States, 21 March 2004, available on the Internet at <http://cisgw3.law.pace.edu/cases/040521u1.html>; Tribunale di Padova, Italy, 25 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040225i3.html>; CLOUT case No. 608 [Tribunale di Rimini, Italy, 26 November 2002] (see full text of the decision); CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000]; CLOUT case No. 380 [Tribunale di Pavia, Italy, 29 December 1999].

²⁵See 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; for a reference in case law to the text of article 7 (1) referred to in the text, see, e.g., Rechtbank Breda, the Netherlands, 27 February 2008, Unilex; CLOUT case No. 802 [Tribunal Supremo, Spain, 17 January 2008] (see full text of the decision).

²⁶CLOUT case No. 595 [Oberlandesgericht München, Germany, 15 September 2004].

²⁷United 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.

²⁸For a recital of the text of article 7 (2) by the courts, see, e.g., District Court in Nitra, Slovakia, 9 March 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070309k1.html>; Efetio Thessalonikis, Greece, 2006 (docket No. 2923/2006), English summary available on the Internet at <http://cisgw3.law.pace.edu/cases/070001gr.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 29 September 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060929r1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 27 October 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051027r1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 18 October 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051018r1.html>; CLOUT case No. 946 [Regional Court in Bratislava, Slovakia, 11 October 2005]; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 18 July 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050718r1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 3 September 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040903r1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 28 May 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040528r1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 11 November 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021111r1.htm>; Rechtbank Rotterdam, the Netherlands, 12 July 2001, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/010712n1.html>.

²⁹ *Amtgericht Sursee*, Switzerland, 12 September 2008, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/1728.pdf>; *Oberlandesgericht Frankfurt*, Germany, 6 October 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/041006g1.html>.

³⁰ See *Rechtbank Arnhem*, the Netherlands, 29 July 2009 (docket No. 172927 / HA ZA 08-1230), unpublished; *Hof van Cassatie*, Belgium, 19 June 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090619b1.html>; *Rechtbank Amsterdam*, the Netherlands, 3 June 2009 (docket No. 403763 / HA ZA 08-2073), unpublished; U.S. District Court, Southern District of New York, United States, 20 August 2008, available on the Internet at <http://cisgw3.law.pace.edu/cases/080820u1.html>; CLOUT case No. 961 [Economic Court of the City of Minsk, Belarus, 10 April 2008]; *Rechtbank Breda*, the Netherlands, 27 February 2008, Unilex; District Court in Bardejov, Slovakia, 29 October 2007, <http://cisgw3.law.pace.edu/cases/071029k1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 29 December 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061229r1.html>.

³¹ *Amtgericht Sursee*, Switzerland, 12 September 2008, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/1728.pdf>.

³² See CLOUT case No.961 [Economic Court of the City of Minsk, Belarus, 10 April 2008]; CLOUT case No. 932 [Obergericht des Kantons Thurgau, Switzerland, 12 December 2006]; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 28 June 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040628r1.html>; *Juzgado Comercial No. 26 Secretaria No. 51*, Buenos Aires, Argentina, 2 July 2003, translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030702a1.html>; Court of Arbitration of the International Chamber of Commerce, Paris, 23 January 1997 (Arbitral award in case No. 8611/HV/JK), Unilex.

³³ American Arbitration Association, United States, 23 October 2007, available on the Internet at <http://cisgw3.law.pace.edu/cases/071023a5.html>; see also Federal Arbitration Court for the Moscow Region, Russian Federation, 25 June 2001, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/010625r1.html>.

³⁴ CLOUT case No. 720 [Netherlands Arbitration Institute, the Netherlands, 15 October 2002] (see full text of the decision).

³⁵ *Amtgericht Sursee*, Switzerland, 12 September 2008, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/1728.pdf>.

³⁶ See, e.g., *Rechtbank Rotterdam*, the Netherlands, 17 March 2010 (docket No. 306752 / HA ZA 08-1162) unpublished; *Rechtbank Zwolle*, the Netherlands, 9 December 2009 (docket No. 145652 / HA ZA 08-635) unpublished; *Landgericht München*, Germany, 18 May 2009, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/1998.pdf>; U.S. District Court, New Jersey, United States, 15 April 2009, available on the Internet at <http://cisgw3.law.pace.edu/cases/090415u1.html>; *Polimeles Protodikio Athinon*, Greece, 2009 (docket No. 4505/2009), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/094505gr.html#i2>; *Amtgericht Sursee*, Switzerland, 12 September 2008, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/1728.pdf>; *Landgericht Landshut*, Germany, 12 June 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080612g2.html>; CLOUT case No. 849 [Audiencia Provincial de Pontevedra, Spain, 19 December 2007]; 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³⁷ CLOUT case No. 932 [Obergericht des Kantons Thurgau, Switzerland, 12 December 2006].

³⁸ Supreme Court, Poland, 11 May 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070511p1.html>; Oberster Gerichtshof, Austria, 18 December 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021218a3.html>.

³⁹ Amtsgericht Hamburg-Altona, Germany, 14 December 2000, available on the Internet at www.cisg-online.ch/cisg/urteile/692.htm.

⁴⁰ See Polimeles Protodikio Athinon, Greece, 2009 (docket No. 4505/2009), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/094505gr.html#ii2>; Tribunale di Padova, Italy, 25 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040225i3.html>; Foreign Trade Court of Arbitration attached to the Yugoslav Chamber of Commerce, Serbia, 9 December 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021209sb.html>; CLOUT case No. 608 [Tribunale di Rimini, Italy, 26 November 2002], also in *Giurisprudenza italiana*, 2003, 896 ff.; CLOUT case No. 1017 [Hof Beroep Ghent, Belgium, 15 May 2002]; Rechtbank van Koophandel Ieper, Belgium, 18 February 2002, available on the Internet at www.law.kuleuven.be/ipr/eng/cases/2002-02-18.html; Rechtbank Koophandel Ieper, Belgium, 29 January 2001, available on the Internet at 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.

⁴¹ Polimeles Protodikio Athinon, Greece, 2009 (docket No. 4505/2009), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/094505gr.html#ii2>.

⁴² See Oberlandesgericht Celle, Germany, 24 July 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090724g1.html>; Rechtbank Rotterdam, the Netherlands, 25 February 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090225n1.html>; Oberlandesgericht München, Germany, 14 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090114g1.html>; Oberlandesgericht Brandenburg, Germany, 18 November 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081118g1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 8 February 2008, Unilex; Audiencia Provincial de Navarra, Spain, 27 December 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071227s4.html>; Tribunale di Rovereto, Italy, 21 November 2007, Unilex; American Arbitration Association, United States, 23 October 2007, available on the Internet at <http://cisgw3.law.pace.edu/cases/071023a5.html>; Oberlandesgericht Köln, Germany, 21 December 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051221g1.html>; Landgericht Neubrandenburg, Germany, 3 August 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050803g1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 2 June 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050602r1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 27 May 2005, English translation available on the internet at <http://cisgw3.law.pace.edu/cases/050527r1.html>; Primer Tribunal Colegiado en Materia Civil del Primer Circuito, Mexico, 10 March 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050310m1.html>; Single-Member Court of First Instance Larissa, Greece, 2005 (docket No. 165/2005), English summary on the Internet at <http://cisgw3.law.pace.edu/cases/050165gr.html>; Tribunale di Padova, Italy, 25 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040225i3.html>; Hof's-Gravenhage, the Netherlands, 23 April 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030423n1.html>; Court of Arbitration of the International Chamber of Commerce, France, 2003 (Arbitral award in No. 11849), available on the Internet at <http://cisgw3.law.pace.edu/cases/031849i1.html>; Foreign Trade Court of Arbitration attached to the Yugoslav Chamber of Commerce, Serbia, 9 December 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021209sb.html>; CLOUT case No. 1017 [Hof van Beroep Ghent, Belgium, 15 May 2002], also available on the Internet at www.law.kuleuven.be/ipr/eng/cases/2002-05-15.html; Bundesgerichtshof, Germany, 9 January 2002, *Internationales Handelsrecht*, 2002, 17; Oberlandesgericht Hamm, Germany, 12 November 2001, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/011112g1.html>; CLOUT case 445 [Bundesgerichtshof, Germany, 31 October 2001], also in *Internationales Handelsrecht*, 2002, 14 ff.; CLOUT case No. 605 [Oberster Gerichtshof, Austria, 22 October 2001]; 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

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⁴³ See CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997].

⁴⁴ CLOUT case No. 154 [Cour d'appel de Grenoble, France, 22 February 1995].

⁴⁵ Rechtbank Rotterdam, the Netherlands, 25 February 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090225n1.html>; for similar statements, see Tribunale di Rovereto, Italy, 21 November 2007, Unilex; Oberlandesgericht Köln, Germany, 21 December 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051221g1.html>; Landgericht Neubrandenburg, Germany, 3 August 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050803g1.html>; CLOUT case No. 831 [Hooge Raad, the Netherlands, 28 January 2005].

⁴⁶ Audiencia Provincial de Navarra, Spain, 27 December 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071227s4.html>.

⁴⁷ CLOUT case No. 547 [Audiencia Provincial de Navarra, Spain, 22 September 2003].

⁴⁸ Oberlandesgericht Celle, Germany, 24 July 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090724g1.html>; Tribunale di Rovereto, Italy, 21 November 2007, Unilex; Oberlandesgericht Köln, Germany, 21 December 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051221g1.html>; Landgericht Neubrandenburg, Germany, 3 August 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050803g1.html>; Foreign Trade Court of Arbitration attached to the Yugoslav Chamber of Commerce, Serbia, 9 December 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021209sb.html>; CLOUT case No. 445 [Bundesgerichtshof, Germany, 31 October 2001], also in *Internationales Handelsrecht*, 2002, 14 ff.

⁴⁹ CLOUT case No. 595 [Oberlandesgericht München, Germany, 15 September 2004]; Tribunale di Padova, Italy, 31 March 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040331i3.html>; Tribunale di Padova, Italy, 25 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040225i3.html>.

⁵⁰ See Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 27 July 1999, English translation available 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 [Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft—Wien, Austria, 15 June 1994]; CLOUT case No. 93 [Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft—Wien, Austria, 15 June 1994] (see full text of the decision); Hof s'Hertogenbosch, the Netherlands, 26 February 1992, *Nederlands Internationaal Privaatrecht*, 1992, No. 354.

⁵¹ Rechtbank Amsterdam, Netherlands, 5 October 1994, *Nederlands Internationaal Privaatrecht*, 1995, No. 231.

⁵² CLOUT case No. 49 [Oberlandesgericht Düsseldorf, Germany 2 July 1993].

⁵³ CLOUT case No. 205 [Cour d'appel de Grenoble, France, 23 October 1996], also in *Revue critique de droit international privé*, 1997, 756.

⁵⁴ Amtgericht Sursee, Switzerland, 12 September 2008, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/1728.pdf>; Oberster Gerichtshof, Austria, 29 June 1999, *Transportrecht-Internationales Handelsrecht*, 1999, 48.

⁵⁵ Oberster Gerichtshof, Austria, 18 December 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021218a3.html>.

⁵⁶ CLOUT case No. 312 [Cour d'appel de Paris, France, 14 January 1998].

⁵⁷ Landgericht Berlin, Germany, 24 March 1998, Unilex.

⁵⁸ Tribunal Cantonal du Valais, Switzerland, 28 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090128s1.html>; CLOUT case No. 934 [Tribunal Cantonal du Valais, Switzerland, 27 April 2007], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070427s1.html>; Tribunal Cantonal du Valais, Switzerland, 27 October 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061027s1.html>; Juzgado Comercial No. 26 Secretaria No. 51, Buenos Aires, Argentina, English 2 July 2003, translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030702a1.html>.

⁵⁹ See Tribunal Cantonal du Valais, Switzerland, 28 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090128s1.html>; CLOUT case No. 934 [Tribunal Cantonal du Valais, Switzerland, 27 April 2007], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070427s1.html>; CLOUT case No. 885 [Bundesgericht, Switzerland, 13 November 2003]; 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].

⁶⁰ See CLOUT case No. 97 [Handelsgericht des Kantons Zürich, Switzerland, 9 September 1993].

⁶¹ CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000]; Bundesgerichtshof, Germany, 9 January 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020109g1.html>; CLOUT case No. 380 [Tribunale di Pavia, Italy, 29 December 1999].

⁶² For references to this principle, see Tribunal Cantonal du Valais, Switzerland, 28 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090128s1.html>; CLOUT case No. 934 [Tribunal Cantonal du Valais, Switzerland, 27 April

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⁶³ See Tribunal Cantonal du Valais, Switzerland, 28 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090128s1.html>; CLOUT case No. 885 [Bundesgericht, Switzerland, 13 November 2003] (see full text of the decision); CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000].

⁶⁴ CLOUT case No. 894 [Bundesgericht, Switzerland, 7 July 2004] (see full text of the decision); see also CLOUT case No. 885 [Bundesgericht, Switzerland, 13 November 2003] (see full text of the decision).

⁶⁵ See CLOUT case No. 261 [Bezirksgericht der Sanne, Switzerland, 20 February 1997]; CLOUT case No. 103 [International Chamber of Commerce, 1993 (no. 6653)]. 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 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].

⁶⁶ Tribunale di Padova, Italy, 25 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040225i3.html>; CLOUT case No. 424 [Oberster Gerichtshof, Austria, 9 March 2000], also available on the Internet at www.cisg.at/6_31199z.htm; CLOUT cases Nos. 93 [Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft-Wien, Austria, 15 June 1994] and 94 [Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft-Wien, Austria, 15 June 1994].

⁶⁷ CLOUT case No. 424 [Oberster Gerichtshof, Austria, 9 March 2000], also available on the Internet at www.cisg.at/6_31199z.htm.

⁶⁸ Tribunale di Padova, Italy, 25 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040225i3.html>; Foreign Trade Court of Arbitration attached to the Yugoslav Chamber of Commerce, Serbia, 9 December 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021209sb.html>.

⁶⁹ See Rechtbank Arnhem, the Netherlands, 17 January 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070117n1.html>; Tribunale di Padova, Italy, 31 March 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040331i3.html>; Rechtbank Rotterdam, the Netherlands, 12 July 2001, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/010712n1.html>; Bundesgericht, Switzerland, 15 September 2000, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/000915s2.html>; Compromex Arbitration, Mexico, 29 April 1996, available on the Internet at www.uc3m.es/cisg/rmexi2.htm; CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (see full text of the decision).

⁷⁰ Oberster Gerichtshof, Austria, 29 June 1999, *Zeitschrift für Rechtsvergleichung*, 2000, 33.

⁷¹ CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (see full text of the decision).

⁷² Handelsgericht Wien, Austria, 3 May 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070503a3.html>.

⁷³ Foreign Trade court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, 6 November 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051106sb.html>; see also Foreign Trade Court of Arbitration attached to the Yugoslav Chamber of Commerce, Serbia, 27 November 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021127sb.html>.

⁷⁴ Foreign Trade court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, 6 November 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051106sb.html>.

⁷⁵ Tribunale di Padova, Italy, 25 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040225i3.html>.

⁷⁶ Landgericht Stuttgart, Germany, 13 August 1991, available on the Internet at www.cisg-online.ch/cisg/urteile/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].

⁷⁷ Tribunale di Padova, Italy, 25 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040225i3.html>; Landgericht Zwickau, 19 March 1999, available on the Internet at www.cisg-online.ch/cisg/urteile/519.htm; Court of Arbitration of the International Chamber of Commerce, December 1997 (Arbitral award No. 8817), Unilex; see also CLOUT case No. 608 [Tribunale di Rimini, Italy, 26 November 2002], also in *Giurisprudenza italiana*, 2003, 896 ff.

⁷⁸ Tribunale di Padova, Italy, 25 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040225i3.html>; Rechtbank Koophandel Ieper, Belgium, 29 January 2001, available on the Internet at www.law.kuleuven.ac.be/int/tradelaw/WK/2001-01-29.htm.

⁷⁹ CLOUT case No. 348 [Oberlandesgericht Hamburg, Germany, 26 November 1999].

⁸⁰ See Landgericht München, Germany, 18 May 2009, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/1998.pdf>; Polimeles Protodikio Athinon, Greece, 2009 (docket No. 4505/2009), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/094505gr.html#ii2>; Monomeles Protodikio Thessalonikis, Greece, 2007 (docket No. 43945/2007), English summary available on the Internet at <http://cisgw3.law.pace.edu/cases/080002gr.html>; CLOUT case No. 894 [Bundesgericht, Switzerland, 7 July 2004] (see full text of the decision); Tribunale di Padova, Italy, 25 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040225i3.html>; Oberlandesgericht Düsseldorf, Germany, 25 July 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030725g1.html>; Landgericht Mönchengladbach, Germany, 15 July 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030715g1.html>; CLOUT case No. 605 [Oberster Gerichtshof, Austria, 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 www.cisg-online.ch/cisg/urteile/311.htm; Landgericht München, Germany, 6 May 1997, available on the Internet at www.cisg-online.ch/cisg/urteile/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, Unilex; CLOUT case No. 289 [Oberlandesgericht Stuttgart, Germany, 21 August 1995]; Landgericht München, Germany, 20 March 1995, Unilex; Rechtbank Middelburg, the Netherlands, 25 January 1995, *Nederlands Internationaal Privaatrecht*, 1996, No. 127; Amtsgericht Mayen, Germany, 6 September 1994, available on the Internet at www.cisg-online.ch/cisg/urteile/382.htm; CLOUT case No. 281 [Oberlandesgericht Koblenz, Germany, 17 September 1993]; CLOUT case No. 125 [Oberlandesgericht Hamm, Germany, 9 June 1995]; Rechtbank Roermond, the Netherlands, 6 May 1993, Unilex; CLOUT case No. 99 [Rechtbank Arnhem, the Netherlands, 25 February 1993].

⁸¹ Supreme Court, Poland, 11 May 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070511p1.html>; Oberster Gerichtshof, Austria, 8 November 2005, English translation on the Internet at <http://cisgw3.law.pace.edu/cases/051108a3.html#i>.

⁸² Oberster Gerichtshof, Austria, 8 November 2005, English translation on the Internet at <http://cisgw3.law.pace.edu/cases/051108a3.html#i>; Tribunale di Padova, Italy, 25 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040225i3.html>.

⁸³ Tribunale di Padova, Italy, 31 March 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040331i3.html>; Court of Arbitration of the International Chamber of Commerce, December 1998 (Arbitral award No. 8908), Unilex.

⁸⁴ 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).

⁸⁵ Arbitral Tribunal at the Bulgarian Chamber of Commerce and Industry, Bulgaria, 12 February 1998 (award No. 11/1996), Unilex; Landgericht Zwickau, Germany, 19 March 1999, available on the Internet at www.cisg-online.ch/cisg/urteile/519.htm.

⁸⁶ See, e.g., U.S. District Court, New Jersey, United States, 15 April 2009, available on the Internet at <http://cisgw3.law.pace.edu/cases/090415u1.html>; Tribunal Cantonal du Valais, Switzerland, 28 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090128s1.html>; Rechtbank Rotterdam, the Netherlands, 21 January 2009 (docket No. 277329 / HA ZA 97-272) unpublished; Handelsgericht Aargau, Switzerland, 26 November 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081126s1.html>; Monomeles Protodikio Thessalonikis, Greece, 2007 (docket No. 43945/2007), English summary available on the Internet at <http://cisgw3.law.pace.edu/cases/080002gr.html>; Handelsgericht Aargau, Switzerland, 19 June 2007, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/1741.pdf>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 29 December 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061229r1.html>; CLOUT case No. 945 [District Court in Galanta, Slovakia, 15 December 2006]; CLOUT case No. 917 [High Commercial Court, Croatia, 24 October 2006]; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 14 December 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051214r1.html>; CLOUT case No. 944 [Hof 's-Hertogenbosch, the Netherlands, 11 October 2005]; CLOUT case No. 919 [High Commercial Court, Croatia, 26 July 2005]; Tribunale di Padova, Italy, 31 March 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040331i3.html>; Tribunal Cantonal du Valais, Switzerland, 30 April 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030430s1.html>; Foreign Trade Court of Arbitration attached to the Yugoslav Chamber of Commerce, Serbia, 9 December 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021209sb.html>; Kantonsgericht Schaffhausen, Switzerland, 25 February 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020225s1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 30 July 2001, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/010730r1.html>; Bulgarian Chamber of Commerce and Industry, Bulgaria, 12 March 2001, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/010312bu.html>; Rechtbank van Koophandel Ieper, Belgium, 29 January 2001, available on the Internet at www.law.kuleuven.be/ipr/eng/cases/2001-01-29.html; Court of Arbitration of the International Chamber of Commerce, France, 2001 (Arbitral award No. 9771), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/019771i1.html>. For a decision referring to this approach as well as the approach favoring resort to the general principles of the Convention (although, for procedural reasons, the decision did not have to decide which approach to favor), see Oberlandesgericht Köln, Germany, 15 September 2004, available on the Internet at www.cisg-online.ch/cisg/urteile/1057.pdf.

⁸⁷ Kantonsgericht Schaffhausen, Switzerland, 25 February 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020225s1.html>.

⁸⁸ Hof van Cassatie, Belgium, 19 June 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090619b1.html>.

⁸⁹ CLOUT case No. 248 [Bundesgericht, Switzerland, 28 October 1998] (see full text of the decision).

⁹⁰ American Arbitration Association, United States, 23 October 2007, available on the Internet at <http://cisgw3.law.pace.edu/cases/071023a5.html>.

⁹¹ CLOUT case No. 747 [Oberster Gerichtshof, Austria, 23 May 2005] (see full text of the decision); CLOUT case No. 428 [Oberster Gerichtshof, Austria, 7 September 2000], also available on the Internet at www.cisg.at/8_2200v.htm.

⁹² See the Digest for article 40, paragraph 16.

⁹³ CLOUT case No. 237 [Arbitration Institute of the Stockholm Chamber of Commerce, Sweden, 5 June 1998] (see full text of the decision).

⁹⁴ 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”.

⁹⁵ CLOUT case No. 168 [Oberlandesgericht Köln, Germany, 21 March 1996].

⁹⁶ Hof van Cassatie, Belgium, 19 June 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090619b1.html>.

⁹⁷ Netherlands Arbitration Institute, the Netherlands, 10 February 2005, available on the Internet at <http://cisgw3.law.pace.edu/cases/050210n1.html>.

⁹⁸ See Court of Arbitration of the International Chamber of Commerce, 1995 (Arbitral award No. 8128), Unilex.

⁹⁹ Court of Arbitration of the International Chamber of Commerce, March 1998 (Arbitral award No. 9117), Unilex; Court of Arbitration of the International Chamber of Commerce, 1997 (Arbitral award No. 8817), Unilex.

¹⁰⁰CLOUT case No. 205 [Cour d'appel de Grenoble, France, 23 October 1996] (see full text of the decision).

¹⁰¹See Rechtbank Zwolle, the Netherlands, 5 March 1997, Unilex.

¹⁰²China International Economic and Trade Arbitration Commission, People's Republic of China, 2004 (Arbitral award in No. CISG/2004/07), available on the Internet at <http://cisgw3.law.pace.edu/cases/040900c1.html#xiii>.

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 commerce¹) 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 of the contract) or Part III (on the rights and obligations of the parties). This view, supported by legislative history,³ has been adopted in decisions:⁴ courts have resorted to the criteria set forth in article 8 to interpret statements and conduct relating to the process of formation of contract,⁵ the performance of the contract,⁶ and its avoidance.⁷

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

3. According to both legislative history⁹ and case law,¹⁰ article 8 governs not only the interpretation of unilateral acts of each party but is also “equally applicable to the interpretation of ‘the contract’, when the document is embodied in a single document”.¹¹

4. According to one court, it is possible to derive a general duty from article 8 (in conjunction with article 7), pursuant to which, in performing one's own obligation, one has to take into account the interests of opposing party.¹²

5. It is worth pointing out, however, that one court stated that “the will of the parties (article 8 CISG) . . . only has to be taken into account is so far as the contract . . . has no clear provision since the contract precedes the CISG in the hierarchy of rules.”¹³

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

6. Paragraphs 1 and 2 of article 8 set forth two sets of criteria and a hierarchy for those criteria: the ones set forth in article 8 (1) have to be resorted to primarily,¹⁴ before resorting to those contained in article 8 (2). According to some courts, article 8 (1) permits a substantial inquiry into the parties' “subjective”¹⁵ and “real”¹⁶ intent, “even if the parties did not engage in any objectively ascertainable means of registering this intent”.¹⁷ 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”¹⁸ or could not have been unaware of it.¹⁹ According to one court, “article 8 (1) of the CISG, in recognizing subjective criteria for interpretation, invites an inquiry as to the true intent of the parties, but excludes the use of in-depth psychological investigations. Therefore, if the terms of the contract are clear, they are to be given their literal meaning, so parties cannot later claim that their undeclared intentions should prevail.”²⁰

7. A party who asserts that 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.²¹

8. The subjective intent of a party is irrelevant unless it is manifested in some fashion;²² this is the rationale behind one court's statement that “the intent that one party secretly had, is irrelevant”.²³ A different court stated that, due to the need that the intent be manifested in some fashion, the “Convention is indeed governed by the principle of reliance that is common to numerous legislations: it is applied to expressed declarations and to communications, but also to the persuasive conduct exhibited before or after the conclusion of a contract.”²⁴

9. One court stated that where a common intent of the parties can be discerned, that common intent is to be taken

into account, even if the objective meaning attributable to the statements of the parties differs.²⁵

10. 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;²⁶ 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."²⁷ 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.²⁸

OBJECTIVE INTERPRETATION

11. Where it is not possible to use the subjective intent standard in article 8 (1) to interpret a party's statements or conduct,²⁹ one must resort to "a more objective analysis"³⁰ as provided for by article 8 (2),³¹ which should allow the courts to determine "a presumptive"³² or "normative"³³ intent. 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.³⁴ Several courts have characterized the result of an interpretation based on this criterion as a "reasonable interpretation".³⁵

12. 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.³⁶ 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.

13. 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. Several courts have 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'.³⁷

14. 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 to the contract.³⁸

15. 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.³⁹

16. 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).⁴⁰ 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".⁴¹ 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.⁴² 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.

17. 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.⁴³

18. 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.⁴⁴ 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.

19. 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.⁴⁵

20. According to one court, article 8 (2) is based upon the *contra proferentem* rule, pursuant to which standard contract terms have to be interpreted in favour of the party against whom they are employed.⁴⁶

CONSIDERATIONS RELEVANT IN INTERPRETING STATEMENTS OR OTHER CONDUCT OF A PARTY

21. 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—objective⁴⁷—circumstances of the case. Such circumstances specifically include⁴⁸ the negotiations,⁴⁹ any practices which the parties have established between themselves,⁵⁰ usages, and any subsequent conduct of the parties.⁵¹ Several decisions⁵² 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)⁵³ or article 8 (2).⁵⁴

22. In respect of the circumstances to be taken into account in determining the intent of the parties pursuant to article 8 (1), one court stated that “the exact wording chosen by the parties as well as the systematic context are of particular relevance.”⁵⁵ That court also stated that “any previous negotiations and subsequent conduct of the parties may indicate how they have actually understood their respective declarations of intent. Additionally, the actual intent can be construed on the basis of the parties' interests, the purpose of the contract and the objective circumstances at the time of the conclusion of the contract.”⁵⁶

23. In respect of the criteria to be taken into account when resorting to an article 8 (2) interpretation, that same court stated that “the declarations of the parties must be interpreted according to their reasonable meaning in the light of wording, context and the principle of good faith . . . Such an interpretation according to the principle of good faith seeks to determine the normative consensus, while the crucial factor will be an interpretation from the perspective of the recipient In accordance with article 8 (3) CISG, 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 must be considered as well as the interests of either party and the purpose and systematic context of the contract.”⁵⁷

24. According to a different court, “examples of the conduct [referred to in article 8 (3)] might be: Acceptance of the goods, payment of the purchase price, sending of an invoice or its signing by the buyer.”⁵⁸ Similarly, one court stated that “[w]hen determining whether statements or other conduct count as an acceptance, [the conduct referred to in article 8 (3)], implies the performance of the contract, or that prepares the performance, i.e., payment, acceptance of the goods without protest (possibly followed by processing) by the buyer, the start of production, or the sending of (part of) the goods by the seller.”⁵⁹

25. 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.⁶⁰ 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.⁶¹ 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.⁶² One of those courts⁶³ stated that “the parol evidence rule is not viable in CISG cases in light of article 8 of the Convention”⁶⁴ 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.”⁶⁵ 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.”⁶⁶

26. 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.⁶⁷ According to a different court, however, “extrinsic evidence should not be excluded, unless the parties actually intend the merger clause to have this effect.”⁶⁸ According to that same court, “article 8 requires an examination of all relevant facts and circumstances when deciding whether the Merger Clause represents the parties' intent That is, to be effective, a merger clause must reflect ‘the parties' intent.’ This suggests that if either party had a contrary intent, the merger clause between them would have no effect.”⁶⁹

27. As several courts have pointed out,⁷⁰ subsequent conduct by the parties may show what a statement was intended to mean when it was made. In one case,⁷¹ 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.

28. 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.⁷²

29. 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.⁷³

30. Finally, in respect of article 8 (3), one court stated that "[t]he wording of this provision can also be understood in a way that contradictory conduct by a party bars that party from relying on a different meaning of its former conduct".⁷⁴

STANDARD CONTRACT TERMS AND THE LANGUAGE OF STATEMENTS

31. Article 8 has also been invoked in addressing the question whether standard contract terms employed by one party became part of a contract.⁷⁵ In various cases⁷⁶ it was held that that the question was governed by the Convention's rules on interpretation rather than by domestic law. Citing article 8 of the Convention, several courts 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 courts asserted, standard terms become part of an offer only if the offeree is able "to become aware of them in a reasonable manner,"⁷⁷ and if the intention to incorporate such terms is apparent to the recipient of the offer.⁷⁸ Where such intention is ambiguous, the terms do not become part of the contract,⁷⁹ nor do they become part of the contract if they "differ from the expectation of the contractual partner to such an extent that the latter cannot reasonably be expected to have anticipated that such a clause might be included".⁸⁰ In addition, according to some courts, the Convention

requires the user of general terms and conditions to transmit the text or make it available to the other party.⁸¹

32. In reaching similar conclusions regarding the incorporation of standard terms under the Convention, some courts also addressed the issue of the language in which the standard terms are expressed.⁸² The courts stated that incorporation of standard terms must be determined by interpreting the contract in light of article 8. To be effective, the courts 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 courts, one relevant circumstance is the language in which the standard terms are written.⁸³ In one of the cases, the seller's standard contract terms were not in the language of the contract, and one of the courts 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.⁸⁴

33. The language issue was also dealt with in another decision⁸⁵ 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.

34. In a different case, the court stated that for the standard contract terms to become part of the contract, they have to be drafted "either in the language of the contract, or in that of the opposing party or a language that the opposing party knows".⁸⁶ In a different case, a court stated that standard contract terms "are only incorporated if . . . the other contracting party is given sufficient opportunity to take note of them, either in the language of negotiations or in its native language."⁸⁷

35. Another court⁸⁸ 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.

36. In yet another decision, one court stated that for the standard contract terms to become part of the offer it is sufficient that they be drafted in a common language.⁸⁹

Notes

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

²See CLOUT case No. 605 [Oberster Gerichtshof, Austria, 22 October 2001]; Oberster Gerichtshof, Austria, 24 April 1997, available on the Internet at www.cisg.at/2_10997m.htm.

³United 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”.

⁴See also CLOUT case No. 932 [Obergericht des Kantons Thurgau, Switzerland, 12 December 2006] (see full text of the decision), stating that article 8 “applies to all declarations, actions and omissions of the parties that may have an effect on the conclusion or execution of the contract.”

⁵See 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>; CLOUT case No. 424 [Oberster Gerichtshof, Austria, 9 March 2000], also available on the Internet at www.cisg.at/6_31199z.htm; Landgericht Zwickau, Germany, 19 March 1999, available on the Internet at <http://cisg-online.ch/cisg/urteile/519.htm>; CLOUT case No. 189 [Oberster Gerichtshof, Austria, 20 March 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. 106 [Oberster Gerichtshof, Austria, 10 November 1994].

⁶CLOUT 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).

⁷CLOUT 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).

⁸CLOUT case No. 932 [Obergericht des Kantons Thurgau, Switzerland, 12 December 2006] (see full text of the decision); Appellate Court Helsinki, Finland, 31 May 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040531f5.html#iii>; CLOUT case No. 5 [Landgericht Hamburg, Germany, 26 September 1990] (see full text of the decision).

⁹United 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.

¹⁰CLOUT case No. 303 [Court of Arbitration of the International Chamber of Commerce, 1994 (Arbitral award no. 7331)] (see full text of the decision).

¹¹United 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; in case law see Appellate Court Helsinki, Finland, 31 May 2004, English translation available on the internet at <http://cisgw3.law.pace.edu/cases/040531f5.html#iii>; CLOUT case No. 877 [Bundesgericht, Switzerland, 22 December 2000], also available on the Internet at www.cisg.law.pace.edu/cisg/wais/db/cases2/001222s1.html.

¹²Oberlandesgericht Köln, Germany, 2 July 2007, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/1811.pdf>.

¹³Hof van Beroep Antwerpen, Belgium, 24 April 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060424b1.html>.

¹⁴Handelsgericht Aargau, Switzerland, 26 November 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081126s1.html>; Appellationsgericht Basel-Stadt, Switzerland, 26 September 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080926s1.html>; Zivilgericht Basel-Stadt, Switzerland, 8 November 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061108s1.html>.

¹⁵U.S. District Court, Southern District of New York, United States, 18 January 2011, available on the Internet at <http://cisgw3.law.pace.edu/cases/110118u1.html>; Handelsgericht Aargau, Switzerland, 26 November 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081126s1.html>; CLOUT case No. 844 [U.S. District Court, Kansas, United States, 28 September 2007] (see full text of the decision); CLOUT case No. 932 [Obergericht des Kantons Thurgau, Switzerland, 12 December 2006] (see full text of the decision); U.S. District Court, Southern District of New York, United States, 23 August 2006, available on the Internet at <http://cisgw3.law.pace.edu/cases/060823u1.html#i1>; CLOUT case No. 911 [Cour de justice de Genève, Switzerland, 12 May 2006] (see full text of the decision); Oberlandesgericht Linz, Austria, 23 January 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060123a3.html>; 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>; CLOUT case No. 222 [U.S. Court of Appeals (11th Circuit), United States, 29 June 1998] (see full text of the decision).

¹⁶Handelsgericht Aargau, Switzerland, 5 February 2008, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/1740.pdf>; Audiencia Provincial de Navarra, sección 3ª, Spain, 27 December 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071227s4.html>; Oberlandesgericht Stuttgart, Germany, 15 May 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060515g1.html#vi>; CLOUT case No. 931 [Bundesgericht, Switzerland, 5 April 2005] (see full text of the decision); CLOUT case No. 578 [U.S. District Court, Western District of Michigan, United States, 17 December 2001] (see full text of the decision); CLOUT case No. 607 [Oberlandesgericht Köln, Germany, 16 July 2001]; CLOUT case No. 617 [U.S. District Court, Northern District of California, United States, 30 January 2001].

¹⁷CLOUT case No. 222 [U.S. Court of Appeals (11th Circuit), United States, 29 June 1998] (see full text of the decision).

¹⁸CLOUT case No. 222 [U.S. Court of Appeals (11th 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 U.S. District Court, Southern District of New York, United States, 18 January 2011, available on the Internet at <http://cisgw3.law.pace.edu/cases/110118u1.html>; Court of Arbitration of the International Chamber of Commerce, Switzerland, 2000 (Arbitral award No. 10329), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/000329i1.html>; 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].

¹⁹For references to this part of article 8 (1), see U.S. District Court, Maryland, United States, 8 February 2011, available on the Internet at <http://cisgw3.law.pace.edu/cases/110208u1.html>; CLOUT case No. 1034 [Audiencia Provincial de Cáceres, Spain, 14 July 2010], text available on the Internet at <http://turan.uc3m.es/uc3m/dpto/PR/dppr03/cisg/sespan84.htm>; CLOUT case No. 851 [Audiencia Provincial de Madrid, sección 14ª, Spain, 20 February 2007]; CLOUT case No. 932 [Obergericht des Kantons Thurgau, Switzerland, 12 December 2006] (see full text of the decision); Zivilgericht Basel-Stadt, Switzerland, 8 November 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061108s1.html>; CLOUT case No. 777 [U.S. Court of Appeals (11th Circuit), United States, 12 September 2006]; U.S. District Court, Southern District of New York, United States, 23 August 2006, available on the Internet at <http://cisgw3.law.pace.edu/cases/060823u1.html#ii1>; CLOUT case No. 911 [Cour de justice de Genève, Switzerland, 12 May 2006] (see full text of the decision); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 13 April 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060413r1.html>; China International Economic and Trade Arbitration Commission, People's Republic of China, 7 December 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051207c1.html>; Obergericht des Kantons Zug, Switzerland, 5 July 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050705s1.html>; CLOUT case No. 931 [Bundesgericht, Switzerland, 5 April 2005] (see full text of the decision); Netherlands Arbitration Institute, the Netherlands, 10 February 2005, available on the Internet at <http://cisgw3.law.pace.edu/cases/050210n1.html>; Kantonsgericht Freiburg, Switzerland, 11 October 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/041011s1.html>; CLOUT case No. 890 [Tribunale d'appello Lugano, Switzerland, 29 October 2003] (see full text of the decision); Bundesgericht, Switzerland, 4 August 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030804s1.html>; Rechtbank van Koophandel Hasselt, Belgium, 26 May 2003, available on the Internet at www.law.kuleuven.be/ipr/eng/cases/2003-05-26.html; CLOUT case No. 537 [Oberlandesgericht Graz, Austria, 7 March 2002]; Court of Appeal Wellington, New Zealand, 27 November 2000, available on the Internet at <http://cisgw3.law.pace.edu/cases/001127n6.html>; CLOUT case No. 215 [Bezirksgericht St. Gallen, Switzerland, 3 July 1997] (see full text of the decision).

²⁰Audiencia Provincial de Navarra, sección 3ª, Spain, 27 December 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071227s4.html>.

²¹CLOUT case No. 215 [Bezirksgericht St. Gallen, Switzerland, 3 July 1997] (see full text of the decision).

²²Zivilgericht Basel-Stadt, Switzerland, 8 November 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061108s1.html>; CLOUT case No. 911 [Cour de justice de Genève, Switzerland, 12 May 2006] (see full text of the decision).

²³CLOUT case No. 5 [Landgericht Hamburg, Germany, 26 September 1990] (see full text of the decision).

²⁴CLOUT case No. 911 [Cour de justice de Genève, Switzerland, 12 May 2006] (see full text of the decision).

²⁵Oberlandesgericht Hamm, Germany, 12 November 2001, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/011112g1.html>.

²⁶Court of Arbitration of the International Chamber of Commerce, 1995 (Arbitral award No. 8324), Unilex.

²⁷CLOUT case No. 222 [U.S. Court of Appeals (11th Circuit), United States, 29 June 1998] (see full text of the decision); for similar statements, see also CLOUT case No. 932 [Obergericht des Kantons Thurgau, Switzerland, 12 December 2006] (see full text of the decision).

²⁸Court of Arbitration of the International Chamber of Commerce, 1995 (Arbitral award No. 8324), Unilex.

²⁹For a case stating that resort to article 8 (2) was to be had since subjective intent could not be proven, see U.S. District Court, Southern District of New York, United States, 18 January 2011, available on the Internet at <http://cisgw3.law.pace.edu/cases/110118u1.html>.

³⁰Court of Arbitration of the International Chamber of Commerce, 1995 (Arbitral award No. 8324), Unilex; for other cases that refer expressly to interpretation under article 8 (2) as being more "objective," see U.S. District Court, Southern District of New York, United States, 18 January 2011, available on the Internet at <http://cisgw3.law.pace.edu/cases/110118u1.html>; U.S. District Court, Colorado, United States, 6 July 2010, available on the Internet at <http://cisgw3.law.pace.edu/cases/100706u1.html>; Appellationsgericht Basel-Stadt, Switzerland, 26 September 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080926s1.html>; Oberlandesgericht Hamburg, Germany, 25 January 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080125g1.html>; CLOUT case No. 844 [U.S. District Court, Kansas, United States, 28 September 2007] (see full text of the decision); CLOUT case No. 911 [Cour de justice de Genève, Switzerland, 12 May 2006] (see full text of the decision); Oberlandesgericht Linz, Austria, 23 January 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060123a3.html>; Oberlandesgericht Linz, Austria, 23 March 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050323a3.html>; CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002]; CLOUT case No. 607 [Oberlandesgericht Köln, Germany, 16 July 2001]; CLOUT case No. 877 [Bundesgericht, Switzerland, 22 December 2000], also available on the Internet at www.cisg.law.pace.edu/cisg/wais/db/cases/2/001222s1.html; 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>; CLOUT case No. 222 [U.S. Court of Appeals (11th Circuit), United States, 29 June 1998] (see full text of the decision); Hoge Raad, Netherlands, 7 November 1997, Unilex; CLOUT case No. 409 [Landgericht Kassel, Germany, 15 February 1996], also Unilex.

³¹It 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, Unilex.

³²Handelsgericht Aargau, Switzerland, 26 November 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081126s1.html>.

³³Handelsgericht Aargau, Switzerland, 5 February 2008, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/1740.pdf>; CLOUT case No. 931 [Bundesgericht, Switzerland, 5 April 2005] (see full text of the decision); CLOUT case No. 877 [Bundesgericht, Switzerland, 22 December 2000] (see full text of the decision).

³⁴Kantonsgericht St. Gallen, Switzerland, 15 June 2010, available on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/2159.pdf; Rechtbank Arnhem, the Netherlands, 7 October 2009, available on the Internet at www.globalsaleslaw.com/content/api/cisg/urteile/2012.pdf; Tribunal de Justiça do Rio Grande do Sul, Brazil, 20 May 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090520b5.html>; Supreme Court, Slovakia, 30 April 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080430k1.html>; Handelsgericht Aargau, Switzerland, 5 February 2008, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/1740.pdf>; Bundesgerichtshof, Germany, 27 November 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071127g1.html>; CLOUT case No. 844 [U.S. District Court, Kansas, United States, 28 September 2007]; CLOUT case No. 828 [Hof 's-Hertogenbosch, the Netherlands, 2 January 2007]; CLOUT case No. 932 [Obergericht des Kantons Thurgau, Switzerland, 12 December 2006] (see full text of the decision); CLOUT case No. 777 [U.S. Court of Appeals (11th Circuit), United States, 12 September 2006]; U.S. District Court, Southern District of New York, United States, 23 August 2006, available on the Internet at <http://cisgw3.law.pace.edu/cases/060823u1.html#ii1>; CLOUT case No. 911 [Cour de justice de Genève, Switzerland, 12 May 2006] (see full text of the decision); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 13 April 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060413r1.html>; China International Economic and Trade Arbitration Commission, People's Republic of China, 7 December 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051207c1.html>; Obergericht des Kantons Zug, Switzerland, 5 July 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050705s1.html>; CLOUT case No. 931 [Bundesgericht, Switzerland, 5 April 2005] (see full text of the decision); Netherlands Arbitration Institute, the Netherlands, 10 February 2005, available on the Internet at <http://cisgw3.law.pace.edu/cases/050210n1.html>; Kantonsgericht Freiburg, Switzerland, 11 October 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/041011s1.html>; CLOUT case No. 553 [Audiencia Provincial Barcelona, sección 16ª, Spain, 28 April 2004]; CLOUT case No. 885 [Bundesgericht, Switzerland, 13 November 2003]; CLOUT case No. 890 [Tribunale d'appello Lugano, Switzerland, 29 October 2003] (see full text of the decision); Bundesgericht, Switzerland, 4 August 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030804s1.html>; Rechtbank van Koophandel Hasselt, Belgium, 26 May 2003, available on the Internet at www.law.kuleuven.be/ipr/eng/cases/2003-05-26.html; Oberlandesgericht Schleswig-Holstein, Germany, 29 October 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021029g1.html>; Foreign Trade Arbitration Court attached to the Yugoslav Chamber of Commerce in Belgrade, Serbia, 25 May 2001, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/010525sb.html>; Court of Appeal Wellington, New Zealand, 27 November 2000, available on the Internet at <http://cisgw3.law.pace.edu/cases/001127n6.html>; Landgericht Zwickau, Germany, 19 March 1999, available on the Internet at www.cisg-online.ch/cisg/urteile/519.htm; CLOUT case No. 189 [Oberster Gerichtshof, Austria, 20 March 1997]; Hoge Raad, Netherlands, 7 November 1997, Unilex; CLOUT case No. 215 [Bezirksgericht St. Gallen, Switzerland, 3 July 1997] (see full text of the decision); CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, 21 June 1996] (see full text of the decision); Arbitration Court of the Chamber of Commerce and Industry of Budapest, Hungary, 17 November 1995 (Arbitration award No. Vb 94124), Unilex; 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].

³⁵U.S. District Court, Colorado, United States, 6 July 2010, available on the Internet at <http://cisgw3.law.pace.edu/cases/100706u1.html>; CLOUT case No. 273 [Oberlandesgericht München, Germany, 9 July 1997]. For a reference to a "reasonable interpretation", albeit without express citation to article 8 (2), see Rechtbank Arnhem, the Netherlands, 11 February 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090211n1.html>.

³⁶CLOUT case No. 215 [Bezirksgericht St. Gallen, Switzerland, 3 July 1997] (see full text of the decision).

³⁷Oberlandesgericht München, Germany, 14 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090114g1.html>; CLOUT case No. 106 [Oberster Gerichtshof, Austria, 10 November 1994].

³⁸CLOUT case No. 877 [Bundesgericht, Switzerland, 22 December 2000] (see full text of the decision).

³⁹Oberlandesgericht Dresden, Germany, 27 December 1999, available on the Internet at www.cisg-online.ch/cisg/urteile/511.htm (internal citations to Convention omitted).

⁴⁰CLOUT case No. 270 [Bundesgerichtshof, Germany, 25 November 1998].

⁴¹Ibid. (internal citations to Convention omitted) (see full text of the decision).

⁴²CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998] (see full text of the decision).

⁴³CLOUT case No. 317 [Oberlandesgericht Karlsruhe, Germany, 20 November 1992].

⁴⁴CLOUT case No. 151 [Cour d'appel de Grenoble, France, 26 April 1995].

⁴⁵CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002], also Unilex.

⁴⁶Oberlandesgericht Stuttgart, Germany, 31 March 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080331g1.html>.

⁴⁷For this qualification, see Handelsgericht Aargau, Switzerland, 26 November 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081126s1.html>.

⁴⁸According 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.

⁴⁹See Court of Appeal, United Kingdom, 17 February 2006, Unilex; Court of Arbitration of the International Chamber of Commerce, France, 2003 (Arbitral award in case No. 11849), available on the Internet at <http://cisgw3.law.pace.edu/cases/031849i1.html>.

⁵⁰For cases resorting to the practices established between the parties as an element used to determine intent, see U.S. District Court, Southern District of New York, United States, 18 January 2011, available on the Internet at <http://cisgw3.law.pace.edu/cases/110118u1.html>; Tribunal Cantonal du Valais, Switzerland, 28 January 2009, English translation available on the Internet at <http://cisgw3.law.pace>.

edu/cases/090128s1.html; Handelsgericht Aargau, Switzerland, 5 February 2008, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/1740.pdf>; CLOUT case No. 750 [Oberster Gerichtshof, Austria, 31 August 2005] (see full text of the decision).

⁵¹For references to article 8 (3) in case law, see U.S. District Court, Eastern District of Pennsylvania, United States, 29 January 2010, available on the Internet at <http://cisgw3.law.pace.edu/cases/100129u1.html#ii>; Oberlandesgericht München, Germany, 14 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090114g1.html>; Handelsgericht Aargau, Switzerland, 5 February 2008, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/1740.pdf>; CLOUT case No. 802 [Tribunal Supremo, Spain, 17 January 2008] (see full text of the decision); Oberlandesgericht Köln, Germany, 2 July 2007, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/1811.pdf>; CLOUT case No. 828 [Hof 's-Hertogenbosch, the Netherlands, 2 January 2007]; CLOUT case No. 932 [Obergericht des Kantons Thurgau, Switzerland, 12 December 2006] (see full text of the decision); Zivilgericht Basel-Stadt, Switzerland, 8 November 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061108s1.html>; U.S. District Court, Southern District of New York, United States, 23 August 2006, available on the Internet at <http://cisgw3.law.pace.edu/cases/060823u1.html#i1>; Supreme Court, Czech Republic, 29 March 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060329cz.html>; Obergericht des Kantons Zug, Switzerland, 5 July 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050705s1.html>; Oberlandesgericht Linz, Austria, 23 March 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050323a3.html>; Netherlands Arbitration Institute, the Netherlands, 10 February 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050210n1.html>; Kantonsgericht Zug, Switzerland, 2 December 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/041202s1.html>; Kantonsgericht Freiburg, Switzerland, 11 October 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/041011s1.html>; CLOUT case No. 890 [Tribunale d'appello Lugano, Switzerland, 29 October 2003] (see full text of the decision); Bundesgericht, Switzerland, 4 August 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030804s1.html>; Rechtbank van Koophandel Hasselt, Belgium, 26 May 2003, available on the Internet at www.law.kuleuven.be/ipr/eng/cases/2003-05-26.html; CLOUT case No. 576 [U.S. Circuit Court of Appeals (9th Circuit), United States, 5 May 2003]; Federal Arbitration Court for the Volgo-Vyatsky Circuit, Russian Federation, 20 December 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021220r1.html>; Hof van Beroep Antwerpen, Belgium, 16 December 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021216b1.html>; China International Economic and Trade Arbitration Commission, People's Republic of China, 8 November 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021108c1.html>; High Court, Auckland, New Zealand, 27 March 2002, available on the Internet at <http://cisgw3.law.pace.edu/cases/020327n6.html>; Court of Appeal Wellington, New Zealand, 27 November 2000, available on the Internet at <http://cisgw3.law.pace.edu/cases/001127n6.html>; CLOUT case No. 215 [Bezirksgericht St. Gallen, Switzerland, 3 July 1997]; CLOUT case No. 106 [Oberster Gerichtshof, Austria, 10 November 1994].

⁵²See House of Lords, United Kingdom, 1 July 2009, available on the Internet at <http://cisgw3.law.pace.edu/cases/090701uk.html>; Court of Arbitration of the International Chamber of Commerce, 1995 (Arbitral award No. 8324/1995), Unilex.

⁵³CLOUT 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).

⁵⁴CLOUT case No. 106 [Oberster Gerichtshof, Austria, 10 November 1994].

⁵⁵Handelsgericht Aargau, Switzerland, 26 November 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081126s1.html>.

⁵⁶Ibid.; see also CLOUT case No. 932 [Obergericht des Kantons Thurgau, Switzerland, 12 December 2006] (see full text of the decision).

⁵⁷Handelsgericht Aargau, Switzerland, 26 November 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081126s1.html>; see also Handelsgericht Aargau, Switzerland, 5 February 2008, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/1740.pdf>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 27 May 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050527r1.html>.

⁵⁸Oberlandesgericht Linz, Austria, 23 March 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050323a3.html>.

⁵⁹Rechtbank van Koophandel Tongeren, Belgium, 25 January 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050125b1.html>.

⁶⁰CLOUT case No. 24 [U.S. Court of Appeals (5th Circuit), United States, 15 June 1993].

⁶¹For a definition of the parol evidence rule in a case governed by the Convention, see U.S. District Court, Eastern District of Pennsylvania, United States, 29 January 2010, available on the Internet at <http://cisgw3.law.pace.edu/cases/100129u1.html#ii>.

⁶²See U.S. District Court, Eastern District of Pennsylvania, United States, 29 January 2010, available on the Internet at <http://cisgw3.law.pace.edu/cases/100129u1.html#ii>; CLOUT case No. 222 [U.S. Court of Appeals (11th Circuit), United States, 29 June 1998]; CLOUT case No. 578 [U.S. District Court, Western District of Michigan, United States of America, 17 December 2001] (see full text of the decision); CLOUT case No. 434 [U.S. District Court, Northern District of Illinois, United States, 28 August 2001] (see full text of the decision); CLOUT case No. 419 [U.S. District Court, Northern District of Illinois, United States, 27 October 1998].

⁶³CLOUT case No. 222 [U.S. Court of Appeals (11th Circuit), United States, 29 June 1998].

⁶⁴Ibid. (see full text of the decision).

⁶⁵CLOUT case No. 23 [U.S. District Court, Southern District of New York, United States, 14 April 1992] (see full text of the decision).

⁶⁶CLOUT case No. 413 [U.S. District Court, Southern District of New York, United States, 6 April 1998] (see full text of the decision).

⁶⁷CLOUT case No. 222 [U.S. Court of Appeals (11th Circuit), United States, 29 June 1998] (see full text of the decision).

⁶⁸U.S. District Court, Southern District of New York, United States, 23 August 2006, available on the Internet at <http://cisgw3.law.pace.edu/cases/060823u1.html#ii1>.

⁶⁹Ibid.

⁷⁰U.S. District Court, Colorado, United States, 6 July 2010, available on the Internet at <http://cisgw3.law.pace.edu/cases/100706u1.html>; 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).

⁷¹CLOUT case No. 215 [Bezirksgericht St. Gallen, Switzerland, 3 July 1997] (see full text of the decision).

⁷²CLOUT case No. 23 [U.S. District Court, Southern District of New York, United States, 14 April 1992].

⁷³CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998] (see full text of the decision); CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, 21 June 1996], also Unilex.

⁷⁴Oberlandesgericht Linz, Austria, 23 March 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050323a3.html>.

⁷⁵*Contra*, see Rechtbank Arnhem, the Netherlands, 17 March 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040317n1.html>, stating that “[b]ecause the application of general conditions is not expressly dealt with in the mentioned provisions of the CISG, the question has to be answered with the further applicable substantive law.”

⁷⁶U.S. District Court, Maryland, United States, 8 February 2011, available on the Internet at <http://cisgw3.law.pace.edu/cases/110208u1.html>; Oberlandesgericht Celle, Germany, 24 July 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090724g1.html>; Rechtbank Utrecht, the Netherlands, 21 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090121n1.html>; Oberlandesgericht München, Germany, 14 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090114g1.html>; Landgericht Landshut, Germany, 12 June 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080612g2.html>; Tribunale di Rovereto, Italy, 21 November 2007, Unilex; CLOUT case No. 827 [Hof 's-Hertogenbosch, the Netherlands, 29 May 2007]; CLOUT case No. 828 [Hof 's-Hertogenbosch, the Netherlands, 2 January 2007]; Landgericht Coburg, Germany, 12 December 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061212g1.html>; Tribunale di Rovereto, Italy, 24 August 2006, Unilex; CLOUT case No. 750 [Oberster Gerichtshof, Austria, 31 August 2005] (see full text of the decision); Oberlandesgericht Linz, Austria, 8 August 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050808a3.html>; Oberlandesgericht Linz, Austria, 23 March 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050323a3.html>; CLOUT case No. 831 [Hoge Raad, the Netherlands, 28 January 2005]; CLOUT case No. 821 [Oberlandesgericht Karlsruhe, Germany, 20 July 2004]; Oberlandesgericht Düsseldorf, Germany, 21 April 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040421g3.html#law>; CLOUT case No. 592 [Oberlandesgericht Düsseldorf, Germany, 30 January 2004]; CLOUT case No. 819 [Landgericht Trier, Germany, 8 January 2004]; CLOUT case No. 534 [Oberster Gerichtshof, Austria, 17 December 2003]; Oberlandesgericht Düsseldorf, Germany, 25 July 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030725g1.html>; CLOUT case 445 [Bundesgerichtshof, Germany, 31 October 2001].

⁷⁷CLOUT case 445 [Bundesgerichtshof, Germany, 31 October 2001] (see full text of the decision); see also Oberlandesgericht Celle, Germany, 24 July 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090724g1.html>; Rechtbank Utrecht, the Netherlands, 21 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090121n1.html>; Oberlandesgericht München, Germany, 14 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090114g1.html>; Landgericht Landshut, Germany, 12 June 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080612g2.html>; Tribunale di Rovereto, Italy, 24 August 2006, Unilex; Oberlandesgericht Linz, Austria, 8 August 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050808a3.html>; CLOUT case No. 592 [Oberlandesgericht Düsseldorf, Germany, 30 January 2004]; CLOUT case No. 534 [Oberster Gerichtshof, Austria, 17 December 2003].

⁷⁸Rechtbank Utrecht, the Netherlands, 21 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090121n1.html>; Oberlandesgericht München, Germany, 14 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090114g1.html>; Tribunale di Rovereto, Italy, 21 November 2007, Unilex; Oberlandesgericht Linz, Austria, 23 March 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050323a3.html>; Oberlandesgericht Innsbruck, Austria, 1 February 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050201a3.html>; CLOUT case No. 592 [Oberlandesgericht Düsseldorf, Germany, 30 January 2004]; Oberlandesgericht Düsseldorf, Germany, 25 July 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030725g1.html>; CLOUT case 445 [Bundesgerichtshof, Germany, 31 October 2001].

⁷⁹U.S. District Court, Maryland, United States, 8 February 2011, available on the Internet at <http://cisgw3.law.pace.edu/cases/110208u1.html>; see also Oberlandesgericht Linz, Austria, 8 August 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050808a3.html>, stating that “a party which desires to contract only according to its own standard terms and conditions requires an unambiguous declaration of that intent.” See also Oberster Gerichtshof, Austria, 26 January 2005, Unilex.

⁸⁰Landgericht Landshut, Germany, 12 June 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080612g2.html>.

⁸¹Landgericht Stuttgart, Germany, 15 October 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/091015g1.html>; Oberlandesgericht Celle, Germany, 24 July 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090724g1.html>; Rechtbank Utrecht, the Netherlands, 21 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090121n1.html>; Oberlandesgericht München, Germany, 14 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090114g1.html>; Landgericht Landshut, Germany, 12 June 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080612g2.html>; Tribunale di Rovereto, Italy, 21 November 2007, Unilex; CLOUT case 445 [Bundesgerichtshof, Germany, 31 October 2001] (see full text of the decision).

⁸²See Tribunale di Rovereto, Italy, 21 November 2007, Unilex; Oberlandesgericht Linz, Austria, 8 August 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050808a3.html>; Oberlandesgericht Innsbruck, Austria, 1 February 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050201a3.html>; Oberlandesgericht Düsseldorf, Germany, 21 April 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040421g3.html#law>; CLOUT case No. 534 [Oberster Gerichtshof, Austria, 17 December 2003]; Oberlandesgericht Düsseldorf, Germany, 25 July 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030725g1.html>; CLOUT case No. 345 [Landgericht Heilbronn, Germany, 15 September 1997].

⁸³Tribunale di Rovereto, Italy, 21 November 2007, Unilex; Oberlandesgericht Düsseldorf, Germany, 21 April 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040421g3.html#law>.

⁸⁴Rechtbank Koophandel Hasselt, Belgium, 2 June 1999, available on the Internet at www.law.kuleuven.ac.be/int/tradelaw/WK/1999-06-02.htm.

⁸⁵CLOUT case No. 132 [Oberlandesgericht Hamm, Germany, 8 February 1995].

⁸⁶Tribunale di Rovereto, Italy, 21 November 2007, Unilex.

⁸⁷Landgericht Memmingen, Germany, 13 September 2000, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/000913g1.html>.

⁸⁸CLOUT case No. 409 [Landgericht Kassel, Germany, 15 February 1996], also Unilex.

⁸⁹Oberlandesgericht Innsbruck, Austria, 1 February 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050201a3.html>; CLOUT case No. 534 [Oberster Gerichtshof, Austria, 17 December 2003]. For a case referring to the language issue without, however, conclusively deciding the issue, see Oberlandesgericht Düsseldorf, Germany, 21 April 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040421g3.html#law>.

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). In any case, according to one court, “any applicable practice or usage has the same effect as a contract.”²

2. The validity of usages is outside the Convention’s scope;³ the Convention addresses only their applicability.⁴ As a consequence, the validity of usages is governed by applicable domestic law.⁵ 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).⁶ Practices established between the parties and usages under article 9 (2), however, take a backseat compared to contractual agreements of the parties.⁷

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,⁸ but—as one court has stated⁹—may be implicit. According to one decision, if parties do not want to be bound by the practices established between themselves, they need to expressly exclude them.¹⁰

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 international usages.¹¹ 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)).¹²

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”.¹³ 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.¹⁴ 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.¹⁵ 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.¹⁶ In another decision,¹⁷ a different court ruled that practices established between the parties may lead to the need to comply with certain form requirements, despite the Convention being based upon the principle of informality. In one case, an arbitral tribunal upheld the practices established between the parties in relation to the determination of the contents of the contract via phone.¹⁸ In a different case, a court disregarded the claim by one party that reservation of title by the seller amounted to a practice established between the parties, since no proof was given of such practice.¹⁹ In a different case, an arbitral tribunal stated that the practices established between the parties imposed a certain way of examining the goods.²⁰ One court stated that practices established between the parties may impact the way standard contract terms become part of the contract.²¹ A different tribunal stated that the fact that the buyer had on several occasions signed the faxed copy of the order confirmation containing standard contract forms established a practice between the buyer and the seller, a practice “the buyer has not deviated from . . . once nor has [the buyer] informed the seller after receipt of the general conditions

that it did not wish the application of these conditions or wished to apply its own general conditions, if any.” This led the court to state that the seller’s standard contract terms had become part of the contract, since, “[b]y not informing the seller that it did not accept the general conditions, the buyer created in any case the expectation that it agreed to the application of the general conditions”.²² In another case relating to the incorporation of standard contract terms, one court stated that “[a]lthough [Buyer]’s counter-offer was not expressly accepted by the [Seller], it was nevertheless common that the [Seller] accepted the orders of the [Buyer] and delivered according thereto, even though [Seller] had not responded to them.” This led the court to state that this amounted to practices established between the parties, with the consequence that “the order of the [Buyer] was the basis for the contract and the standard terms had been effectively included.”²³ One court stated that practices had been established between the parties, pursuant to which the seller had always to take back defective goods when providing the buyer with substitutes.²⁴ In one case, the court stated that a contract had also not been formed in accordance with the practices established between the parties, even though the same procedure, whereby an order was made orally by the buyer and confirmed in writing by the seller, had been followed before. The court held that the existence of such practices did not absolve the parties of their obligations arising out of article 14 (1) and article 18 (1), which provided, respectively, that an offer should be sufficiently definite and that silence on the part of the offeree did not in itself amount to acceptance. The court concluded that, in the case at hand, the seller, who wished to supply the buyer with a new kind of fabric very different from the fabrics sold previously, could not rely on the practices established between the parties for transactions concerning standard fabrics. Since the practices were irrelevant, the ‘confirmation of order’ should therefore be regarded as an offer to buy which the buyer had not accepted.²⁵

7. The Convention does not define “practices established between the parties”. According to one court, “[c]ontrary to usages, which must be observed in at least one branch of industry, practices within the meaning of article 9 CISG are established only between the parties. Practices are conduct that occurs with a certain frequency and during a certain period of time set by the parties, which the parties can then assume in good faith will be observed again in a similar instance. Examples are the disregard of notice deadlines, the allowance of certain cash discounts upon immediate payment, delivery tolerances, etc.”²⁶ 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. According to one tribunal, this requirement is met where the parties had previously concluded a dozen transactions.²⁷ 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”.²⁸ 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.²⁹ Another court has stated that one prior transaction between the parties did not establish “practices” in the sense of article 9 (1).³⁰ One court stated that where the parties had not concluded any previous contract, no practices could have been established between the parties.³¹ 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”.³² 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”.³³

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.³⁴

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.”³⁵ 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”.³⁶

10. Usages that are binding on the parties pursuant to article 9 (2) prevail over conflicting provisions of the Convention.³⁷ 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.³⁸ Also, one court stated that the practices established between the parties prevail over the usages referred to in article 9 (2).³⁹

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.⁴⁰ 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.⁴¹ 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.⁴²

13. There is no difference in the allocation of burden of proof under articles 9 (1) and (2):⁴³ 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 as one of fact.⁴⁴ 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.⁴⁵ 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.⁴⁶ 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.⁴⁷ 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.⁴⁸ 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.⁴⁹

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).⁵⁰ 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;⁵¹ 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.⁵² In a different case, a court stated that usages as defined under article 9 (2) may impose form requirements that otherwise do not exist under the Convention.⁵³ In a different case, an arbitral tribunal stated, on the basis of the relevant trade usages, that "the average profit margin of an organization, irrespective of the area of

activity, amounts to 10 per cent."⁵⁴ In yet another case, one court stated, after looking into trade usages as defined by article 9 (2), that "[i]t appears that the placement of oral orders for goods followed by invoices with sales terms is commonplace, and while every term of the contract is not usually part of the oral discussion, subsequent written confirmation containing additional terms are binding unless timely objected to."⁵⁵ One court stated that "where international business usages with respect to certain characteristics [of the goods] exist, these must be presented as a minimum of quality"⁵⁶ pursuant to article 9 (2) of the Convention.

15. On the other hand, there are examples of courts finding that certain trade usages claimed by one party did not exist. One court found that in light of the particularity of the production process and the transportation requirements of the goods, a testing-before-delivery requirement "cannot be regarded as a generally accepted and commonly known usage as is contended by the representatives of the buyer."⁵⁷

16. 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".⁵⁸ 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".⁵⁹ Some courts stated that where the rate of interest has not been agreed upon by the parties or "if no relevant trade usage applies under article 9 CISG, interest rates are governed by the complementary domestic law."⁶⁰

LETTERS OF CONFIRMATION, INCOTERMS AND THE UNIDROIT PRINCIPLES

17. 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"⁶¹ 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".⁶² 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".⁶³ Similarly, one court stated that "silence will in general not be of any legal effect as far as the CISG is concerned. Nevertheless, silence may—in deviation from article 18(1)(2) CISG—result in an acceptance of the terms contained in the letter of confirmation, if there is a corresponding commercial usage in terms of article 9 (2) CISG which can be readily identified by the parties Such commercial usage can be assumed if the parties have their places of business in countries whose laws contain rules on commercial letters of confirmation and on the legal effects of silence on the part of the addressee and if these rules are similar to that under German law".⁶⁴ 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.⁶⁵

18. Several courts commented on the relationship between article 9 (2) and INCOTERMS.⁶⁶ After asserting that

"INCOTERMS are incorporated into the Convention through article 9 (2)",⁶⁷ one 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.⁶⁸ Similar statements occur in an arbitral award⁶⁹ as well as in other decisions of a court in a different State.⁷⁰ 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.⁷¹ More recently, one court stated "[i]n principle, the Incoterms apply only in case of a definite and express agreement by the parties, unless there is a practice which the parties have established between themselves (cf. article 9 (1) CISG . . .). In lack of an express agreement between the parties, these rules may also be applicable under article 9 (2) CISG, as their role as usages is widely recognized and regularly observed in international trade, provided, however, that the applicable Incoterm clause is relevant to the contract Finally, even when the Incoterms were not incorporated into the contract explicitly or implicitly, they are considered as rules of interpretation" ⁷²

19. 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.⁷³ Similarly, an arbitral tribunal stated that the UNIDROIT Principles reflect international trade usages.⁷⁴

Notes

¹See 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; for a reference to the text of article 9 (1) in case law, see U.S. District Court, Eastern District of Pennsylvania, United States, 29 January 2010, available on the Internet at <http://cisgw3.law.pace.edu/cases/100129u1.html>.

²Turku Court of Appeal, Finland, 12 April 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020412f5.html>.

³CLOUT case No. 605 [Oberster Gerichtshof, Austria, 22 October 2001], also available on the Internet at www.cisg.at/1_4901i.htm.

⁴See CLOUT case No. 425 [Oberster Gerichtshof, Austria, 21 March 2000], also available on the Internet at www.cisg.at/10_34499g.htm.

⁵See CLOUT case No. 425 [Oberster Gerichtshof, Austria, 21 March 2000], also available on the Internet at www.cisg.at/10_34499g.htm; CLOUT case No. 240 [Oberster Gerichtshof, Austria, 15 October 1998] (see full text of the decision).

⁶See Polimeles Protodikio Athinon, Greece, 2009 (docket No. 4505/2009), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/094505gr.html>; CLOUT case No. 867 [Tribunale di Forlì, Italy, 11 December 2008], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081211i3.html>; Rechtbank van Koophandel Ieper, Belgium, 18 February 2002, available on the Internet at www.law.kuleuven.ac.be/int/tradelaw/WK/2002-02-18.htm; Rechtbank Koophandel Veurne, Belgium, 25 April 2001, available on the Internet at www.law.kuleuven.ac.be/int/tradelaw/WK/2001-04-25.htm; Rechtbank Koophandel Ieper, Belgium, 29 January 2001, available on the Internet at www.law.kuleuven.ac.be/int/tradelaw/WK/2001-01-29.htm; CLOUT case No. 425 [Oberster Gerichtshof, Austria, 21 March 2000], also available on the Internet at www.cisg.at/10_34499g.htm; Juzgado Nacional de Primera Instancia en lo Comercial No. 10, Argentina, 6 October 1994, available on the Internet at www.uc3m.es/uc3m/dpto/PR/dppr03/cisg/sargen8.htm.

⁷For this result see, e.g., Tribunal de Grande Instance de Strasbourg, France, 22 December 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061222f1.html>; Hof van Beroep Antwerpen, Belgium, 24 April 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060424b1.html>.

⁸For a case in which the parties expressly chose to be bound by trade usages, see China International Economic and Trade Arbitration Commission, People's Republic of China, 1990 (Arbitral award No. CISG/1990/01), available on the Internet at www.cisg.law.pace.edu/cases/900000c1.html (in the case at hand the parties chose to be bound by an "FOB" clause).

⁹CLOUT case No. 425 [Oberster Gerichtshof, Austria, 21 March 2000], also available on the Internet at www.cisg.at/10_34499g.htm.

¹⁰CLOUT case No. 579 [U.S. District Court for the Southern District of New York, United States, 10 May 2002] (see full text of the decision).

¹¹Ibid.

¹²CLOUT case No. 240 [Oberster Gerichtshof, Austria, 15 October 1998] (see full text of the decision).

¹³Court of Arbitration of the International Chamber of Commerce, France, December 1997) (Arbitral award No. 8817), Unilex.

¹⁴Court of Arbitration of the International Chamber of Commerce, 23 January 1997 (Arbitral award No. 8611/HV/JK), Unilex.

¹⁵CLOUT case No. 202, France [Cour d'appel de Grenoble, France, 13 September 1995] (see full text of the decision).

¹⁶CLOUT case No. 313 [Cour d'appel de Grenoble, France, 21 October 1999] (see full text of the decision).

¹⁷See Kantonsgericht Zug, Switzerland, 14 December 2009, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/2026.pdf>.

¹⁸China International Economic and Trade Arbitration Commission, People's Republic of China, 9 January 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080109c1.html>.

¹⁹CLOUT case No. 827 [Gerechtshof 's-Hertogenbosch, the Netherlands, 29 May 2007].

²⁰China International Economic and Trade Arbitration Commission, People's Republic of China, 2006 (Arbitral award in case No. CISG/2006/16), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060200c1.html>.

²¹Oberlandesgericht Linz, Austria, 8 August 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050808a3.html>.

²²Netherlands Arbitration Institute, the Netherlands, 10 February 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050210n1.html>.

²³Oberlandesgericht Innsbruck, Austria, 1 February 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050201a3.html>; see also Landgericht Innsbruck, Austria, 9 July 2004, available on the Internet at www.cisg-online.ch/cisg/urteile/1129.pdf.

²⁴CLOUT case No. 889 [Handelsgericht Zürich, Switzerland, 24 October 2003].

²⁵CLOUT case No. 490 [Cour d'Appel de Paris, France, 10 September 2003].

²⁶CLOUT case No. 750 [Oberster Gerichtshof, Austria, 31 August 2005] (see full text of the decision).

²⁷Guangdong High People's Court, People's Republic of China, 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050000c2.html>.

²⁸CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000] (see full text of the decision).

²⁹CLOUT case No. 221 [Zivilgericht des Kantons Basel-Stadt, Switzerland, 3 December 1997] (see full text of the decision); see also China International Economic and Trade Arbitration Commission, People's Republic of China, 21 February 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050221c1.html>, stating that "according to article 9 of CISG, the usual practice formed during the parties' long-term business relationship shall be followed".

³⁰Landgericht Zwickau, Germany, 19 March 1999, available on the Internet at www.cisg-online.ch/cisg/urteile/519.htm.

³¹Rechtbank Arnhem, the Netherlands, 17 March 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040317n1.html>.

³²CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (see full text of the decision); see also CLOUT case No. 537 [Oberlandesgericht Graz, Austria, 7 March 2002] (see full text of the decision).

³³CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (see full text of the decision).

³⁴Landgericht Gera, Germany, 29 June 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060629g1.html>; 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].

³⁵See Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 13 April 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060413r1.html>.

³⁶CLOUT case No. 579 [U.S. District Court, Southern District of New York, 10 May 2002], also available on the Internet at www.cisg.law.pace.edu/cisg/wais/db/cases/2/020510u1.html#vi.

³⁷CLOUT case No. 425 [Oberster Gerichtshof, Austria, 21 March 2000], also available on the Internet at www.cisg.at/10_34499g.htm; CLOUT case No. 240 [Oberster Gerichtshof, Austria, 15 October 1998].

³⁸See Hof van Beroep Antwerpen, Belgium, 24 April 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060424b1.html>; CLOUT case No. 292 [Oberlandesgericht Saarbrücken, Germany, 13 January 1993] (see full text of the decision).

³⁹CLOUT case No. 777 [U.S. Court of Appeals (11th Circuit), United States, 12 September 2006].

⁴⁰CLOUT case No. 175 [Oberlandesgericht Graz, Austria, 9 November 1995].

⁴¹CLOUT case No. 425 [Oberster Gerichtshof, Austria, 21 March 2000], also available on the Internet at www.cisg.at/10_34499g.htm.

⁴²CLOUT case No. 240 [Oberster Gerichtshof, Austria, 15 October 1998] (see full text of the decision).

⁴³See paragraph 8 *supra*.

⁴⁴CLOUT case No. 425 [Oberster Gerichtshof, Austria, 21 March 2000], also available on the Internet at www.cisg.at/10_34499g.htm.

⁴⁵See CLOUT case No. 347 [Oberlandesgericht Dresden, Germany, 9 July 1998].

⁴⁶CLOUT case No. 221 [Zivilgericht des Kantons Basel-Stadt, Switzerland, 3 December 1997].

⁴⁷CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (see full text of the decision).

⁴⁸Hjesteret, Denmark, 15 February 2001, Unilex.

⁴⁹*Mainschiffahrts-Genossenschaft eb (MSG) v. Les Gravihres Rhinanes SARL*, 20 February 1997, European Community Reports I 927 n.34 (1997).

⁵⁰Court of Arbitration of the International Chamber of Commerce, France, 1995 (Arbitral award No. 8324), Unilex.

⁵¹CLOUT case No. 5 [Landgericht Hamburg, Germany, 26 September 1990] (see full text of the decision).

⁵²See Helsinki Court of Appeal, Finland, 29 January 1998, Unilex.

⁵³Kantonsgericht Zug, Switzerland, 14 December 2009, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/2026.pdf>.

⁵⁴Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 13 April 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060413r1.html>.

⁵⁵U.S. District Court, Western District Washington, United States, 13 April 2006, available on the internet at <http://cisgw3.law.pace.edu/cases/060413u1.html>.

⁵⁶CLOUT case No. 536 [Oberster Gerichtshof, Austria, 27 February 2003].

⁵⁷Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 16 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040216r1.html>.

⁵⁸Juzgado Nacional de Primera Instancia en lo Comercial No. 10, Argentina, 23 October 1991, Unilex.

⁵⁹Juzgado Nacional de Primera Instancia en lo Comercial No. 10, Argentina, 6 October 1994, Unilex.

⁶⁰Landgericht Bamberg, Germany, 23 October 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061023g1.html>; see also CLOUT case No. 590 [Landgericht Saarbrücken, Germany, 1 June 2004] (see full text of the decision).

⁶¹CLOUT case No. 276 [Oberlandesgericht Frankfurt am Main, Germany, 5 July 1995].

⁶²CLOUT case No. 95 [Zivilgericht Basel-Stadt, Switzerland, 21 December 1992]; see also Kantonsgericht Freiburg, Switzerland, 11 October 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/041011s1.html>, stating that “[u]nder the CISG, differently from Swiss law, a document of confirmation which is not objected to shall be considered as acceptance only if it corresponds with international trade practices or usages between the parties. None of these circumstances are present in the instant case, with the consequence that [Buyer] is not entitled to base its contentions on them.”

⁶³CLOUT case No. 95 [Zivilgericht Basel-Stadt, Switzerland, 21 December 1992].

⁶⁴Landgericht Kiel, Germany, 27 July 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040727g1.html>.

⁶⁵Landgericht Frankfurt, Germany, 6 July 1994, Unilex.

⁶⁶U.S. District Court, Southern District of Texas, United States, 7 February 2006, available on the Internet at <http://cisgw3.law.pace.edu/cases/060207u1.html>; CLOUT Case No. 447 [U.S. District Court, Southern District of New York, United States of America, 26 March 2002], also available on the Internet at www.cisg.law.pace.edu/cisg/wais/db/cases2/020326u1.html.

⁶⁷See also U.S. District Court, Southern District of Texas, United States, 7 February 2006, available on the Internet at <http://cisgw3.law.pace.edu/cases/060207u1.html>, stating that “[b]ecause Incoterms is the dominant source of definitions for the commercial delivery terms used by parties to international sales contracts, it is incorporated into the CISG through article 9(2)”; for similar statements, see CLOUT case No. 575 [U.S. Court of Appeals (5th Circuit), United States, 11 June 2003]; Juzgado Comercial No. 26 Secretaria No. 51, Argentina, April 2003 (docket No. 44766), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030400a1.html>; Juzgado Comercial No. 26 Secretaria No. 52, Argentina, 17 March 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030317a1.html>.

⁶⁸CLOUT Case No. 447 [U.S. District Court, Southern District of New York, United States of America, 26 March 2002].

⁶⁹Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 6 June 2000, available on the Internet at www.cisg.law.pace.edu/cisg/wais/db/cases2/000606r1.html.

⁷⁰Corte d’appello Genova, Italy, 24 March 1995, Unilex.

⁷¹See also Juzgado Comercial No. 26 Secretaria No. 51, Buenos Aires, Argentina, 2 July 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030702a1.html>.

⁷²Tribunal Cantonal du Valais, Switzerland, 28 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090128s1.html>.

⁷³International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 5 June 1997, Unilex.

⁷⁴Court of Arbitration of the International Chamber of Commerce, Switzerland, October 1998 (Arbitral award No. 9333), Unilex.

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 addressing issues linked to the location of a 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 that 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. In a different decision, an arbitral tribunal determined that the Convention was applicable pursuant to article 1 (1) (a). To reach this conclusion, the tribunal first had to determine which among several places of business of the seller was the relevant one. The tribunal stated that, pursuant to article 10 (a), the place of business to be taken into account was the one located in the Russian Federation, on the grounds that "Russia had a closer connection with the contract as the goods were to be produced in Russia, according to Russian standards and delivered on Russian ships, being all these circumstances perfectly known by the parties".⁵

4. Another court⁶ 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." Similarly, an arbitral tribunal relied on article 10 (a) to decide whether the contract concluded between a buyer with place of business in Serbia and a seller with a place of business in Germany and one in Serbia was international. In light of the fact that "the leading role in conclusion and performance of the contract was performed by the Swiss [place of business of the seller] (it conducted negotiations, signed the contract, delivered the machine from Switzerland, the payment was performed at its account, etc.), while the Serbian [place of business] was only involved in the attempts to reach the settlement regarding an existing debt,"⁷ the tribunal decided that the contract was international.

5. In another case⁸ 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, instead of the Spanish company, the German manufacturer 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).

6. In yet another case, a court had to decide a dispute between a partnership between a German and an Austrian company, carrying out construction work in Germany, and an Austrian company, to which that partnership had sold three pieces of construction equipment to be picked up at the construction site. On the issue of applicability of the Convention, the court considered the seller's relevant place

of business to be the construction site where the contract had been concluded and where the equipment was to be picked up by the buyer. According to the court, pursuant to article 10 (a), the construction site had the closest relationship to the contract and its performance.⁹

7. In another decision¹⁰ 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)

8. Article 10 (b) has been referred to in very few decisions, in which the courts merely described the text of the provision,¹¹ if at all.¹²

Notes

¹United 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.

²For 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.

³See U.S. District Court, Northern District of California, United States, 2 November 2005, available on the Internet at <http://cisgw3.law.pace.edu/cases/051102u1.html#iii>; Oberster Gerichtshof, Austria, 26 January 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050126a3.html>; CLOUT case No. 549 [Audiencia Provincial de Valencia, Spain, 7 June 2003] (see full text of the decision); CLOUT case No. 433 [U.S. District Court, Northern District Court of California, United States, 27 July 2001], *Federal Supplement (2nd Series)* vol. 164, p.1142 (*Asante Technologies v. PMC-Sierra*), also available on the Internet at www.cisg.law.pace.edu/cisg/wais/db/cases2/010727u1.html (merely quoting the text of article 10 (a)); Oberlandesgericht Stuttgart, Germany, 28 February 2000, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/000228g1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 11 May 1997, available 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 the United Kingdom—without, however, specifying any reason for the decision).

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

⁵CLOUT case No. 727 [Chamber of National and International Arbitration of Milan, Italy, 28 September 2001].

⁶CLOUT case No. 400 [Cour d'appel Colmar, France, 24 October 2000] (see full text of the decision).

⁷Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, 15 July 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080715sb.html>.

⁸Oberlandesgericht Stuttgart, Germany, 28 February 2000, available on the Internet at www.cisg.law.pace.edu/cisg/text/000228g1german.html.

⁹CLOUT case No. 746 [Oberlandesgericht Graz, Austria, 29 July 2004].

¹⁰CLOUT case No. 261 [Bezirksgericht der Sanne, Switzerland, 20 February 1997].

¹¹Oberlandesgericht Hamm, Germany, 2 April 2009, available on the Internet at www.globalsaleslaw.com/content/api/cisg/urteile/1978.pdf; Landgericht Hamburg, Germany, 11 June 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030611g2.html>; CLOUT case No. 106 [Oberster Gerichtshof, Austria, 10 November 1994] (see full text of the decision).

¹²For a decision simply citing article 10 (b), without even referring to its text, see Tribunal Cantonal du Valais, Switzerland, 2 December 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021202s1.html>.

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 According to one court, this means that “[u]nder article 11 CISG, a contract of sale can be concluded informally,”³ without the need for a writing requirement to be met,⁴ which in turn has led one court to state that for the purpose of contract conclusion a party’s signature was not required.⁵ In light of the foregoing, it is unsurprising that some courts stated that under the Convention a contract can be concluded orally,⁶ and even through the conduct of the parties.⁷

2. Where, however, the parties have agreed upon a certain form requirement, that agreement—which may be either express or implicit—prevails; consequently, the contract must meet the form requirements agreed upon.⁸ One court held that where the parties agree upon certain form requirements, these requirements are to be met not simply for evidentiary purposes. Rather, they must be considered as having been introduced for validity purposes.⁹

3. The party claiming the existence of an agreed form requirement bears the burden of proof.¹⁰

4. The principle of freedom from form requirements is not only subject to party autonomy, but also to usages applicable pursuant to article 9.¹¹

5. Several tribunals have expressly 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.¹² 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,¹³ and it has been held that a written contract may be orally modified.¹⁴ Some courts stated that a notice of non-conformity can be given in any form, basing their decision on the general principle of freedom from form requirements enshrined in article 11.¹⁵

6. 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.”¹⁶

FORM REQUIREMENTS AND EVIDENCE OF THE CONTRACT

7. 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. One court expressly stated that the Convention “dispenses with certain formalities associated with proving the existence of a contract.”¹⁷ It is therefore unsurprising that various courts have emphasized that “a contract [governed by the Convention] can be proven by any means, including witnesses.”¹⁸ According to one court, this means that “[a] contract may be proven by a document, oral representations, conduct, or some combination of the three.”¹⁹ At the same time, this means that domestic rules requiring a contract to be evidenced in writing in order to be enforceable are superseded;²⁰ 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].”²¹ A different court even stated that the “[Convention]’s lack of a writing requirement allows all relevant information into evidence even if it contradicts the written documentation.”²²

8. 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.²³ It is on this basis that one court stated that even though the Convention allows the performance of the contract to be proved by means of witnesses, it is up to the court to determine whether hearing witnesses is helpful at all.²⁴ A different court²⁵ stated that a judge may attribute more weight to a written document than to oral testimony.

9. For comments on the applicability of the parol evidence rule under the Convention, see the Digest for article 8.²⁶

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

10. “Article 11’s elimination of formal writing requirements does not apply in all instances in which

the [Convention] governs".²⁷ 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 96.²⁸ Different views exist as to the effects of an article 96 reservation.²⁹ 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.³⁰ Under this view,³¹ 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.³² 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,³³ and the contract can only be modified in writing.³⁴

Notes

¹See *Kantonsgericht Zug*, Switzerland, 14 December 2009, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/2026.pdf>; U.S. District Court, Southern District of Ohio, United States, 26 March 2009, available on the Internet at <http://cisgw3.law.pace.edu/cases/090326u1.html>; U.S. District Court, Delaware, United States, 9 May 2008, available on the Internet at <http://cisgw3.law.pace.edu/cases/080509u1.html>; Regional Court Zilina, Slovakia, 25 October 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071025k1.html>; American Arbitration Association International Centre for Dispute Resolution, United States, 23 October 2007, available on the Internet at <http://cisgw3.law.pace.edu/cases/071023a5.html>; Regional Court in Zilina, Slovakia, 18 June 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070618k1.html>; Congrad County Court, Hungary, 6 June 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070606h1.html>; Corte di Cassazione, Italy, 16 May 2007, Unilex; District Court in Nitra, Slovakia, 9 March 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070309k1.html>; CLOUT case No. 847 [U.S. District Court, Minnesota, United States, 31 January 2007]; U.S. District Court, Southern District of New York, United States, 23 August 2006, available on the Internet at <http://cisgw3.law.pace.edu/cases/060823u1.html#i1>; District Court in Nitra, Slovakia, 27 June 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060627k1.html>; District Court in Nitra, Slovakia, 17 May 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060517k1.html>; Regional Court in Banska Bystrica, Slovakia, 10 May 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060510k1.html>; District Court in Nitra, Slovakia, 27 February 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060227k1.html>; *Kantonsgericht Freiburg*, Switzerland, 11 October 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/041011s1.html>; Bundesgericht, Switzerland, 4 August 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030804s1.html>; CLOUT case No. 576 [U.S. Circuit Court of Appeals (9th Circuit), United States, 5 May 2003]; *Cour d'appel de Liège*, Belgium, 28 April 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030428b1.html>; *Cour de Justice de Genève*, Switzerland, 13 September 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020913s1.html>; CLOUT case No. 537 [Oberlandesgericht Graz, Switzerland, 7 March 2002]; CLOUT case No. 424 [Oberster Gerichtshof, Austria, 9 March 2000], also available on the Internet at 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.

²See *Kantonsgericht Zug*, Switzerland, 14 December 2009, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/2026.pdf>; Corte di Cassazione, Italy, 16 May 2007, Unilex; *Rechtbank Arnhem*, the Netherlands, 17 January 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070117n1.html>; Corte di Cassazione, Italy, 13 October 2006, available on the Internet at www.cisg-online.ch/cisg/urteile/1404.pdf; *Landgericht Bamberg*, Germany, 13 April 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050413g1.html>; *Rechtbank Arnhem*, the Netherlands, 17 March 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040317n1.html>; *Cour d'appel de Grenoble*, France, 28 November 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021128f2.html>; Bundesgericht, Switzerland, 15 September 2000, Unilex.

³CLOUT case No. 95 [Zivilgericht Basel-Stadt, Switzerland, 21 December 1992] (see full text of the decision); see also Corte di Cassazione, Italy, 13 October 2006, available on the Internet at www.cisg-online.ch/cisg/urteile/1404.pdf; *Handelsgericht St. Gallen*, Switzerland, 29 April 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040429s1.html>; *Oberlandesgericht Hamm*, Germany, 12 November 2001, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/011112g1.html>.

⁴CLOUT case No. 828 [Hof 's-Hertogenbosch, the Netherlands, 2 January 2007]; U.S. District Court, Southern District of New York, United States, 23 August 2006, available on the Internet at <http://cisgw3.law.pace.edu/cases/060823u1.html#i1>; *Rechtbank van Koophandel Tongeren*, Belgium, 25 January 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050125b1.html>; Hof van Beroep Ghent, Belgium, 4 October 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/041004b1.html>; CLOUT case No. 633 [U.S. District Court, Southern District of New York, United States, 7 November 2001].

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

⁶See U.S. District Court, Eastern District of California, United States, 21 January 2010, available on the Internet at <http://cisgw3.law.pace.edu/cases/100121u1.html#i1>; *Rechtbank Breda*, the Netherlands, 16 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090116n1.html>; District Court in Dolny Kubin, Slovakia, 17 June 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080617k1.html>; U.S. District Court, Minnesota, United States, 16 June 2008, available on the Internet at <http://cisgw3.law.pace.edu/cases/080616u1.html>; Supreme Court of the Slovak Republic, Slovakia, 27 June 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070627k2.html>; District Court in Nitra, Slovakia, 27 June 2006,

English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060627k1.html>; District Court in Nitra, Slovakia, 17 May 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060517k1.html>; Rechtbank van Koophandel Tongeren, Belgium, 25 January 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050125b1.html>; CLOUT case No. 222 [U.S. Court of Appeals (11th 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 [Oberlandesgericht Köln, Germany, 22 February 1994], also available on the Internet at www.cisg-online.ch/cisg/urteile/127.htm.

⁷For this statement, see Rechtbank van Koophandel Tongeren, Belgium, 25 January 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050125b1.html>; CLOUT case No. 1017 [Hof van Beroep Ghent, Belgium, 15 May 2002], available in Dutch on the Internet at www.law.kuleuven.be/ipr/eng/cases/2002-05-15.html; CLOUT case No. 134 [Oberlandesgericht München, Germany, 8 March 1995].

⁸Kantonsgericht Zug, Switzerland, 14 December 2009, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/2026.pdf>.

⁹Ibid.

¹⁰Ibid.

¹¹Ibid.

¹²See Rechtbank Arnhem, the Netherlands, 17 January 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070117n1.html>; Compromex Arbitration, Mexico, 29 April 1996, Unilex, also available on the Internet at www.uc3m.es/cisg/rmexi2.htm; CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (see full text of the decision).

¹³CLOUT case No. 422 [Oberster Gerichtshof, Austria, 29 June 1999], *Zeitschrift für Rechtsvergleichung*, 2000, 33.

¹⁴CLOUT case No. 1017 [Hof van Beroep Ghent, Belgium, 15 May 2002], available in Dutch on the Internet at 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).

¹⁵Appellationshof Bern, Switzerland, 11 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040211s1.html>.

¹⁶United 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.

¹⁷U.S. Court of Appeals (3rd Circuit), United States, 21 July 2010, available on the Internet at <http://cisgw3.law.pace.edu/cases/100721u1.html>.

¹⁸See U.S. District Court, Southern District of Ohio, United States, 26 March 2009, available on the Internet at <http://cisgw3.law.pace.edu/cases/090326u1.html>; Kantonsgericht Freiburg, Switzerland, 11 October 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/041011s1.html>; Oberlandesgericht Rostock, Germany, 27 October 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/031027g1.html>; Cour d'appel de Liège, Belgium, 28 April 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030428b1.html>; Rechtbank van Koophandel Veurne, Belgium, 19 March 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030319b1.html>; Cour de Justice de Genève, Switzerland, 11 November 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021111s2.html>; Rechtbank van Koophandel Hasselt, Belgium, 22 May 2002, available on the Internet at www.law.kuleuven.ac.be/int/tradelaw/WK/2002-05-22.htm; Rechtbank van Koophandel Kortrijk, Belgium, 4 April 2001, available on the Internet at 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].

¹⁹CLOUT case No. 579 [U.S. District Court, Southern District of New York, United States, 10 May 2002].

²⁰See U.S. District Court, Colorado, United States, 6 July 2010, available on the Internet at <http://cisgw3.law.pace.edu/cases/100706u1.html>; U.S. District Court, Southern District of Ohio, United States, 26 March 2009, available on the Internet at <http://cisgw3.law.pace.edu/cases/090326u1.html>.

²¹CLOUT case No. 414 [U.S. District Court, Southern District of New York, United States, 8 August 2000] (see full text of the decision).

²²U.S. District Court, Eastern District of Pennsylvania, United States, 29 January 2010, available on the Internet at <http://cisgw3.law.pace.edu/cases/100129u1.html#ii>, at note 6.

²³See Rechtbank van Koophandel Kortrijk, Belgium, 4 April 2001, available on the Internet at www.law.kuleuven.be/ipr/eng/cases/2001-04-04.html; Landgericht Memmingen, 1 December 1993, available on the Internet at www.cisg-online.ch/cisg/urteile/71.htm.

²⁴Hof van Beroep Antwerpen, Belgium, 24 April 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060424b1.html>.

²⁵Rechtbank van Koophandel Hasselt, Belgium, 22 May 2002, available on the Internet at www.law.kuleuven.ac.be/int/tradelaw/WK/2002-05-22.htm.

²⁶See paragraphs 22 and 23 of the Digest for article 8.

²⁷U.S. Court of Appeals (3rd Circuit), United States, 21 July 2010, available on the Internet at <http://cisgw3.law.pace.edu/cases/100721u1.html>.

²⁸See U.S. Court of Appeals (3rd Circuit), United States, 21 July 2010, available on the Internet at <http://cisgw3.law.pace.edu/cases/100721u1.html>; Rechtbank van Koophandel, Hasselt, Belgium, 2 May 1995, available on the Internet at www.law.kuleuven.be/ipr/eng/cases/1995-05-02.html.

²⁹For a recent overview of the conflicting views, see U.S. Court of Appeals (3rd Circuit), United States, 21 July 2010, available on the Internet at <http://cisgw3.law.pace.edu/cases/100721u1.html>.

³⁰Rechtbank Rotterdam, the Netherlands, 12 July 2001, English translation available at <http://cisgw3.law.pace.edu/cases/010712n1.html>.

³¹See also U.S. Court of Appeals (3rd Circuit), United States, 21 July 2010, available on the Internet at <http://cisgw3.law.pace.edu/cases/100721u1.html>; Rechtbank Rotterdam, the Netherlands, 12 July 2001, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/010712n1.html>.

³²Rechtbank Rotterdam, the Netherlands, 12 July 2001, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/010712n1.html>; Hoge Raad, the Netherlands, 7 November 1997, Unilex; CLOUT case No. 52 [Fovárosi Biróság, Hungary 24 March 1992].

³³U.S. District Court, New Jersey, United States, 7 October 2008, available on the Internet at <http://cisgw3.law.pace.edu/cases/081007u1.html>; U.S. District Court, Southern District of Florida, United States, 19 May 2008, available on the Internet at <http://cisgw3.law.pace.edu/cases/080519u2.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 16 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040216r1.html>.

³⁴The High Arbitration Court of the Russian Federation, Russian Federation, 16 February 1998, English editorial remarks available on the Internet at <http://cisgw3.law.pace.edu/cases/980216r1.html>; Rechtbank van Koophandel Hasselt, Belgium, 2 May 1995, available on the Internet at 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 provision² 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 principle⁵ is not directly applicable where one party has its relevant place of business in a State that made a declaration under article 96,⁶ but different views exist as to the further effects of such a reservation.⁷ 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;⁸ instead, the applicable form requirements, if any, will depend on the rules of private international law of the forum. Under this approach,⁹ if private international law 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.¹⁰ The opposing view is that, if one party has its relevant place of business in an article 96 reservatory State, writing requirements apply.¹¹

Notes

¹For 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.

²See 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."

³Oberlandesgericht Linz, Austria, 23 January 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060123a3.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 16 March 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050316r1.html>; CLOUT case No. 651 [Tribunale di Padova, Italy, 11 January 2005]; CLOUT case No. 482 [Cour d'appel de Paris, France, 6 November 2001], also available on the Internet at <http://witez.jura.uni-sb.de/CISG/decisions/061101v.htm>; CLOUT case No. 433 [U.S. District Court, Northern District of California, United States, 27 July 2001]; CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000], expressly stating that article 12—as well as the Convention's final provisions—cannot be derogated from (see full text of the decision).

⁴See 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.

⁵For references in case law to this principle, see Kantonsgericht Zug, Switzerland, 14 December 2009, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/2026.pdf>; Corte di Cassazione, Italy, 16 May 2007, Unilex; Rechtbank Arnhem, the Netherlands, 17 January 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070117n1.html>; Corte di Cassazione, Italy, 13 October 2006, available on the Internet at www.cisg-online.ch/cisg/urteile/1404.pdf; Landgericht Bamberg, Germany, 13 April 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050413g1.html>; Rechtbank Arnhem, the Netherlands, 17 March 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040317n1.html>; Cour d'appel de Grenoble, France, 28 November 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021128f2.html>; Bundesgericht, Switzerland, 15 September 2000, Unilex.

⁶See U.S. Court of Appeals (3rd Circuit), United States, 21 July 2010, available on the Internet at <http://cisgw3.law.pace.edu/cases/100721u1.html>; Rechtbank van Koophandel Hasselt, Belgium, 2 May 1995, available on the Internet at www.law.kuleuven.be/ipr/eng/cases/1995-05-02.html.

⁷For a recent overview of the conflicting views, see U.S. Court of Appeals (3rd Circuit), United States, 21 July 2010, available on the Internet at <http://cisgw3.law.pace.edu/cases/100721u1.html>.

⁸Rechtbank Rotterdam, the Netherlands, 12 July 2001, English translation available at <http://cisgw3.law.pace.edu/cases/010712n1.html>.

⁹See also U.S. Court of Appeals (3rd Circuit), United States, 21 July 2010, available on the Internet at <http://cisgw3.law.pace.edu/cases/100721u1.html>; Rechtbank Rotterdam, the Netherlands, 12 July 2001, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/010712n1.html>.

¹⁰Rechtbank Rotterdam, the Netherlands, 12 July 2001, English translation available at <http://cisgw3.law.pace.edu/cases/010712n1.html>; Hoge Raad, the Netherlands, 7 November 1997, Unilex; CLOUT case No.52 [Fovárosi Biróság Hungary 24 March 1992].

¹¹U.S. District Court, New Jersey, United States, 7 October 2008, available on the Internet at <http://cisgw3.law.pace.edu/cases/081007u1.html>; U.S. District Court, Southern District of Florida, United States, 19 May 2008, available on the Internet at <http://cisgw3.law.pace.edu/cases/080519u2.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 16 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040216r1.html>; High Arbitration Court of the Russian Federation, Russian Federation, 16 February 1998, English editorial remarks available on the Internet at <http://cisgw3.law.pace.edu/cases/980216r1.html>; Rechtbank van Koophandel Hasselt, Belgium, 2 May 1995, available on the Internet at 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 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”,¹ and thus (in their form) can satisfy applicable writing requirements if such exist.² According to one court,³ the definition of “writing” under article 13 is flexible enough to also include email and other electronic means of communication.

2. According to one court, where the parties themselves agreed on what is to be understood as “writing”, the agreed-upon definition prevails.⁴ That same court also stated that, in order to interpret the parties’ agreement as to form, resort is to be had to the interpretive criteria set forth in article 8 of the Convention.⁵

APPLICATION

3. The provision has rarely been resorted 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.⁶ 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.⁷

4. A different court⁸ stated that where the parties have agreed that their contract must be in writing, this requirement is met where the contract meets the definition of “writing” as defined under article 13. That court also stated that where the parties agree on a writing requirement, that requirement constitutes a validity requirement rather than a requirement for the sole purpose of proving the contract.

Notes

¹For a reference to the text of article 13 of the Convention, see District Court in Komarno, Slovakia, 24 February 2009, <http://cisgw3.law.pace.edu/cases/090224k1.html>.

²See Tribunal of International Commercial Arbitration at the Ukraine Chamber of Commerce and Trade, Ukraine, 25 November 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021125u5.html> (relating to telefax communication); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 28 April 1995, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/950428r1.html> (referring to telex communications).

³Supreme Court, Egypt, 11 April 2006, available on the Internet at <http://cisgw3.law.pace.edu/cisg/text/060411e1arabic.pdf>.

⁴Oberlandesgericht Innsbruck, Austria, 18 December 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071218a3.html>.

⁵Ibid.

⁶See Oberster Gerichtshof, Austria, 2 July 1993, Unilex.

⁷Oberster Gerichtshof, Austria, 26 April 1997, available on the Internet at www.cisg.at/6_51296.htm.

⁸Kantonsgericht Zug, Switzerland, 14 December 2009, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/2026.pdf>.

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 (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 Another Court asserted that the provisions of the CISG on formation of contracts accord with generally accepted contract principles².

2. A number of decisions have applied the offer-acceptance paradigm of Part II to proposals to modify a sales contract (article 29)³ or to proposals to terminate the contract.⁴ Several decisions have distinguished between the conclusion of the sales contract and an agreement to arbitrate disputes arising under that contract⁵ or a forum selection clause⁶. However, some decisions have asserted that the CISG governs the substantive question of contract formation, including whether a forum selection clause or an arbitration agreement is part of the parties’ agreement⁷. For this reason, article 29 CISG—and thus also the rules on offer and acceptance—have been applied to determine the inclusion of forum or arbitration clauses after the conclusion of the contract⁸. Furthermore, some decisions have held that determining whether forum selection clauses were part of a contract would be the same under the CISG or under its special regulation.⁹

PERMITTED RESERVATIONS BY CONTRACTING STATES

3. A Contracting State may declare that it is not bound by Part II of the Sales Convention (article 92). Denmark, Finland, Norway and Sweden have made this declaration, although as this is written these States are considering withdrawing their article 92 declarations (see the Digest for article 92). 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)¹⁰ or the Convention (which will be the case if the applicable national law is that of a Contracting State).¹¹ 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.¹² 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.¹³ In the absence of a dispute about whether a contract had been concluded, one court declined to analyse the effect of article 92.¹⁴

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 (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 (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 (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, or when it is difficult to distinguish the offer and the acceptance.¹⁵ 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.¹⁶ And one court recognized that, apart from the rules on offer and acceptance, the parties can reach an agreement gradually, as a result of negotiations (with no clearly distinguishable offer and acceptance), on the basis of the principle of party autonomy set forth in article 6 CISG.¹⁷

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.¹⁸ Another court considered a similar claim but concluded that the party seeking to enforce a promise had not established its case.¹⁹

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 (article 4 (a)). Consequently, domestic law applicable by virtue of the rules of private international law will govern issues of validity. According to one decision the CISG does not regulate legal issues pertaining to the lack of mutual assent based on error or mistake.²⁰ [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 (article 11). Thus article 11 prevents the application of domestic law formality requirements to the conclusion of a contract under the CISG. See 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 (articles 12, 96). See also the Digest for article 12.

10. Part II is silent on the need for “consideration” or a “causa”; it has been asserted that consideration is not required by the CISG.²¹ 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.²²

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. Some Contracting States have adopted special legal rules on the enforceability of standard terms.²³ 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, as well as the rules on practices and usages in article 9, to determine whether the parties have agreed to incorporate standard terms into their contract.²⁴ One decision has relied on the general principles underlying the Convention to assess the incorporation of general conditions.²⁵ 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.²⁶ Nevertheless, several courts have applied the special national legal rules to determine the enforceability of standard terms in contracts otherwise governed by the Convention,²⁷ while several

others have noted that the standard terms would be enforceable under either national law or the Convention.²⁸ 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).²⁹ Unexpected clauses have been analysed as a matter of incorporation of standard terms (and not an issue of content) and thus to be assessed under article 8 CISG in conjunction with the principle of good faith.³⁰

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.³¹ One decision indicates that a mere note mentioning that standard terms were displayed at one of the party’s place of business and on its website would not suffice to include them in the contract.³² 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.³³ However another decision asserted that, when there is a clear indication on the face of a confirmation of the application of one party’s general terms and conditions, the other party had the right to ask that those terms be sent before signing the contract.³⁴ 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.³⁵ 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.³⁶ Several other decisions give no effect to standard terms when they are not translated into the language of the other party³⁷, or in the language of the contract;³⁸ except, as asserted in some decisions, when the general terms are in the English language,³⁹ or when circumstances require a party to procure a translation himself or to request that a translation be supplied to him.⁴⁰ Another decision refers to the “general principle” that ambiguities in the standard terms are to be interpreted against the party relying upon them.⁴¹

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 be considered an offer, or an acceptance that concludes 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.⁴² 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.⁴³ However, one court

found, without analysis of the scope of the trade usage, that the recipient was bound,⁴⁴ 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,⁴⁵ and when the applicable law recognized it.⁴⁶ 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.⁴⁷ 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.⁴⁸ Even if a letter of confirmation is not given full effect, it may be relevant for the evaluation of evidence of the parties' intent.⁴⁹

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 (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.⁵⁰

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.⁵¹ The issue may also arise when an agent acts for a principal.⁵² Whether a person is entitled to bring a legal action to enforce contractual obligations is a distinct issue.⁵³

Notes

¹U.S. District Court, Southern District of New York, United States, 10 May 2002 (201 F. Supp.2nd 236 at 283), available on the Internet at <http://cisgw3.law.pace.edu/cases/020510u1.html>.

²Canadian International Trade Tribunal, Canada, 6 October 2005 (Cherry Stix Ltd. v. President of the Canada Borders Services Agency), available on the Internet at www.unilex.info/case.cfm?pid=1&do=case&id=1081&step=FullText (also stating that those domestic principles are of guidance). See to this regard considering that case law interpreting contract formation under article 2 of the UCC might be helpful: CLOUT Case No. 699 [U.S. District Court, New York, United States, 19 March 2005, (Genpharm Inc. v. Pliva-Lachema A.S.)], available on the Internet at <http://cisgw3.law.pace.edu/cases/050319u1.html>.

³CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/981130s1.html> (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], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/960710s1.html> (see full text of the decision); 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], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/951213f1.html>; China International Economic & Trade Arbitration Commission [CIETAC], People's Republic of China, 29 March 1996, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/960329c2.html>.

⁴CLOUT case No. 120 [Oberlandesgericht Köln, Germany, 22 February 1994], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/940222g1.html>; China International Economic & Trade Arbitration Commission [CIETAC], People's Republic of China, 1 April 1993, Unilex, also available on the Internet at www.cisg.law.pace.edu/cgi-bin/isearch.

⁵Tribunal Supremo, Spain, 26 May 1998, available on the Internet at 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 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).

⁶Oberlandesgericht Celle, Germany, 24 July 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090724g1.html> (applying Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters); Kantonsgericht Zug, Switzerland, 11 December 2003, English abstract available on the Internet at <http://cisgw3.law.pace.edu/cases/031211s1.html>.

⁷U. S. District Court, Eastern District of California, 21 January 2010 (Golden Valley Grape Juice and Wine, LLC v. Centrisys Corporation), available on the Internet at <http://cisgw3.law.pace.edu/cases/100121u1.html> (in regard to a forum selection clause); Federal District Court, Alabama, United States, 31 March 2010 (Belcher-Robinson, L.L.C. v. Linamar Corporation), available on the Internet at <http://cisgw3.law.pace.edu/cases/100331u1.html>; Tribunale di Rovereto, Italy, 21 November 2007, Unilex; Netherlands Arbitration Institute (NAI) (interim award), the Netherlands, 10 February 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050210n1.html> (considering affirmatively an arbitration clause included in a standard term under CISG rules on formation and also considering as guiding principles in regard to the incorporation of standard terms both the Unidroit Principles of International Commercial Contracts and the Principles of European Contract Law); Rechtbank Arnhem, the Netherlands, 17 January 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070117n1.html> (arbitration clause in general terms and conditions not accepted, article 18 (1)); Gerechtshof's Hertogenbosch, the Netherlands, 19 November 1996, Unilex (forum selection clause); CLOUT Case No. 610 [U.S. District Court, North Dakota, United States, 19 February 1998] (PrimeWood, Inc. v. Roxan GmbH) (*obiter dicta* forum selection clause); Cámara Nacional de Apelaciones en lo Comercial (Sala D), Argentina, 22 February 2002 (arbitration clause relying on article 61.3).

⁸CLOUT Case No. 576 [U.S. Court of Appeals for the Ninth Circuit, United States, 5 May 2003 (Chateau des Charmes Wines Ltd. v. Sabaté USA, Sabaté S.A.)], available on the Internet at cisgw3.law.pace.edu/cases/030505u1.html; U.S. District Court, Delaware, United States, 9 May 2008 (Solae, LLC v. Hershey Canada, Inc.), available on the Internet at <http://cisgw3.law.pace.edu/cases/080509u1.html>; U.S. District Court, Minnesota, United States, 16 June 2008, (BTC-USA Corporation v. Novacare), available on the Internet at <http://cisgw3.law.pace.edu/cases/080616u1.html> (oral contract followed by general conditions with a forum selection clause, which were accepted by initialing them); Tribunale di Rovereto, Italy, 24 August 2006, English abstract available at <http://cisgw3.law.pace.edu/cases/060824i3.html>; Superior Court of Justice of Ontario, Canada, 28 October 2005 (Chateau des Charmes Wines Ltd v. Sabaté USA, Inc.), available on the Internet at www.unilex.info/case.cfm?pid=1&do=case&id=1080&step=FullText.

⁹Oberlandesgericht Dresden, Germany, 11 June 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070611g1.html> (both CISG and EU Regulation 44/2001 require that the other party can reasonably identify that standard terms are supposed to become part of a contract).

¹⁰Turku 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], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/950727g1.html> (transaction between Danish seller and German buyers; Danish law applicable); CLOUT Case No. 999 [Ad hoc Arbitral Tribunal, Denmark, 10 November 2000] (Canadian buyer and Danish seller, applicable law of the contract that of the seller's, i.e., Denmark). See also CLOUT case No. 419 [U.S. District Court, Northern District of Illinois, United States, 27 October 1998] (transaction between Swedish seller and U.S. buyer; although U.S. state law would apply to contract formation, the issue before the court was whether domestic parol evidence rule excluded testimony and article 8 (3)—in Part I—preempted that rule); and U.S. District Court, New Jersey, United States, 15 June 2005, (Valero Marketing v. Greeni Oy), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050615u1.html> (US buyer and Finnish seller, the Court found that the issue regarding the effects of the confirmation letter had to be settled in accordance with private international law rules which lead to domestic law of USA).

¹¹CLOUT case No. 309 [Østre Landsret, Denmark, 23 April 1998] (transaction between Danish seller and French buyer; French law applicable); CLOUT case No. 301 [Court of Arbitration of the International Chamber of Commerce, 1992 (Arbitral award No. 7585)], also available on Unilex (transaction between Italian seller and Finnish buyer; Italian law applicable).

¹²CLOUT case No. 134 [Oberlandesgericht München, Germany, 8 March 1995], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/950308g1.html> (contract between Finnish seller and German buyer).

¹³CLOUT 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, People's Republic of China, 1995, Unilex (negotiations between Chinese seller and Swedish buyer); CLOUT case No. 121 [Oberlandesgericht Frankfurt a.M., Germany, 4 March 1994], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/940304g1.html> (negotiations between German seller and Swedish buyer).

¹⁴CLOUT 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, Denmark, 15 February 2001, available on the Internet at www.cisg.dk/hdl5022001danskversion.htm (transaction between Italian seller and Danish buyer; issue of whether court had jurisdiction resolved by reference to article 31).

¹⁵Landgericht Hamburg, Germany, 26 November 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/031126g1.html> (analysing under Part II a situation where an exchange of different kinds of declarations was made by the parties).

¹⁶CLOUT case No. 134 [Oberlandesgericht München, Germany, 8 March 1995] English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/950308g1.html>.

¹⁷CLOUT case No. 1017 [Hof van Beroep Gent, 15 May 2002], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020515b1.html> (the parties agreed on several important matters relating to the anticipated contract in a letter of intent, which the court considered as an agreement in principle, and which prevented the parties from stepping back on the points on which the agreement had already been reached, committing them to keep on negotiating the pending terms).

¹⁸U.S. District Court, Southern District of New York, United States, 21 August 2002, 2002 Westlaw 1933881, 2002 US Dist. LEXIS 15442 (accepting that the 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”).

¹⁹CLOUT case No. 173 [Fovárosi Biróság, Hungary, 17 June 1997], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/970617h1.html> (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).

²⁰Court of Arbitration of the International Chamber of Commerce, 2000 (Arbitral award No. 10329), 29 *Yearbook Commercial Arbitration*, 108 (2004), available on the Internet at cisgw3.law.pace.edu/cases/000329i1.html (signature of a contract by error as regard payment of the goods to be sold); Oberlandesgericht Graf, Austria, 24 February 1999, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/990224a3.html> (question of internal consent left to domestic law).

²¹U.S. District Court, Western District of Pennsylvania, United States, 25 July 2008 (Norfolk Southern Railway Company v. Power Source Supply, Inc.), available at <http://cisgw3.law.pace.edu/cases/080725u1.html> (relying on article 29(1)).

²²U.S. District Court, Southern District 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”).

²³See, e.g., the German *Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen* (AGBG) [Unfair Contract Terms Act].

²⁴U.S. District Court, Eastern District of California, 21 January 2010 (*Golden Valley Grape Juice and Wine, LLC v. Centrisys Corporation*),

available on the Internet at <http://cisgw3.law.pace.edu/cases/100121u1.html> (an e-mail offer with an attachment containing the general conditions is part of the offer); 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); Arrondissementsrechtbank Hertogenbosch, the 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 [U.S. 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 article 8 to determine whether standard terms incorporated in contract); Oberlandesgericht München, Germany, 14 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090114g1.html> (applying article 8 to determine the incorporation of standard terms); CLOUT case No. 750 [Oberster Gerichtshof, Austria, 31 August 2005], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050831a3.html> (considering article 9 CISG for the incorporation of standard terms in the offer); CLOUT Case No. 534 [Oberster Gerichtshof, Austria, 17 December 2003], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/031217a3.html> (the incorporation of standard terms depends on whether the intent to apply the standard conditions to the contract is known or ought to have been known to the other party. Whether this is the case depends on the circumstances of the particular case). 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], English translation available on the Internet at (<http://cisgw3.law.pace.edu/cases/960206a3.html>) (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); Cour d'appel de Paris, France, 7 October 2009, English translation available at www.cisg-france.org/decisions/071009v.htm (limitation of liability clause not considered accepted by application of article 18); Tribunal Commercial Nivelles, Belgium, 19 September 1995, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/950919b1.html> (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); Tribunale di Rovereto, Italy, 21 November 2007, Unilex (under CISG, standard terms are deemed validly incorporated into a contract if they are printed on the reverse side of a document embodying the proposal, provided that the front side of such document makes an express reference to those terms); Arrondissementsrechtbank Rotterdam, the Netherlands, 14 October 1999, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/991014n1.html> (stating that the mere printing of the general terms and conditions on the reverse of the invoice, with a reference to them on the face of the invoice, is not sufficient, since there was no acceptance); CLOUT case No. 821 [Oberlandesgericht Karlsruhe, Germany, 20 July 2004], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040720g1.html> (incorporation of standard terms governed by CISG and included in the contract because the terms and conditions were imprinted on the reverse of the order forms (also in the German language), each with a clear reference to them on the face of the forms); CLOUT Case No. 592 [Oberlandesgericht Düsseldorf, Germany, 30 January 2004], English translation available at <http://cisgw3.law.pace.edu/cases/040130g1.html> (the CISG requirement that the offeror's intention to incorporate standard terms in the contract be recognizable by the party receiving the offer was not met in the present case) (see full text of the decision) See also Rechtbank van Koophandel Hasselt, Belgium, 18 October 1995, UNILEX (seller's standard terms in invoice sent with goods a unilateral act to which buyer had not consented); to the same effect, CLOUT case No. 827 [Gerechtshof 's Hertogenbosch, Netherlands, 29 May 2007], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070529n1.html>; CLOUT Case No. 617 [U.S. District Court, Northern District of California, United States, 30 January 2001, (*Supermicro Computer v. Digitechnic*)], available on the Internet at <http://cisgw3.law.pace.edu/cases/010130u1.html> (holding that a disclaimer clause might not be valid if the addressee could prove that he was not aware of it, because the CISG requires a "mirror-image" approach to contract negotiations that allows the court to inquire into the subjective intent of the parties). Contra, Arrondissementsrechtbank Arnhem, the Netherlands, 17 March 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040317n1.html> (because the application of general conditions is not expressly dealt with in the mentioned provisions of the CISG, the question has to be answered under the law applicable by virtue of Private International Law (article 7 (2) of the CISG)). 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.

²⁵Rechtbank Breda, Netherlands, 27 February 2008, Unilex (under articles 8, 9 and 18 (1), the invoice that contained the general terms was accepted when the buyer paid).

²⁶CLOUT 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; Oberlandesgericht Düsseldorf, Germany, 25 July 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030725g1.html> (the CISG, and particularly articles 14, 8 and 9 CISG, exclusively governs the incorporation of standard business terms into a contract); Oberlandesgericht Celle, Germany, 24 July 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090724g1.html>; Landgericht Landshut, Germany, 12 June 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080612g2.html>).

²⁷CLOUT case No. 318 [Oberlandesgericht Celle, Germany, 2 September 1998], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/980902g1.html> (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).

²⁸CLOUT case No. 361 [Oberlandesgericht Braunschweig, Germany, 28 October 1999], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/991028g1.html> (standard terms enforceable under both applicable domestic law and the Convention) (see full text of the decision); Gerechtshof 's-Hertogenbosch, the Netherlands, 24 April 1996, Unilex (standard terms enforceable under both applicable domestic law and the Convention).

²⁹CLOUT 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); U.S. District Court, Washington, United States, 13 April 2006 (Barbara Berry, S.A. de C.V. v. Ken M. Spooner Farms, Inc.), available on the Internet at <http://cisgw3.law.pace.edu/cases/060413u1.html> (holding that the validity of a disclaimer clause was not governed by the CISG, citing article 4, and was deemed valid under domestic law; also stating that, under the CISG, oral agreements followed by written confirmation containing additional terms are binding unless timely objected to); U.S. District Court, Western District of Pennsylvania, United States, 25 July 2008 (Norfolk Southern Railway Company v. Power Source Supply, Inc.), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080725u1.html> (relying on article 29(1); validity of disclaimer clause deemed governed by domestic law by virtue of article 4 (a), under which the disclaimer was considered valid); Amtsgericht Nordhorn, Germany, 14 June 1994, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/940614g1.html> (standard terms on back of form incorporated in contract but validity of terms to be determined under domestic law); Landgericht Landshut, Germany, 12 June 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080612g2.html> (incorporation of standard terms governed by the CISG but content of standard terms has to be assessed according to national law (article 4)). To the same effect: Landgericht Neubrandenburg, Germany, 3 August 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050803g1.html> (also stating that standard terms of business that do not appear until the issuance of invoices consequently remain irrelevant); CLOUT Case No. 819 [Landgericht Trier, Germany, 8 January 2004], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040108g1.html>; Oberlandesgericht Linz, Austria, 23 March 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050323a3.html> (stating that the CISG does not contain provisions governing the substantive validity of standard terms (a set off ban); however, the standard of appropriateness needs to be adjusted according to unified law and internationally accepted usages; the clause was considered in line with international standards since under both German and Austrian Law it was valid, and because it did not conflict with the principle of good faith underlying the CISG). See also CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/970625g1.html> (citing both article 4 and article 14 ff., court leaves open the issue whether standard terms were enforceable). See generally paragraph 1 of the Digest for article 4.

³⁰Landgericht Landshut, Germany, 12 June 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080612g2.html> (deeming a conformation order that changed the negotiated place of performance an unexpected clause, in part because it was printed in small type). But see Oberlandesgericht Düsseldorf, Germany, 21 April 2004, English translation available at <http://cisgw3.law.pace.edu/cases/040421g3.html> (surprising terms under domestic law).

³¹CLOUT 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); Arrondissementsrechtbank Hertogenbosch, the 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); Oberlandesgericht Düsseldorf, Germany, 25 July 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030725g1.html> (a mere reference in an order to standard terms of purchase is not sufficient for their incorporation in the contract); Arrondissementsrechtbank Utrecht, the Netherlands, 21 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090121n1.html>; Landgericht Landshut, Germany, 12 June 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080612g2.html> (holding that standard terms were not incorporated into the contract, since the contract merely referred to them); Oberlandesgericht Oldenburg, Germany, 20 December 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071220g1.html>; Tribunale di Rovereto, Italy, 21 November 2007, on Unilex.

³²Oberlandesgericht Celle, Germany, 24 July 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090724g1.html> (stating that the effective inclusion of standard terms and conditions requires not only that the offeror's intention that he wants to include his standard terms and conditions in the contract be apparent to the recipient; in addition, the CISG requires the user of standard terms and conditions to transmit the text or make it available in another way).

³³CLOUT case No. 445 [Bundesgerichtshof, Germany, 31 October 2001], also in *Neue Juristische Wochenschrift*, 2001, 370 ff.; Oberlandesgericht Düsseldorf, Germany, 25 July 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030725g1.html>; Oberlandesgericht Celle, Germany, 24 July 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090724g1.html>; Oberlandesgericht München, Germany, 14 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090114g1.html>.

³⁴China International Economic and Trade Arbitration Commission (CIETAC), People's Republic of China, 15 September 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050915c1.html> (holding that a party failed to do so but balancing this failure with the other's party obligation to send the general terms and conditions).

³⁵CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002 (see full text of the decision) (approving reasoning of lower appeals court).

³⁶CLOUT case No. 132 [Oberlandesgericht Hamm, Germany, 8 February 1995] (discussion of "language risk" in light of article 8).

³⁷CLOUT 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 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); CLOUT Case No. 490 [Cour d'appel de Paris, France, 10 September 2003], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030910f1.html> (where seller of textiles was German and buyer was French, standard terms in German language were not incorporated into the contract because of buyer's ignorance of the German language).

³⁸Oberlandesgericht Düsseldorf, Germany, 21 April 2004, English translation available at <http://cisgw3.law.pace.edu/cases/040421g3.html> (where contract was in English, general conditions in German were not included unless it could be proven that the addressee understood German); Oberster Gerichtshof, Austria, 29 November 2005, English excerpts available on the Internet at <http://cisgw3.law.pace.edu/cases/051129a3.html> (general conditions in German, same language as the negotiations).

³⁹Oberlandesgericht München, Germany, 14 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090114g1.html> (in a contract between a German seller and an Italian buyer, the validity of the agreement deemed not frustrated by the fact that the general terms and conditions were written in English rather than the language of the negotiations; it was irrelevant whether the other party spoke that language). For decisions considering German, as well as English and French, as international languages: Oberlandesgericht Linz, Austria, 8 August 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050808a3.html> (in a case where the parties were from Italy and Germany, and the general conditions were in German, which was also the language of the negotiation of the contract).

⁴⁰CLOUT case No. 750 [Oberster Gerichtshof, Austria, 31 August 2005], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050831a3.html> (general terms and conditions were in German and not in the language of the contract (English); in analyzing whether terms were incorporated into the contract, the court took into account the duration, intensity, and importance of the business relationship and the extent of use of the language in the relevant cultural area (see full text of the decision). The preceding decision followed: CLOUT case No. 534 [Oberster Gerichtshof, Austria, 17 December 2003], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/031217a3.html> (taking into account both that the buyer on several occasions referred in English to its German written standard terms printed on the backside of its documents, and the economic importance of the contract); Oberlandesgericht Innsbruck, Germany, 1 February 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050201a3.html>.

⁴¹CLOUT case No. 165 [Oberlandesgericht Oldenburg, Germany, 1 February 1995] (see full text of the decision).

⁴²CLOUT case No. 931 [Bundesgericht, Switzerland, 5 April 2005], English translation available on the Internet at: <http://cisgw3.law.pace.edu/cases/050405s1.html> (confirmation of purchase was considered to be a counteroffer since it materially altered the terms of the offer; counteroffer was accepted by the seller); CLOUT Case No. 490 [Cour d'appel de Paris, France, 10 September 2003], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030910f1.html> (confirmation order deemed an offer which was never accepted); CLOUT case No.880 [Tribunal Cantonal Vaud, Switzerland, 11 April 2002], English translation available on the Internet at: <http://cisgw3.law.pace.edu/cases/020411s1.html> (confirmation order deemed an acceptance); Landgericht Düsseldorf, Germany, 25 August 1994, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/940825g1.html> (holding that the requirement of immediacy was not fulfilled by a letter of confirmation because it was not sent immediately after negotiations; also asserting that the institution of letters of confirmation were alien to the CISG).

⁴³CLOUT case No. 347 [Oberlandesgericht Dresden, Germany, 9 July 1998]; CLOUT case No. 276 [Oberlandesgericht Frankfurt a.M., Germany, 5 July 1995], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/950705g1.html>. 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"); Kantonsgericht Freiburg, Switzerland, 11 October 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/041011s1.html> (holding that, under the CISG, as opposed to Swiss law, a document of confirmation, which is not objected to, is considered an acceptance only if it corresponds with international trade practices or usages between the parties).

⁴⁴Oberlandesgericht Saarbrücken, Germany, 14 February 2001, Unilex.

⁴⁵CLOUT case No. 95 [Zivilgericht Basel-Stadt, Switzerland, 21 December 1992], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/921221s1.html>. See also: Landesgericht Kiel, Germany, 27 July 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040727g1.html> (commercial usage can be assumed if the parties have their places of business in countries whose laws contain rules on commercial letters of confirmation and on the legal effects of silence on the part of the addressee).

⁴⁶Landesgericht Kiel, Germany, 27 July 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040727g1.html> (relevant law concerning the legal effects of silence on the part of the addressee is that applicable at the addressee's seat).

⁴⁷CLOUT case No. 292 [Oberlandesgericht Saarbrücken, Germany, 13 January 1993], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/930113g1.html> (citing article 18 (1)) (see full text of the decision).

⁴⁸Arrondissementsrechtbank 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).

⁴⁹CLOUT case No. 276 [Oberlandesgericht Frankfurt a.M., Germany, 5 July 1995]; Landgericht Neubrandenburg, Germany, 3 August 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050803g1.html>.

⁵⁰See, e.g., CLOUT case No. 417 [U.S. District Court, Northern District of Illinois, United States, 7 December 1999] (article 8), full text available at <http://cisgw3.law.pace.edu/cases/991207u1.html> (see full text of the decision); CLOUT case No. 306 [Oberster Gerichtshof, Austria, 11 March 1999] (citing article 8 (1)); CLOUT case No. 413 [U.S. District Court, Southern District of New York, United States, 6 April 1998] (article 8 (3)), available at <http://cisgw3.law.pace.edu/cases/980406u1.html> (see full text of the decision); Hoge Raad, the Netherlands, 7 November 1997, Unilex (articles 8 (1), (2)); CLOUT case No. 189 [Oberster Gerichtshof, Austria, 20 March 1997] (article 8 (2)); Landgericht Oldenburg, Germany, 28 February 1996, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/960228g1.html> (article 8 (2)); CLOUT case No. 334 [Obergericht des Kantons Thurgau, Switzerland, 19 December 1995], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/951219s1.html> (article 8 (1), (2) and (3)); CLOUT case No. 308 [Federal Court of Australia, Australia, 28 April 1995] (articles 8 (1), (2)) (see full text of the decision); CLOUT case No. 106 [Oberster Gerichtshof, Austria, 10 November 1994] (article 8 (2), (3)); CLOUT case No. 23 [U.S. District Court, Southern District of New York, United States, 14 April 1992] (article 8 (3)); CLOUT case No. 227 [Oberlandesgericht Hamm Germany, 22 September 1992], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/920922g1.html> (article 8 (2)).

⁵¹Oberlandesgericht Frankfurt, Germany, 30 August 2000, Unilex (citing article 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 www.cisg-online.ch/cisg/urteile/583.htm (citing article 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 articles 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 article 8, commission refers to surrounding circumstances to identify seller); CLOUT case No. 330 [Handelsgericht des Kantons St. Gallen, Switzerland, 5 December 1995] English translation available on the Internet at (<http://cisgw3.law.pace.edu/cases/951205s1.html>) (citing article 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 article 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).

⁵²CLOUT case No. 239 [Oberster Gerichtshof, Austria, 18 June 1997] (remanded 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] English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/951219s1.html> (citing article 8, court concludes manufacturer rather than its distributor was party to contract); CLOUT case No. 5 [Landgericht Hamburg, Germany, 26 September 1990], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/900926g1.html> (citing article 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).

⁵³See, 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. According to one decision, article 14 is not relevant in determining applicability of the CISG.³

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.⁴

ADDRESSEES OF PROPOSAL

3. The first sentence of paragraph (1) focuses on proposals that are addressed to one or more specific persons.⁵ Under the applicable law of agency, the maker of an offer addressed to an agent may be bound by the acceptance of the principal.⁶ 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.⁷ The CISG also applies in determining who is the offeror, and whether a party transmitting an offer is a mere intermediary.⁸ In addition, one court has resorted to article 14 to analyse whether there was an acceptance of the subrogation of one of the parties to the contract.⁹

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 8.¹⁰ 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.¹¹ 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”.¹² 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.¹³ 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.¹⁴ 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.¹⁵ On the other hand, no offer was deemed to exist where the proposal reserved the power of the party to refuse to enter into the contract, by using the expression “non-committed”.¹⁶ Furthermore, one decision considered that the sending of samples is not an offer.¹⁷

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.¹⁸ 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.¹⁹ Decisions have applied the rules of interpretation in article 8 to determine whether a communication or act is sufficiently definite.²⁰ 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.²¹

7. Article 14 does not require that the proposal include all the terms of the proposed contract.²² If, for example, the parties have not agreed on the place of delivery,²³ the period of delivery,²⁴ or the mode of transportation²⁵ 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.²⁶ Another court assumed that an offer to purchase monoammoniumphosphate with the specification “P 205 52 per cent +/- 1 per cent, min 51 per cent” was a sufficiently definite indication of the quality of the goods ordered.²⁷ If, however, the parties are unable to agree on the quality of the goods ordered there is no contract.²⁸

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.²⁹ 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;³⁰ “an order up to 250,000 pounds” of soy lecithin;³¹ “a greater number of Chinchilla furs” because the buyer accepted the furs tendered without objection;³² “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;³³ “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;³⁴ “10,000 tons +/-5 per cent”.³⁵ 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.³⁶ 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.³⁷

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.³⁸

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;³⁹ no specific agreement on price where a course of dealing between the parties established the price;⁴⁰ a proposal that prices were to be adjusted to reflect market prices;⁴¹ 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;⁴² an agreement that the price of sour cherries would be “be fixed during the season,” which was determinable under the standard of article 55.⁴³

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;⁴⁴ an agreement that the parties would agree on the price of additional goods ten days before the new year.⁴⁵

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.⁴⁶

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”.⁴⁷ 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 55.⁴⁸ 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).⁴⁹ 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.⁵⁰ 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 aeroplane engines concerning which the parties were negotiating.⁵¹ 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.⁵²

16. Some decisions, however, have taken a more liberal approach by considering that a sales contract can be validly concluded without any reference to the price (express or implicit) by the parties; the price is then objectively determined by reference to a general price, i.e., under the article 55 formula.⁵³ Or, in the case of urgent transactions, if no price is mentioned it is assumed that the parties intended the price currently charged for such goods.⁵⁴

17. 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.⁵⁵ Another court has considered the application of article 55 in a situation where the term “to be fixed during the season” was interpreted as an agreement that the parties wanted to agree on the price at a later point in time; it was held that this would not affect the validity of the contract since, according to article 6 CISG, the parties are entitled to exclude the requirements of article 14 (1) sentence two and to disregard the minimum requirements for an offer.⁵⁶ In this regard the type of goods (for example seasonal goods) as well as the agreed quantity play an important role, while other factors, such as the price for reselling the goods, might be of less importance.⁵⁷

Notes

¹CLOUT case No. 121 [Oberlandesgericht Frankfurt, Germany, 4 March 1994], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/940304g1.html> (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], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/970320a3.html> (stating that a counter-offer must satisfy the conditions of article 14).

²CLOUT 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).

³Supreme Court, Poland, 27 January 2006, Unilex (CISG governs a long-term framework contract).

⁴CLOUT case No. 429 [Oberlandesgericht Frankfurt, Germany, 30 August 2000], English translation available on the internet at <http://cisgw3.law.pace.edu/cases/000830g1.html>; Oberlandesgericht Stuttgart, Germany, 28 February 2000, available on the Internet at 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], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/900926g1.html>. See paragraph 15 of the Digest for Part II.

⁵Oberlandesgericht Graz, Austria, 15 June 2000, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/000615a3.html> (an offer addressed to two companies, both are entitled to accept it).

⁶CLOUT case No. 239 [Oberster Gerichtshof, Austria, 18 June 1997], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/970618a3.html> (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); Oberlandesgericht Graz, Austria, 15 June 2000, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/000615a3.html> (CISG does not provide for questions of representation and thus national law applies); Oberlandesgericht Graf, Austria, 24 February 1999, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/990224a3.html> (agency issues governed by domestic law); Landgericht Landshut, Germany, 12 June 2008, English Translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080612g2.html> (the CISG does not provide for the transfer of authority); and Hangzhou Intermediate People’s Court, People’s Republic of China, 2002, English abstract, available on the Internet at <http://cisgw3.law.pace.edu/cases/020002c1.html>.

⁷CLOUT case No. 334 [Obergericht des Kantons Thurgau, Switzerland, 19 December 1995] (interpreting the statements and acts of the parties in accordance with article 8, manufacturer rather than its dealer was party to contract; manufacturer had, however, assigned its claim for breach to dealer).

⁸Bundesgericht, Switzerland, 4 August 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030804s1.html> (the seller bought the goods (wine) from a third party who sent the goods directly to the buyer. The Court, considering article 14 (1) and article 8 CISG, stated that delivering wine was not an implied offer to contract with the buyer, and thus the acceptance of the delivery does not amount to an acceptance as concerns the claimed deference of contractual rights).

⁹Oberlandesgericht Frankfurt, Germany, 6 October 2004, English Translation available on the Internet at <http://cisgw3.law.pace.edu/cases/041006g1.html> (no consent was found and the fact that the seller kept to the business relationship with the buyer as a whole cannot be considered as consent to the unmodified contractual rights and obligations from the buyer’s predecessor).

¹⁰CLOUT case No. 215 [Bezirksgericht St. Gallen, Switzerland, 3 July 1997] (see full text of the decision).

¹¹CLOUT case No. 215 [Bezirksgericht St. Gallen, Switzerland, 3 July 1997] (stressing the parties’ conduct subsequent to conclusion of the contract).

¹²CLOUT case No. 330 [Handelsgericht des Kantons St. Gallen, Switzerland, 5 December 1995] (see full text of the decision). Regional Court in Zilina, Slovakia, 18 June 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070618k1.html> (the court considered that there was no contract according to CISG because it lacked of quantity and type of the goods, however there was performance by sending the goods and paying for them and thus one of the contracts deemed to be concluded).

¹³Oberlandesgericht Hamburg, Germany, 4 July 1997, Unilex (“We can only propose you”; “First truck could be delivered”).

¹⁴CLOUT case No. 131 [Landgericht München, Germany, 8 February 1995], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/950208g4.html>.

¹⁵CLOUT case No. 217 [Handelsgericht des Kantons Aargau Switzerland 26 September 1997].

¹⁶Kantonsgericht Zug, Switzerland, 2 December 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/041202s1.html> (the use of the term “non-committed” normally negates the intention of the offeror to be bound).

¹⁷Hof van Beroep, Belgium, 8 November 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/041108b1.html>.

¹⁸CLOUT case No. 417 [U.S. District Court, Northern District of Illinois, United States, 7 December 1999], full text available on the Internet at <http://cisgw3.law.pace.edu/cases/991207u1.html> (conditions satisfied); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 13 April 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060413r1.html> (conditions in the document that the parties designated a contract were qualified by the Tribunal as an agreement to generally agreed terms for future contracts [i.e., a framework agreement], since it lacked essential terms of the contracts, which were further stipulated by the parties in separate agreements named Supplements to the contract); China International Economic & Trade Arbitration Commission [CIETAC], People’s Republic of China, 23 April 1997, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/970423c2.html> (For a contract to be concluded under the CISG, article 14 CISG needs to be satisfied; additional items such as “Detailed Color & Equipment Attached” but not included does not prevent contract formation as they would have to be clarified during the performance of the contract. Since agreement on those issues never took place, the Arbitral tribunal held that both parties were liable for the indefinite description of the goods, and the non-performance of the contract, and thus ordered the termination of the contract in accordance with article 81.2 CISG); Fovárosi Biróság, Hungary, 10 January 1992, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/920110h1.html> (deeming an offer specific as regards the quantity of the engines offered, depending on the unilateral choice of the buyer in regard to the kind of aircraft it would purchase as well as whether an option was exercised; decision reversed on other grounds: CLOUT case No. 53 [Légfelsőbb Biróság, Hungary, 25 September 1992]).

¹⁹CLOUT case No. 52 [Fovárosi Biróság, Hungary, 24 March 1992] (citing article 9 (1), court concludes that prior sales transactions between the parties supplied details unstated in telephone order); Oberlandesgericht Hamm, Germany, 12 November 2001, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/011112g1.html> (deliveries on short notice formed part of the practices that the parties had established between themselves); CLOUT case No. 777 [U.S. Court of Appeals for the Eleventh Circuit, United States, 12 September 2006] (Treibacher Industrie, A.G. v. Allegheny Technologies, Inc.), available on the Internet at <http://cisgw3.law.pace.edu/cases/060912u1.html> (articles 8 and 9 used to interpret one of the terms in the contract, i.e., an agreement to sell a fixed quantity of materials at a fixed price for delivery to “consignment”, which according to the practices established between the parties, and contrary to the industry usage, required the buyer to accept and pay for all of the goods specified in each contract).

²⁰CLOUT Case No. 1034 [Audiencia Provincial de Cáceres, Spain, 14 July 2010], text available on the Internet at <http://turan.uc3m.es/uc3m/dpto/PR/dppr03/cisg/sespan84.htm>.

²¹CLOUT case No. 330 [Handelsgericht des Kantons St. Gallen, Switzerland, 5 December 1995] (fax “ordering” software devices sufficiently definite notwithstanding failure to mention price).

²²See CLOUT case No. 131 [Landgericht München, Germany, 8 February 1995], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/950208g4.html>. (Contract for purchase of software enforceable even if parties intended further agreement with respect to use of software).

²³CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000] (article 31 (a) applies when buyer was unable to establish parties agreed on different place).

²⁴Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russia Federation, 13 April 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060413r1.html> (resorting to article 33 CISG).

²⁵CLOUT case No. 261 [Bezirksgericht der Sanne, Switzerland, 20 February 1997] (English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/970220s1.html>) (seller deemed authorized to arrange for transportation under article 32 (2) when buyer was unable to establish that parties agreed on transport by truck).

²⁶CLOUT case No. 106 [Oberster Gerichtshof, Austria, 10 November 1994].

²⁷CLOUT case No. 189 [Oberster Gerichtshof, Austria, 20 March 1997] (remanding to lower court to determine whether an apparently contradictory response was sufficiently definite).

²⁸CLOUT case No. 135 [Oberlandesgericht Frankfurt a.M., Germany 31 March 1995] (no agreement on quality of test tubes).

²⁹Kantonsgericht Zug, Switzerland, 2 December 2004, English Translation available on the Internet at <http://cisgw3.law.pace.edu/cases/041202s1.html> (a negotiation with no precise agreement on quantity is not a proposal under article 14.1 CISG).

³⁰CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/960206a3.html> (see full text of the decision).

³¹U.S. District Court, Delaware, United States, 9 May 2008 (Solae, LLC v. Hershey Canada, Inc.), available on the Internet at <http://cisgw3.law.pace.edu/cases/080509u1.html>.

³²CLOUT case No. 106 [Oberster Gerichtshof, Austria, 10 November 1994] (citing article 8 (2), (3)) (see full text of the decision).

³³Landgericht Oldenburg, Germany, 28 February 1996, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/960228g1.html> (citing article 8 (2)).

³⁴Oberlandesgericht Hamburg, Germany, 4 July 1997, Unilex.

³⁵CLOUT case No. 189 [Oberster Gerichtshof, Austria, 20 March 1997] (remanding to lower court to determine whether other elements of acceptance were sufficiently definite).

³⁶CLOUT case No. 579 [U.S. District Court, Southern District of New York, United States, 10 May 2002, *Federal Supplement (2nd Series)* 201, 236 ff. confirmed by CLOUT case No. 576 [U.S. District Court, Southern District of New York, United States, 21 August 2002] (Geneva Pharmaceuticals Tech. Corp. v. Barr Labs. Inc.), available on the Internet at <http://cisgw3.law.pace.edu/cases/020821u1.html>.

³⁷CLOUT case No. 291 [Oberlandesgericht Frankfurt a.M., Germany, 23 May 1995].

³⁸CLOUT case No. 187 [U.S.D. District Court, Southern District of New York, United States, 23 July 1997] (see full text of the decision).

³⁹CLOUT case No. 106 [Oberster Gerichtshof, Austria, 10 November 1994].

⁴⁰CLOUT case No. 52 [Fovárosi Biróság, Hungary, 24 March 1992] (citing article 9 (1)).

⁴¹CLOUT case No. 155 [Cour de Cassation, France, 4 January 1995], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/950104f1.html> *affirming*, CLOUT case No. 158 [Cour d'appel, Paris, France, 22 April 1992] (“à revoir en fonction de la baisse du marché”).

⁴²ICC award No. 8324, 1995, Unilex.

⁴³Landgericht Neubrandenburg, Germany, 3 August 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050803g1.html>.

⁴⁴CLOUT case No. 53 [Legfelsőbb Biróság, Hungary, 25 September 1992] (see full text of the decision, available on the Internet at <http://cisgw3.law.pace.edu/cases/920925h1.html>).

⁴⁵CLOUT case No. 139 [Tribunal of International Commercial Arbitration of 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-Practicheskij Commentarij* 1997, No. 21 [46–54] (citing article 8).

⁴⁶CLOUT case No. 330 [Handelsgericht des Kantons St. Gallen, Switzerland, 5 December 1995] (fax “ordering” software devices sufficiently definite notwithstanding failure to mention price).

⁴⁷Supreme Court, Czech Republic, 25 June 2008, English translation available on the Internet at (<http://cisgw3.law.pace.edu/cases/080625cz.html>) (considering that article 55 concerning the purchase price is applicable only on the condition that the agreement has been validly concluded).

⁴⁸See also Oberlandesgericht Frankfurt a.M., Germany, 15 March 1996, available on the Internet at 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, Germany, 23 July 1997] (no citation to articles 14 or 55); CLOUT case No. 410 [Landgericht Alsfeld, Germany, 12 May 1995], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/950512g1.html> (court indicates that buyer did not allege circumstances from which a lower price could establish a contract in accordance with article 55) (see full text of the decision); Kantonsgericht Freiburg, Switzerland, 11 October 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/041011s1.html> (a proposal with no price is not an offer); Tribunal of International Commercial Arbitration at the Russian Chamber of Commerce and Industry, Russian Federation, 9 April 2004, English Translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040409r1.html> (a clause about the price requiring it to be agreed within a settled period of time (yet, it was not agreed), served as a foundation for the declaration that the contract was not concluded for the following period, citing articles 14 and 55 as well as domestic law).

⁴⁹CLOUT 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).

⁵⁰CLOUT 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).

⁵¹CLOUT case No. 53 [Legfelsőbb Biróság, Hungary, 25 September 1992], English translation available on the Internet at (<http://cisgw3.law.pace.edu/cases/920925h1.html>) (transaction between a U.S. seller and a Hungarian buyer).

⁵²CLOUT case No. 151 [Cour d’appel, Grenoble, France, 26 February 1995], English translation available on the Internet at (<http://cisgw3.law.pace.edu/cases/950426f1.html>) (buyer had accepted invoices with higher than market prices).

⁵³CLOUT No. 934 [Tribunal Cantonal Valais, Switzerland, 27 April 2007], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070427s1.html> (*obiter dicta*).

⁵⁴CLOUT No. 934 [Tribunal Cantonal Valais, Switzerland, 27 April 2007], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070427s1.html> (considering in a sale of an oven that if the buyer passes an order for generic goods which he never acquired before and without any reference to a price, this order constitutes an invitation to bid and the seller makes an offer to contract by delivering the goods and the buyer accepts this offer by performing an act).

⁵⁵CLOUT 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).

⁵⁶Landgericht Neubrandenburg, Germany, 3 August 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050803g1.html> (sour cherries, applying article 55 to the several possible interpretations: determinable price under article 14 or open price contract under article 55; but also finding that the price was impliedly agreed upon the acceptance of the first partial delivery and the invoice issued).

⁵⁷Landgericht Neubrandenburg, Germany, 3 August 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050803g1.html> (see full text of the decision).

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

¹CLOUT Case No. 430 [Oberlandesgericht München, Germany, 3 December 1999], see also Unilex (citing articles 14, 15(1), 18 and 23); CLOUT case No. 308 [Federal Court of Australia, 28 April 1995], excerpt available on the Internet at <http://cisgw3.law.pace.edu/cases/950428a2.html> (citing articles 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 articles 14, 15 and 18 when finding that parties had concluded a contract); Landgericht Oldenburg, Germany, 28 February 1996, Unilex (citing articles 14, 15, 16, 17, 18 and 19); CLOUT case No. 291 [Oberlandesgericht Frankfurt a.M., Germany, 23 May 1995] (citing articles 14, 15, 18 (3), 19 (1) and (3)) (see full text of the decision); Landgericht Krefeld, Germany, 24 November 1992, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/921124g1.html> (citing articles 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. A small number of cases refer to paragraph (1) article 16 CISG.²

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 and as a general principle applicable to revocation of a declaration of avoidance of the contract.⁴ 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).⁵

Notes

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

²See Higher Court in Ljubljana, Slovenia, 9 April 2008, English editorial remarks available on the Internet at <http://cisgw3.law.pace.edu/cases/080409sv.html> (holding that an attempted revocation of the offer which was received by the offeree after the acceptance was dispatched (and also after the offeree had shipped the goods) was ineffective under article 16 (1)). The following decision cites article 16, but because the case did not involve irrevocability of the offer—see paragraph 2—the citation effectively refers to paragraph (1) of article 16: Landgericht Oldenburg, Germany, 28 February 1996, English translation available on the Internet at (<http://cisgw3.law.pace.edu/cases/960228g1.html>) (citing articles 14, 15, 16, 17, 18 and 19).

³CLOUT case No. 94 [Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft-Wien, Austria, 15 June 1994], see also Unilex (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).

⁴CLOUT Case No. 999 [Ad hoc Arbitral Tribunal, Denmark, 10 November 2000] (also citing article 7(2)).

⁵CLOUT case No. 579 [U.S. District Court, Southern District of New York, United States, 10 May 2002] (201 Federal Supplement (2nd Series) 236 (finding limited to scope of promissory estoppel as claimed by buyer). Confirmed by CLOUT case No. 576 [U.S. District Court, Southern District of New York, United States, 21 August 2002] (Geneva Pharmaceuticals Tech. Corp. v. Barr Labs. Inc.), available on the Internet at <http://cisgw3.law.pace.edu/cases/020821u1.html>.

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

¹Landgericht Oldenburg, Germany, 28 February 1996, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/960228g1.html> (citing articles 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 contract² 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 A party who negotiates or accepts an offer in a foreign language must bear the risk of understanding the intricacies of the meaning of the foreign language (article 8).⁹

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 19.¹⁰ Whether a counter-offer is accepted is then determined by article 18.¹¹

6. An indication of assent may be made by an oral or written statement¹² or by conduct.¹³ The following conduct has been found to indicate assent: buyer's acceptance of goods;¹⁴ buyer's payment for the goods;¹⁵ a third party's taking delivery of goods;¹⁶ delivery of the goods by the seller;¹⁷ seller's acceptance of a bank guarantee, and the start-up of production of the goods;¹⁸ issuance of letter of credit;¹⁹ signing invoices to be sent to a financial institution with a request that it finance the purchase;²⁰ sending a reference letter to an administrative agency;²¹ drawing up and issuing a pro forma invoice;²² sending invoices and packing lists;²³ a handshake by the representatives of the parties;²⁴ sealing and sending back the purchase order;²⁵ issuing a bank transfer as an advance payment;²⁶ cashing a cheque;²⁷ holding on to seller's confirmation of the order and continuously requesting the seller to effect an expeditious delivery.²⁸

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.²⁹ 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.³⁰ 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.³¹ 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.³² 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.³³ One court has asserted that, in its treatment of silence, article 18 represents the principle of good faith, which is also one of the general principles of the CISG.³⁴ A good faith obligation to provide a response to a proposal has also been suggested in some decisions, provided certain circumstances are met.³⁵ Furthermore, a court has considered invalid a statement of an offeror deeming the addressee's silence as acceptance.³⁶

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.³⁷

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.³⁸

10. Article 18 (2) provides a special rule for oral offers: an oral offer must be accepted immediately unless the circumstances indicate otherwise.³⁹ One court has indicated that oral offers include conversations face-to-face, by telephone, or by any other technical or electronic means of communication that allows immediate oral contact; but not statements captured in a material medium such as, notably, a fax.⁴⁰

EFFECTIVENESS BY PERFORMANCE OF ACT

11. 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.⁴¹ 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.⁴²

Notes

¹CLOUT case No. 291 [Oberlandesgericht Frankfurt a.M., Germany, 23 May 1995], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/950523g1.html> (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).

²CLOUT 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], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/980709g1.html> (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).

³CLOUT case No. 120 [Oberlandesgericht Köln, Germany, 22 February 1994] (acceptance of proposal to terminate contract); China International Economic and Trade Arbitration Commission, People's Republic of China, 1 April 1993, Unilex (acceptance of proposal to terminate), also available on the Internet at www.cisg.law.pace.edu/cgi-bin/isearch.

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

⁵CLOUT case No. 429 [Oberlandesgericht Frankfurt a.M., Germany, 30 August 2000], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/000830g1.html> (sending of promissory note interpreted as not an acceptance).

⁶See, 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 [U.S. District Court, Southern District of New York, United States, 14 April 1992] (course of dealing created duty to respond to offer).

⁷CLOUT case No. 173 [Fovárosi Biróság, Hungary, 17 June 1997], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/970617h1.html> (no clear agreement to extend distribution contract); CLOUT case No. 135 [Oberlandesgericht Frankfurt a.M., Germany, 31 March 1995], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/950331g1.html> (correspondence did not reach agreement on quality of glass ordered).

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

⁹Landgericht Kassel, Germany, 15 February 1996, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/960215g2.html> (stating that, if the offeree is uncertain of the meaning of an offer in a foreign language, the offeree must raise objections in order to get sufficient certainty, make further inquiries, or use a professional translation).

¹⁰CLOUT case No. 242 [Cour de Cassation, France, 16 July 1998], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/980716f1.html> (reply with different jurisdiction clause was a material modification under article 19 and therefore a counter-offer); CLOUT case No. 227 [Oberlandesgericht Hamm, Germany, 22 September 1992] (reply with reference to “unwrapped” bacon was a counter-offer under article 19 and not an acceptance under article 18).

¹¹CLOUT 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).

¹²CLOUT case No. 395 [Tribunal Supremo, Spain, 28 January 2000] (faxed unconditional acceptance); CLOUT case No. 308 [Federal Court of Australia, Australia, 8 April 1995] (statement in offeree’s letter interpreted as an acceptance) (see full text of the decision); CLOUT case No. 845 [U.S. District Court, Michigan, United States, 28 September 2007 (Easom Automation Systems, Inc. v. Thyssenkrupp Fabco, Corp.)], available on the Internet at <http://cisgw3.law.pace.edu/cases/070928u1.html> (oral acceptance of the offer).

¹³CLOUT case No. 429 [Oberlandesgericht Frankfurt a.M., Germany, 30 August 2000], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/000830g1.html> (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).

¹⁴CLOUT 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).

¹⁵Rechtbank Breda, the Netherlands, 27 February 2008, Unilex (holding that an invoice that contained general terms and conditions was accepted when the buyer paid in accordance with article 18(1)); Supreme Court, Ukraine, 11 December 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071211u5.html>; Tribunal de grande instance de Strasbourg, France, 22 December 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061222f1.html>.

¹⁶CLOUT 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).

¹⁷Landgericht Bamberg, Germany, 13 April 2005, English Translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050413g1.html>; CLOUT Case No. 1029 [Cour d’appel de Rennes, France, 27 May 2008], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080527f1.html>.

¹⁸Court of Arbitration of the International Chamber of Commerce, December 1998 (Arbitral award No. 8908), available on the Internet at www.unilex.info/case.cfm?pid=1&do=case&id=401&step=FullText (tacit acceptance of the ordered pipes).

¹⁹CLOUT case No. 417 [U.S. District Court, Northern District of Illinois, United States, 7 December 1999], available on the Internet at <http://cisgw3.law.pace.edu/cases/991207u1.html> (pleading stated a cause of action by alleging facts showing parties concluded contract of sale); Comisión para la protección del comercio exterior de Mexico (Compromex), Mexico, 29 April 1996, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/960429m1.html> (letter of credit proved that the contract had been concluded).

²⁰Cámara Nacional de Apelaciones en lo Comercial, Argentina, 14 October 1993, Unilex.

²¹CLOUT case No. 579 [U.S. District Court, Southern District of New York, United States, 10 May 2002], 201 *Federal Supplement (2nd Series)* 236 ff.

²²District Court in Nitra, Slovakia, 27 February 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060227k1.html>.

²³U.S. District Court, Southern District of Florida, United States 19 May 2008, (Zhejiang Shaoxing Yongli Printing and Dyeing Co., Ltd v. Microflock Textile Group Corporation), available on the Internet at <http://cisgw3.law.pace.edu/cases/080519u2.html>.

²⁴Oberlandesgericht Innsbruck, Austria, 18 December 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071218a3.html>.

²⁵China International Economic and Trade Arbitration Commission, People’s Republic of China, 9 November 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051109c1.html>; Commercial Court Tongeren, Belgium, 25 January 2005, English Translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050125b1.html>.

²⁶Handelsgericht St. Gallen, Switzerland, 29 April 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040429s1.html>; CLOUT case No. 1033 [Audiencia Provincial de Murcia, Spain, 15 July 2010], English translation available on the Internet at <http://turan.uc3m.es/uc3m/dpto/PR/dppr03/cisg/trad85.htm>.

²⁷Landgericht Kassel, Germany, 15 February 1996, English translation available on the Internet at (<http://cisgw3.law.pace.edu/cases/960215g2.html>) (citing article 18(3)).

²⁸Landgericht München, Germany, 6 April 2000, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/000406g1.html> (stating that the buyer therefore had concurrently implicitly accepted the seller’s offer).

²⁹CLOUT 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], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/980127f1.html> (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).

³⁰CLOUT case No. 313 [Cour d’appel, Grenoble, France, 21 October 1999], English translation available on the Internet at (<http://cisgw3.law.pace.edu/cases/991021f1.html>) (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); Finally, a contract cannot be assumed on the basis of silence to a letter of acknowledgement—as the Court cannot establish such a practice at the seat of the [Buyer] and as the [Seller] neither alleged nor proved such a practice at the seat of the [Buyer]—as the [Seller] failed to prove that there had been such a practice between the parties; Landgericht Gera, Germany, 29 June 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060629g1.html> (silence to a letter of acknowledgement does not amount to

an acceptance of the contract unless practice exists at the seat of the addressee or such a practice between the parties exists); *Rechtbank van Koophandel Veurne*, Belgium, 19 March 2003, English translation available on the Internet at (<http://cisgw3.law.pace.edu/cases/030319b1.html>) (silence amounts as acceptance whether an agreement of the parties, practices or a usage exist).

³¹*Gerechtshof 's-Hertogenbosch*, Netherlands, 24 April 1996, *Unilex*; CLOUT case No. 347 [Oberlandesgericht Dresden, Germany 9 July 1998], English translation available on the Internet at (<http://cisgw3.law.pace.edu/cases/980709g1.html>) (buyer who sent commercial letter of confirmation did not establish existence of international usage by which silence constitutes assent); *Rechtbank van Koophandel Veurne*, Belgium, 19 March 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030319b1.html> (silence amounts as acceptance whether an agreement of the parties, practices or a usage exist); *Bezirksgericht Sissach*, Switzerland, 5 November 1998, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/981105s1.html> (also considering the effect of silence as an acceptance if an agreement exists). 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).

³²CLOUT case No. 23 [U.S. 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).

³³CLOUT case No. 120 [Oberlandesgericht Köln, Germany, 22 February 1994].

³⁴*Bezirksgericht Sissach*, Switzerland, 5 November 1998, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/981105s1.html> (considering silence as an acceptance of a letter of confirmation by application of the good faith principle, taking into account that the seller's accepted an attached check and did not object to the letter of confirmation within a reasonable time).

³⁵CLOUT case No. 1017 [Hof van Beroep Gent, 15 May 2002], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020515b1.html> (stating, in regard to the annulment of an order, that "to make a smooth (international) trade possible, a trader is undoubtedly obliged to protest immediately, or within a reasonable period of time, if he receives a letter/communication to which he cannot agree. This obligation simply is the consequence of the positive meaning attached in trade to silence when receiving all kinds of documents, correspondence and so on").

³⁶*Rechtbank van Koophandel Veurne*, Belgium, 19 March 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030319b1.html> ("if we do not receive a reply within seven days from today's date we shall assume that you agree with the content of the purchase agreement").

³⁷CLOUT 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).

³⁸Arbitration Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7844), *The ICC International Court of Arbitration Bulletin* (Nov. 1995) 72-73.

³⁹Cour de Justice de Genève, Switzerland, 13 September 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020913s1.html> (stating, in the case of an oral offer, that the CISG provides that the offer does not survive a telephone conversation).

⁴⁰Cour de Justice de Genève, Switzerland, 13 September 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020913s1.html>.

⁴¹U.S. Court of International Trade, United States, 7 April 2010 (*Pasta Zara S.p.A. v. United States, American Italian Pasta Company, et al.*), available on the Internet at <http://cisgw3.law.pace.edu/cases/100407u1.html> (indicating that the production of goods against the purchase orders might create binding agreements to sell, but such a course of dealing ought to be proven by evidence revealing the entire circumstances in which the parties, in practice, arranged the transactions); U.S. District Court, Eastern District of California, 21 January 2010 (*Golden Valley Grape Juice and Wine, LLC v. Centrisys Corporation et al.*), available on the Internet at <http://cisgw3.law.pace.edu/cases/100121u1.html> (the terms of the offer were accepted when the buyer resold the goods to a third party). CLOUT Case No. 715 [China International Economic & Trade Arbitration Commission, People's Republic of China, 15 December 1997], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/971215c1.html> (indicating that, in a sales transaction between Chinese and Korean parties, pursuant to article 18 (3) CISG loading the goods could have in fact meant acceptance, provided two requirements were met: (1) a notification of acceptance is sent to the buyer in writing since, when signing the CISG, China had made a reservation preserving its writing requirements (article 96 CISG); and (2) such notification of acceptance is sent within a reasonable time. The Arbitration Tribunal concluded that neither the seller's shipping activity, nor the shipping notice it sent five days after shipment constituted a valid acceptance).

⁴²CLOUT case No. 416 [Minnesota [State] District Court, United States 9 March 1999] (if Convention was applicable, party accepted by performance under article 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 article 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 article 18 (3), but because the delivered quantity differed materially from the order the acceptance was a counter-offer under article 19); Supreme Court, Czech Republic, 29 March 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060329cz.html>; Landgericht Kassel, Germany, 15 February 1996, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/960215g2.html> (citing article 18(3)).

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.² 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.³

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;⁴ payment;⁵ quality and quantity of the goods;⁶ place and time of delivery;⁷ settlement of disputes.⁸ 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.⁹ A matter not included in that list has also been considered a material alteration: a requirement that the buyer be accepted by the seller's credit insurance.¹⁰ Thus the list in article 19 (3) has been considered non-exhaustive.¹¹

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.¹² 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.¹³ Modifications that are irrelevant to the addressee have also been considered immaterial.¹⁴

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;¹⁵ seller's standard term reserving the right to change the date of delivery;¹⁶ altering the shipping time but not the delivery time;¹⁷ a modification of the transport costs;¹⁸ an adjustment of the quantity of the goods in each delivery without changing the total amount;¹⁹ a change in a bank guarantee;²⁰ a request that buyer draft a formal termination agreement;²¹ a request to treat the contract confidential until the parties make a joint public announcement;²² a provision requiring that buyer reject delivered goods within a stated period;²³ deletion of a liability clause for contract violations.²⁴

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"). A conflict exists when the two sets of terms differ partially, and also when one of the standard terms does not contain provisions on an issue expressly included in the other's set of standard terms.²⁵ Several decisions conclude that the parties' performance notwithstanding partial contradiction between their standard terms established an enforceable contract.²⁶ 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) conflict²⁷ with the default rules of the Convention

(knock-out rule); several other decisions give effect to the standard terms of the last person to make an offer or counter-offer that is then deemed accepted by subsequent performance by the other party (last-shot rule).²⁸ 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.²⁹

Notes

¹But see CLOUT case No. 189 [Oberster Gerichtshof, Austria, 20 March 1997], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/970320a3.html> (the reply must satisfy the definiteness requirements of article 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. Hangzhou Intermediate People's Court, People's Republic of China, 2002, English abstract available on the Internet at <http://cisgw3.law.pace.edu/cases/020002c1.html> (a counteroffer was found under article 19(1) when the intention manifested was to continue negotiations, as indicated by a response such as, "We herein confirm the above provisions; details will be discussed on 11 June").

²U.S. District Court, Southern District of Ohio, United States, 26 March 2009 (Miami Valley Paper, LLC v. Lebbing Engineering & Consulting GmbH), available on the Internet at <http://cisgw3.law.pace.edu/cases/090326u1.html> (asserting in general that the CISG follows the mirror image rule).

³See, 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], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/970617h1.html> (no clear agreement to extend distribution contract).

⁴CLOUT case No. 424 [Oberster Gerichtshof, Austria, 9 March 2000], available on the Internet at <http://cisgw3.law.pace.edu/cases/000309a3.html> CLOUT case No. 417 [U.S. District Court, Northern District of Illinois, United States, 7 December 1999], available on the Internet at <http://cisgw3.law.pace.edu/cases/991207u1.html> (see full text of the decision); CLOUT case No. 193 [Handelsgericht des Kantons Zürich, Switzerland, 10 July 1996], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/960710s1.html> (see full text of the decision); CLOUT case No. 1029 [Cour d'appel de Rennes, France, 27 May 2008], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080527f1.html>.

⁵CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (time of payment) (see full text of the decision); Court of Arbitration of the International Chamber of Commerce, 2000 (Arbitral award No. 10329), *Yearbook Commercial Arbitration*, vol.29, p.108 (2004), available on the Internet at (<http://cisgw3.law.pace.edu/cases/000329i1.html> (the offer stipulated condition of payment was "by irrevocable L/C at 90 days B/L date". The acceptance included the hand-written payment condition "*E. O. remissa diretta*" [sic] (translation: "and/or directly payment 90 days"); the arbitrator considered this a material modification).

⁶CLOUT case No. 291 [Oberlandesgericht Frankfurt a.M., Germany, 23 May 1995] English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/950523g1.html> (delivery of fewer pairs of shoes than ordered); CLOUT case No. 135 [Oberlandesgericht Frankfurt a.M., Germany, 31 March 1995] English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/950331g1.html> (difference in quality of glass test tubes); CLOUT case No. 121 [Oberlandesgericht Frankfurt a.M., Germany, 4 March 1994], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/940304g1.html> (acceptance ordering additional kinds of screws); CLOUT case No. 227 [Oberlandesgericht Hamm, Germany 22 September 1992], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/920922g1.html> (acceptance offering to sell "unwrapped" rather than wrapped bacon); Kantonsgericht Zug, Switzerland, 2 December 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/041202s1.html> (counter-offering 15 tons instead of 5 tons of food dextrose); Hof van Beroep, Belgium, 8 November 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/041108b1.html> (offer for fabric "Kabul" was counter-offered for fabric "Lima", which was not accepted by the buyer; confirming Rechtbank van Koophandel Oudenaarde, Belgium, 10 July 2001, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/010710b1.html>).

⁷CLOUT case No. 413 [U.S. District Court, Southern District of New York, United States, 6 April 1998] (delivery terms), available on the Internet at <http://cisgw3.law.pace.edu/cases/980406u1.html> (see full text of the decision); CLOUT case No. 133 [Oberlandesgericht München, Germany, 8 February 1995], available on the Internet at <http://cisgw3.law.pace.edu/cases/950208g1.html> (time of delivery) (see full text of the decision); Landgericht München, Germany, 6 April 2000, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/000406g1.html> (delivery dates); Juzgado de Primera Instancia Mexico DF, Mexico, 5 October 2004 (change in time and place of delivery constituted a counter-offer which was not accepted and thus the contract was not concluded), affirmed by Primer Tribunal Colegiado en Materia Civil del Primer Circuito. Amparo Directo Civil (127/2005), 10 March 2005, Mexico, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050310m1.html>.

⁸CLOUT case No. 242 [Cour de Cassation, France, 16 July 1998], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/980716f1.html> (differing choice-of-forum clause); CLOUT case No. 23 [U.S. District Court, Southern District of New York, United States, 14 April 1992] (inclusion of arbitration clause) (see full text of the decision); U.S. District Court, Alabama, United States, 31 March 2010 (Belcher-Robinson, L.L.C. v. Linamar Corporation, et al.), available on the Internet at <http://cisgw3.law.pace.edu/cases/100331u1.html> (inclusion of a forum selection clause considered in a motion to dismiss because article 19 (3) does not clearly identify whether a forum-selection clause materially alters the offer; court suggests it is more reasonable to treat the clause as a material alteration); Oberlandesgericht Frankfurt, Germany, 26 June 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060626g1.html> (indicating that an arbitration clause is always a material alteration under article 19 (3)).

⁹CLOUT case No. 189 [Oberster Gerichtshof, Austria, 20 March 1997].

¹⁰CLOUT case No. 537 [Oberlandesgericht Graz, Austria, 7 March 2002], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020307a3.html> (stating that a condition that was put forward by one party during the negotiations between the parties may be considered as a usage under article 9 CISG impliedly applicable to the contract, provided the other party knew or could not have been unaware of that condition (article 8(1) CISG); as a result of the non-fulfilment of the condition the contract was not considered to be concluded).

¹¹U.S. District Court, Alabama, United States, 31 March 2010 (Belcher-Robinson, L.L.C. v. Linamar Corporation, et al.), available on the Internet at <http://cisgw3.law.pace.edu/cases/100331u1.html>.

¹²Tribunal Commercial de Nivelles, Belgium, 19 September 1995, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/950919b1.html>; China International Economic & Trade Arbitration Commission, People's Republic of China, 10 June 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020610c1.html> (indicating that an objection to a non-material modification made 5 days after the purported acceptance was not timely).

¹³CLOUT case No. 189 [Oberster Gerichtshof, Austria, 20 March 1997].

¹⁴China International Economic & Trade Arbitration Commission, People's Republic of China, 10 June 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020610c1.html> (the offer was modified by the buyer, who deleted the clause providing that "a ship with the age of above 20 years is not accepted", and changed the language "carriage paid" to "carriage is paid according to charter-party"; the alteration was considered non-material given the FOB character of the contract).

¹⁵CLOUT case No. 158 [Cour d'appel, Paris, France 22 April 1992], *affirmed*, CLOUT case No. 155 [Cour de Cassation, France, 4 January 1995], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/950104f1.html> (affirming with no specific reference to the Convention) (see full text of the decision).

¹⁶CLOUT case No. 362 [Oberlandesgericht Naumburg, Germany, 27 April 1999], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/990427g1.html> (delivery clause interpreted in accordance with article 33 (c)).

¹⁷China International Economic and Trade Arbitration Commission, People's Republic of China, 17 September 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030917c1.html> (the shipping time in the offer—April, May, and June 2001—was changed to April, May, June, and July, also deleting "2001"; the Arbitral Tribunal held that the delivery time still began in April, and changing the delivery time from three deliveries to four deliveries did not necessarily mean a material alteration of the delivery time; with regard to the deletion of "year 2001," the Tribunal held that it should have been reasonably understood that the contract would be performed within 2001, because the buyer was still able to buy that year's goods from the seller).

¹⁸Oberlandesgericht Koblenz, Germany, 4 October 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021004g1.html> (the general terms and conditions of the seller stated "transport was to cost DM 9 per square metre"; buyer's answer added the clause "conditions of delivery: free on building site").

¹⁹China International Economic and Trade Arbitration Commission, People's Republic of China, 17 September 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030917c1.html> (change from three deliveries with 500 tons, 700 tons, and 800 tons in each delivery, to four deliveries with 500 tons in each delivery; modifications considered to be immaterial because there was no change in total quantity).

²⁰Arbitration Court of the International Chamber of Commerce, December 1998 (Arbitral award No. 8908), available on the Internet at www.unilex.info/case.cfm?pid=1&do=case&id=401&step=FullText (one party issued a bank guarantee which was not mentioned in the contract, which constituted counter-offer, the other party's acceptance without reserve of the bank guarantee, and the alleged start-up of production of the ordered pipes amounted to a tacit acceptance).

²¹China International Economic & Trade Arbitration Commission, People's Republic of China, 1 April 1993 (Arbitral award No. 75), Unilex, also available on the Internet at <http://cisgw3.law.pace.edu/cases/930401c1.html>.

²²Fováosi Biróság, Budapest, Hungary, 10 January 1992, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/920110hl.html>, *reversed on other grounds*, CLOUT case No. 53 [Legfelsőbb Biróság, Hungary, 25 September 1992].

²³CLOUT case No. 50 [Landgericht Baden-Baden, Germany, 14 August 1991], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/910814g1.html> (see full text of the decision).

²⁴China International Economic and Trade Arbitration Commission, People's Republic of China, 17 September 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030917c1.html> (holding that the deleted clause was not equivalent to an alteration of the extent of one party's liability to the other, as listed in article 19(3) CISG).

²⁵Oberlandesgericht Linz, Austria, 23 March 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050323a3.html>.

²⁶Bundesgerichtshof, Germany, 9 January 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020109g1.html>; Landgericht Kehl, Germany, 6 October 1995, Unilex (parties' performance established that parties either derogated from article 19 or waived enforcement of conflicting standard terms); CLOUT case No. 232 [Oberlandesgericht München, Germany, 11 March 1998], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/980311g1.html> (buyer accepted standard terms that differed from its offer by performing the contract) (see full text of the decision).

²⁷Bundesgerichtshof, Germany, 9 January 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020109g1.html>; Landgericht Kehl, Germany, 6 October 1995, Unilex (enforcing only standard terms that the parties had in common); Oberlandesgericht Düsseldorf, Germany, 25 July 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030725g1.html> (reaching the same result by applying the last-shot rule).

²⁸CLOUT case No. 232 [Oberlandesgericht München, Germany, 11 March 1998], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/980311g1.html> (by performing, buyer accepted standard terms that differed from its offer); Arbitration Court of the International Chamber of Commerce, 1997 (Arbitral award No. 8611), 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, the Netherlands, 19 November 1996, Unilex, (seller's acceptance stated that its standard terms applied only to the extent they did not conflict with buyer's standard terms); Oberlandesgericht Linz, Austria, 23 March 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050323a3.html> (after applying the last-shot rule, the Court stated that the buyer accepted the seller's offer, and thus the incorporation of its standard terms, by accepting the goods and paying part of the price); U.S. District Court, Western District of Pennsylvania, United States, 25 July 2008 (Norfolk Southern Railway Company v. Power Source Supply, Inc.), available on the Internet at <http://cisgw3.law.pace.edu/cases/080725u1.html> (battle of the forms under article 19); CLOUT Case No. 824, [Oberlandesgericht Köln, Germany, 24 May 2006], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060524g1.html> (in a sale of goods between a seller from the Netherlands and a German buyer, where the two exchanged their general terms and conditions the court held that the interpretation of contracts with conflicting terms leads to the application of at least those provisions which do not differ; beyond this, the so-called "last-shot doctrine" applies, according to which the governing terms are those which were exchanged last; in this case, the two alternatives led to the same result since the choice of forum clause was the same).

²⁹CLOUT 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

¹Court of Arbitration of the International Chamber of Commerce, 1994 (Arbitral award No. 7844), *The ICC International Court of Arbitration Bulletin* (Nov. 1995) 72-73 (reference to Austrian law and the Convention for proposition that a late acceptance would not be effective unless the offeror notified the offeree without delay that the acceptance is effective). The same result was reached in Landgericht Hamburg, Germany, 21 December 2001, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/011221g1.html> (although the contract was considered concluded because it had been performed by the seller’s shipment of the goods and their acceptance by the buyer).

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 According to some decisions, the burden of proof concerning the conclusion of the contract lies on the party which relies on fact of such conclusion.⁴

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.⁵

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.⁶

Notes

¹Comisión 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 was not applicable because of an article 92 declaration, court held that the contract was concluded by the 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 article 8, established parties' intent to conclude contract) (see full text of the decision).

²Fovárosi Biróság (Metropolitan Court), Budapest, Hungary, 10 January 1992, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/920110hl.html>, *reversed on other grounds*, CLOUT case No. 53 [Legfelsőbb Biróság, Hungary 25 September 1992] (see full text of the decision).

³Arbitration Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7844), *The ICC International Court of Arbitration Bulletin* (Nov. 1995) 72-73.

⁴Cour d'appel Liège, Belgium, 28 April 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030428b1.html> (contract deemed not concluded due to insufficient proof); Kantonsgericht Freiburg, Switzerland, 11 October 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/041011s1.html>; Oberlandesgericht Dresden, Germany, 10 November 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061110g1.html> (a party who wants to derive legal consequences from the existence of a declaration of intent has the burden of proving the dispatch and reception of the notice; the case discussed the reception of a revocation of the offer and concluded that it was not proven by the sender that the addressee received it). See also Regional Court in Zilina, Slovakia, 29 March 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040329k1.html> (initially holding that the seller failed to prove conclusion of a valid contract of sale and failed to prove delivery of the goods, and thus the seller did not justify its claim for payment of the purchase price), reversed because new evidence was presented to confirm the existence of an international sales contract: Supreme Court, Slovakia, 20 October 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051020k1.html>, case returned to the court of first instance, which then confirmed the existence of the contract. Regional Court in Zilina, Slovakia, 8 January 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070108k1.html> (contract deemed concluded under article 23 CISG). Also see Regional Court in Zilina,

Slovakia, 18 June 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070618k1.html> (holding that one of the contracts was not concluded because bills of lading submitted by the seller contained no signature or seal of the buyer and the seller did not submit any other evidence proving delivery of the goods or the conclusion of a tacit contract).

⁵ 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 article 18 (1)); CLOUT case No. 203 [Cour d'appel, Paris, France 13 December 1995] (confirmation letter sent after contract concluded was not accepted).

⁶ CLOUT case No. 308 [Federal Court of Australia, 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 One court has stated that a declaration of intent reaches its addressee if it has entered the addressee’s sphere in a fashion that affords the latter the possibility, under normal circumstances, to become aware of the content of the declaration; and that any facilities set up by the addressee for the receipt of declarations of intent form part of the addressee’s sphere of control.³

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.⁴ Several other courts have given no effect to standard terms when they were not translated into the language of the other party.⁵

Notes

¹But see Arrondissementsrechtbank, Amsterdam, Netherlands, 5 October 1994, Unilex (applying article 24 to seller’s letter responding to buyer’s explanation for partial rejection of the goods).

²Arrondissementsrechtbank, Amsterdam, the 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).

³Oberlandesgericht Dresden, Germany, 10 November 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061110g1.html> (a notice sent by fax to an office shared by the addressee with other companies).

⁴CLOUT case No. 132 [Oberlandesgericht Hamm, Germany, 8 February 1995], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/950208g3.html> (discussion of “language risk” in light of article 8).

⁵CLOUT case No. 345 [Landgericht Heilbronn, Germany, 15 September 1997], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/970915g1.html> (standard terms stated exclusively in German language sent by a German seller to an Italian buyer); Amtsgericht Kehl, Germany, 6 October 1995, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/951006g1.html> (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). Although the CISG does not expressly provide general rules regarding the burden of proof, it has been held that the Convention (rather than national law) governs the question of who bears the burden of proving the elements of provisions in Part III: the CISG, it was held, includes general principles providing that the party who claims a right based on a rule has the burden to prove that the rule’s conditions are met, and the other party has to prove the facts that exclude or are opposed to the application of the rule.¹

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 (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 (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 (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.

Notes

¹See, e.g., CLOUT case No. 934 [Tribunal Cantonal Valais, Switzerland, 27 April 2007] (see full text of the decision). For other decisions addressing this burden of proof issue see the Digest for article 4 paragraphs 4-7 and the discussion of burden of proof in the digests for particular articles of the Convention (e.g., the Digest for article 35, paragraph 14).

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, 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 However, the court in that case stated three exceptions from the rule that the seller need not know and observe the standards in the buyer’s country: (1) if the standards in both countries are identical; (2) if, before or at the conclusion of the contract, the buyer informed the seller about these standards, or (3) if due to special circumstances the seller knew or should have known about those standards because, e.g., it particularly specialised in exports to the buyer’s country or has a branch office there.⁴

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. It has been expressly stated that the time of the conclusion of contract is the relevant time.⁵

5. It has been held that the term fundamental breach should be interpreted restrictively.⁶ One court found that, in case of doubt, no fundamental breach should be accepted.⁷

SPECIFIC FUNDAMENTAL BREACH SITUATIONS

6. 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-delivery⁸ as well as in the case of final non-payment.⁹ 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.¹⁰ 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.¹¹ 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.¹² Similarly, a buyer's refusal to open a letter of credit as required by the contract has been held to constitute a fundamental breach.¹³ 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)).¹⁴

7. 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.¹⁵ Only when the time for performance is of essential importance either because it is so contracted¹⁶ or due to evident circumstances (e.g., seasonal goods)¹⁷ does delay as such amount to a fundamental breach.¹⁸ Although the date for delivery may be fixed by agreement, a short delay may nonetheless not constitute a fundamental breach if the buyer's interests are not impaired.¹⁹ But even if a delay in delivery, in payment, or in taking delivery of the goods is generally not deemed a 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)).²⁰ Therefore in such cases, but only in such cases, the lapse of the additional period turns a non-fundamental delay in performance into a sufficient reason for avoidance.

8. 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.²¹ 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.²² 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.²³ 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).²⁴ 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.²⁵ 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.²⁶

9. Special problems arise when the goods are defective but repairable. Some courts have held that easy repairability precludes finding a fundamental breach.²⁷ Courts are reluctant to consider a breach fundamental when the seller offers and effects speedy repair without any inconvenience to the buyer.²⁸

10. 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.²⁹ Likewise, a typographical error in a bill of lading (“1999” instead of “1998”) does not constitute a fundamental breach and does not entitle the buyer to refuse payment.³⁰ 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,³¹ or the unjustified denial of a valid contract after having taken possession of samples of the goods³²—can amount to a fundamental breach of contract. The same is true when resale restrictions have been substantially violated,³³ or when the buyer, under an FOB contract, refuses to perform its obligation to hire a ship so that it is impossible for the seller to deliver the goods free on board.³⁴

11. A delay in accepting the goods will generally not constitute a fundamental breach, particularly when the delay is only for a few days.³⁵

12. The cumulation of violations of several contractual obligations makes a fundamental breach more probable, but does not automatically constitute a fundamental breach.³⁶ 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.³⁷

BURDEN OF PROOF

13. Article 25 regulates to some extent the burden of proving its elements. The burden with regard to the foreseeability element of article 25 lies with the party in breach:³⁸ 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.³⁹

Notes

¹CLOUT 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]. See also CLOUT case No. 154 [Cour d'appel Grenoble, France, 22 February 1995], also *Journal du droit international* 1995, 632 (breach of a re-import restriction); CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997], also in *Internationales Handelsrecht* 2003, 172 (breach of an exclusive distribution obligation).

²CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995]. See CLOUT case No. 418 [U.S. 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. See also Audiencia Provincial de Granada [Spain, 2 March 2000], *Internationales Handelsrecht* 2002, 82 (delivery of chicken meat that did not comply with slaughtering regulations in the buyer's country held no breach at all); Oberster Gerichtshof, Austria, 25 January 2006, *Internationales Handelsrecht* 2006, 110 (delivery of pig liver whose import was rejected because it did not comply with import regulations).

³CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995].

⁴See CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995] and CLOUT case No. 418 [U.S. District Court, Eastern District of Louisiana, United States 17 May 1999] (applying the third of the exceptions formulated by the Bundesgerichtshof).

⁵CLOUT case No. 275 [Oberlandesgericht Düsseldorf, Germany, 24 April 1997] (see full text of the decision); CLOUT case No. 681 [China International Economic and Trade Arbitration Commission, People's Republic of China, 18 August 1997].

⁶Bundesgericht, Switzerland, 18 May 2009, *Internationales Handelsrecht* 2010, 27.

⁷Ibid. (see full text of the decision).

⁸CLOUT 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).

⁹CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994]; CLOUT case No. 468 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 5 October 1998]; CLOUT case No. 578 [U.S. District Court, Western District of Michigan, United States, 17 December 2001]; CLOUT case No. 810 [China International Economic and Trade Arbitration Commission, People's Republic of China, 8 April 1999] (refusal to open a letter of credit); CLOUT case No. 983 [China International Economic and Trade Arbitration Commission, People's Republic of China, 10 May 2005] (even final partial non-payment can amount to fundamental breach).

¹⁰CLOUT case No. 275 [Oberlandesgericht Düsseldorf, Germany, 24 April 1997]; also Brandenburgisches Oberlandesgericht, Germany, 18 November 2008 *Internationales Handelsrecht* 2009, 105.

¹¹See 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, Russian Federation, 4 April 1997 (Arbitral award No.387/1995), Unilex (final refusal to pay the price).

¹²CLOUT case No. 308 [Federal Court of Australia, Australia, 28 April 1995].

¹³CLOUT case No. 631 [Supreme Court of Queensland, Australia, 17 November 2000], citing CLOUT case No. 187 [U.S. District Court, Southern District of New York, United States, 23 July 1997] (see full text of the decision). See also CLOUT case No. 986 [China International Economic and Trade Arbitration Commission, People's Republic of China, 4 February 2002].

¹⁴CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997].

¹⁵Corte 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 [Cour of Arbitration of the International Chamber of Commerce, 1992 (Arbitral award No. 7585)] (late payment); CLOUT case No. 859 [Superior Court of Ontario, Canada, 6 October 2003] (late delivery, assuming on the facts a fundamental breach).

¹⁶CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997] (late delivery of goods with volatile market prices under a CIF sale was held to be a fundamental breach of contract).

¹⁷Corte 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 the conclusion of the contract); Court of Arbitration of the International Chamber of Commerce, France, January 1997 (Arbitral award No. 8786), *ICC International Court of Arbitration Bulletin* 2000, 70.

¹⁸CLOUT 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); CLOUT case No. 859 [Superior Court of Ontario, Canada, 6 October 2003] (late delivery a fundamental breach because the seller knew that the buyer did, and had to, rely on timely performance in order to fulfill its own delivery contract with a client [the court, however, relied partly on common law]).

¹⁹CLOUT case No. 846 [U.S. Court of Appeals for the Third Circuit, United States, 19 July 2007] (a two day-delay that did not impede the use of the delivery regarded as a non-fundamental breach).

²⁰See, e.g. CLOUT case No. 301 [Court of Arbitration of the International Chamber of Commerce, 1992 (Arbitral award No. 7585)].

²¹CLOUT case No. 171 [Bundesgerichtshof, Germany, 3 April 1996]; CLOUT case No. 248 [Bundesgericht, Switzerland, 28 October 1998].

²²CLOUT case No. 248 [Bundesgericht, Switzerland, 28 October 1998]; CLOUT case No. 988 [China International Economic and Trade Arbitration Commission, People's Republic of China, 2000] (holding that delivery of non-conforming souvenir coins of which the buyer resold 75 per cent did not constitute a fundamental breach).

²³CLOUT 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 cracked leather) (see full text of the decision); Landgericht Landshut, Germany, 5 April 1995, Unilex (T-shirts that shrink by two sizes after the first washing); Bundesgericht, Switzerland, 18 May 2009 *Internationales Handelsrecht* 2010, 27 (packaging machine reached only one-third of the agreed level of production).

²⁴CLOUT case No. 107 [Oberlandesgericht Innsbruck, Austria, 1 July 1994]. For a similar case see CLOUT case No. 992 [Copenhagen District Court, Denmark, 19 October 2007] (pony bought for riding competitions that proved to be incurably lame held to constitute a fundamental breach); Bundesgericht, Switzerland, 18 May 2009 *Internationales Handelsrecht* 2010, 27 (packaging machine reached only one-third of the agreed level of production).

²⁵ See CLOUT case No. 138 [U.S. Court of Appeals for the Second Circuit, United States, 6 December 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); Bundesgericht, Switzerland, 18 May 2009, *Internationales Handelsrecht* 2010, 27 (even after numerous attempts to correct problems, packaging machine reached only one-third of the agreed level of production).

²⁶ 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). Similarly, Hof 's-Gravenhage, the Netherlands, 23 April 2004, *Nederlands Jurisprudentie* 2004 no. 713 (delivery of flour with carcinogenic addition that was forbidden in the Netherlands but not in Mozambique—the place of delivery and use—held to constitute a fundamental breach).

²⁷ Handelsgericht des Kantons Zürich, Switzerland, 26 April 1995, *Schweizerische Zeitschrift für Internationales und Europäisches Recht* 1996, 51; Oberlandesgericht Köln, Germany, 14 October 2002, *Internationales Handelsrecht* 2003, 15; CLOUT case No. 937 [Cantonal Court of the Jura, Switzerland, 26 July 2007].

²⁸ CLOUT case No. 152 [Cour d'appel, Grenoble, France, 26 April 1995]; CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997].

²⁹ CLOUT case No. 171 [Bundesgerichtshof, Germany, 3 April 1996].

³⁰ CLOUT case No. 808 [China International Economic and Trade Arbitration Commission, People's Republic of China, 4 June 1999].

³¹ CLOUT case No. 308 [Federal Court of Australia, Australia, 28 April 1995].

³² CLOUT case No. 313 [Cour d'appel, Grenoble, France, 21 October 1999] (see full text of the decision).

³³ 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].

³⁴ CLOUT case No. 987 [China International Economic and Trade Arbitration Commission, People's Republic of China, 22 March 2001].

³⁵ CLOUT case No. 243 [Cour d'appel, Grenoble, France, 4 February 1999].

³⁶ CLOUT case No. 171 [Bundesgerichtshof, Germany, 3 April 1996] (see full text of the decision).

³⁷ Ibid. (see full text of the decision).

³⁸ Ibid. (see full text of the decision).

³⁹ Ibid. (see full text of the decision). See also CLOUT case No. 882 [Handelsgericht des Kantons Aargau, Switzerland, 5 November 2002], also in *Internationales Handelsrecht* 2003, 178.

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. It has been held, however, that article 26 does not mean that the required notice must be made by instituting legal proceedings.³

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.⁴ Also, a notice in a statement of claim filed with a court suffices.⁵ The same is true for a notification by facsimile.⁶

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;⁷ another court decided that the buyer did not give valid notice of avoidance by sending back the delivered goods without further explanation.⁸

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.⁹ Therefore, an announcement that the contract will be avoided in the future if the other party does not react,¹⁰ or a letter demanding either price reduction or taking the delivered goods back,¹¹ or the mere sending back of the goods¹² does not constitute a valid notice because the announcement, the alternative formulation, or the return of the goods does not state in unequivocal terms that the contract is now at an end. The same is true if a party merely requests damages,¹³ or if it

declares avoidance with respect to a different contract.¹⁴ 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.¹⁵ The same was ruled with respect to a letter in which the buyer stated that no further business with the seller would be conducted.¹⁶ A buyer’s written refusal to perform combined with a demand for repayment has also been deemed sufficient notice of avoidance.¹⁷ Even formulations such as “de maat is vol” (“the glass is full”) in connection with the request for repayment of the purchase price were considered sufficient.¹⁸ Notice of non-conformity of the goods and notice of avoidance can be combined and expressed in one declaration.¹⁹

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.²⁰

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).²¹ However, where there were negotiations between the parties on the non-conformity, it was held that a declaration of avoidance was still timely if given at the end of unsuccessful negotiations.²² To meet any applicable time limit, dispatch of the notice within the period is sufficient (see article 27).

8. A court held that a buyer cannot claim damages according to article 75 with respect to cover purchases if it declares avoidance only after those cover purchases were made.²³

BURDEN OF PROOF

9. It has been found that the party who claims to have declared avoidance and who relies on it must prove the declaration.²⁴

Notes

¹See 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]; Court of Arbitration of the International Chamber of Commerce, France, August 1999 (Arbitral award No. 9887), *ICC International Court of Arbitration Bulletin* 2000, 109.

²CLOUT case No. 595 [Oberlandesgericht München, Germany, 15 September 2004].

³CLOUT case No. 1039 [Audiencia Provincial de Navarra, Spain, 27 December 2007].

⁴CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996].

⁵CLOUT case No. 308 [Federal Court of Australia, 28 April 1995].

⁶CLOUT case No. 1029 [Cour d'appel Rennes, France, 27 May 2008].

⁷CLOUT case No. 294 [Oberlandesgericht Bamberg, Germany, 13 January 1999].

⁸CLOUT case No. 6 [Landgericht Frankfurt a.M., Germany, 16 September 1991].

⁹Ibid. See also Oberster Gerichtshof, Austria, 6 February 1996, *Zeitschrift für Rechtsvergleichung* 1996, 248, CISG-online No. 224; Court of Arbitration of the International Chamber of Commerce, France, 1 March 1999, CISG-online No. 708; CLOUT case No. 746 [Oberlandesgericht Graz, Austria, 29 July 2004].

¹⁰Landgericht Zweibrücken, Germany, 14 October 1992, Unilex.

¹¹Oberlandesgericht München, Germany, 2 March 1994, *Recht der Internationalen Wirtschaft* 1994, 515. However, it has been held that a mere request to take the goods back is sufficient: see CLOUT case No. 905 [Cantonal Court of the Canton of Valais, Switzerland, 21 February 2005]; similarly, Amtsgericht Charlottenburg, Germany, 4 May 1994, CISG-online No. 386.

¹²CLOUT case No. 6 [Landgericht Frankfurt a.M., Germany, 16 September 1991].

¹³CLOUT case No. 176 [Oberlandesgericht München, Germany, 8 February 1995].

¹⁴CLOUT case No. 6 [Landgericht Frankfurt a.M., Germany, 16 September 1991] (see full text of the decision).

¹⁵CLOUT case No. 235 [Bundesgerichtshof, Germany 25 June 1997].

¹⁶CLOUT case No. 293 [Schiedsgericht der Hamburger freundschaftlichen Arbitrage, Germany, 29 December 1998].

¹⁷CLOUT case No. 594 [Oberlandesgericht Karlsruhe, Germany 19 December 2002].

¹⁸Rechtbank van Koophandel Kortrijk, Belgium, 4 June 2004, CIG-online No. 945.

¹⁹CLOUT case No. 235 [Bundesgerichtshof, Germany, 25 June 1997].

²⁰CLOUT case No. 6 [Landgericht Frankfurt a.M., Germany, 16 September 1991] (see full text of the decision).

²¹See CLOUT case No. 124 [Bundesgerichtshof, Germany, 15 February 1995] (notice after five months: too late); CLOUT case No. 84 [Oberlandesgericht Frankfurt a.M., Germany, 20 April 1994] (two months: too late); CLOUT case No. 83 [Oberlandesgericht München, Germany, 2 March 1994] (four months: too late); CLOUT case No. 6 [Landgericht Frankfurt a.M., Germany, 16 September 1991] (one day: in time) (see full text of the decision).

²²See CLOUT case No. 734 [Audiencia Provincial de Castellón, sección 3ª, Spain, 21 March 2006].

²³CLOUT case No. 730 [Audiencia Provincial de Valencia, sección 8ª, Spain, 31 March 2005].

²⁴See CLOUT case No. 938 [Kantonsgericht des Kantons Zug, Switzerland, 30 August 2007].

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.² 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.³

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.⁴

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.⁵

6. It has been held that article 27 does not govern oral communications.⁶ One court stated that such communications are effective if the other party can hear and—with respect to language—understand them.⁷

EFFECT OF APPROPRIATE AND INAPPROPRIATE COMMUNICATIONS

7. Where the declaring party uses an inappropriate means of transmission the risk of delay, error or failure in transmission is generally on the sender, which may render the communication 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.⁸ On the contrary, where the buyer uses an appropriate means any delay, error or failure of transmission of the notice of non-conformity does not deprive the buyer of its remedies.⁹

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.¹⁰ If the parties have agreed on a specific form of communication the declaring party must also prove that it used the agreed form.¹¹ However the declaring party does not need to prove that the communication reached the addressee.¹²

Notes

¹CLOUT case No. 540 [Oberlandesgericht Graz, Austria, 16 September 2002]; CLOUT case No. 305 [Oberster Gerichtshof, Austria, 30 June 1998]. See also CLOUT case No. 723 [Oberlandesgericht Koblenz, Germany, 19 October 2006] (notice of non-conformity by fax); Oberlandesgericht München, Germany, 17 November 2006, CISG-online No. 1395; Oberster Gerichtshof, Austria, 24 May 2005, *Internationales Handelsrecht* 2005, 249.

²CLOUT case No. 540 [Oberlandesgericht Graz, Austria, 16 September 2002]; CLOUT case No. 723 [Oberlandesgericht Koblenz, Germany, 19 October 2006].

³Landgericht 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].

⁴CLOUT case No. 409 [Landgericht Kassel, Germany, 15 February 1996].

⁵CLOUT 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).

⁶CLOUT case No. 305 [Oberster Gerichtshof, Austria, 30 June 1998] (see full text of the decision).

⁷Ibid.

⁸See CLOUT case No. 409 [Landgericht Kassel, Germany, 15 February 1996] (see full text of the decision).

⁹Handelsgericht Zürich, Switzerland, 30 November 1998, *Schweizerische Zeitschrift für Internationales und Europäisches Recht* 1999, 186.

¹⁰CLOUT 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); CLOUT case No. 723 [Oberlandesgericht Koblenz, Germany, 19 October 2006]; Rechtbank Arnhem, the Netherlands, 11 February 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090211n1.html>.; See also Amtsgericht Freiburg, Germany, 6 July 2007, CISG-online No. 1596.

¹¹Landgericht Stuttgart, Germany, 13 August 1991, Unilex; Rechtbank Arnhem, Netherlands, 11 February 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090211n1.html>.

¹²CLOUT 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 (see also articles 46 and 62). For example, the buyer may obtain a court order requiring the seller to deliver the quantity and quality of steel contracted for,¹ or the seller may obtain an order requiring the buyer to pay.²
3. There is little case law on this provision; only a few cases, and even fewer with relevant discussion of article 28, have been reported thus far.³ In one case, a court stated

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.⁴ If the national law would also grant specific performance in the case, there is no conflict with the Convention and no problem arises.⁵ If the national law would, however, disallow specific performance, alternative relief—in most cases, damages—could be granted instead.⁶ 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.

4. It has been held that a damages claim and a claim for specific performance are not necessarily inconsistent remedies; the creditor may therefore resort to both.⁷ And an arbitration tribunal found that the party to whom a duty is owed must raise a claim for specific performance within a reasonable time after it became aware of the non-performance of the duty.⁸

Notes

¹CLOUT case No. 417 [U.S. District Court, Northern District of Illinois, United States, 7 December 1999].

²Obergericht des Kantons Bern, Switzerland, 1 December 2004, CISG-online No. 1192.

³Zürich Arbitration, Switzerland, 31 May 1996 (specific performance denied because relevant national law (Russian or Swiss) did not provide for such remedy); CLOUT case No. 417 [U.S. District Court, Northern District of Illinois, United States, 7 December 1999]; Obergericht des Kantons Bern, Switzerland, 1 December 2004, CISG-online No. 1192; Arbitration Court of the International Chamber of Commerce, France, 2004 (Arbitral award No. 12173), *Yearbook of Commercial Arbitration* 2009, 111 (stating that a claim for liquidated damages does not exclude a claim for specific performance); International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 30 January 2007 (Arbitral award No. 147/2005), Unilex (stating that a claim for specific performance must be made within reasonable time after the party became aware of non-performance; merely mentioning article 28 without further consideration): CLOUT case No. 636 [Cámara Nacional de Apelaciones en lo Comercial de Buenos Aires, Argentina, 21 July 2002].

⁴CLOUT case No. 417 [U.S. 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”). To the same effect with respect to Swiss internal law, Obergericht des Kantons Bern, Switzerland, 1 December 2004, CISG-online No. 1192.

⁵That was the outcome in CLOUT case No. 417 [U.S. District Court, Northern District of Illinois, United States, 7 December 1999].

⁶Zürich Arbitration, Switzerland, 31 May 1996 (damages granted instead of specific performance; it was held that ordering specific performance of an obligation to produce and deliver aluminum for a further eight or ten years would be inappropriate).

⁷Arbitration Court of the International Chamber of Commerce, France, 2004 (Arbitral award No. 12173), *Yearbook of Commercial Arbitration* 2009, 111.

⁸International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 30 January 2007 (Arbitral award No. 147/2005, Unilex).

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

3. The application of article 29 is subject to the reservation provided for in article 96. Where a state (e.g. the Russian Federation) has made this reservation, the modification or termination of the contract may need to be in writing (see article 12).³

MODIFICATION OR TERMINATION BY MERE AGREEMENT

4. 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.⁴ 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;⁵ 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.⁶ 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.⁷ 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.⁸ It was held that a termination of the contract occurs where the buyer declares avoidance and the seller accepts it.⁹

5. Interpretation of the parties' agreement to modify or terminate a contract is governed by the Convention's rules on construction—in particular article 8. It has been held that the consequences of an agreement to terminate the contract are those provided for by article 81 (1) unless the parties agreed otherwise.¹⁰

6. The agreement of both parties is all that is required in order to modify or terminate their contract.¹¹ No form requirements need be met¹² unless the reservation concerning form applies (articles 11, 12, 96)¹³ 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.¹⁴ 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;¹⁵ it has also been held that a written contract may be orally changed.¹⁶ A court has held that the party that relies on a modifying agreement must prove the modification.¹⁷

FORM AGREEMENTS

7. 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.¹⁸ An oral amendment is ineffective in such a case unless the second sentence of article 29 (2) were to apply.¹⁹

8. 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.²⁰

ABUSE OF “NO ORAL MODIFICATION” CLAUSE

9. Article 29 (2) also 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 (article 7 (1)).²¹

Notes

¹ See CLOUT case No. 86 [U.S. 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, paragraphs 2-3.

³ Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 25 March 1997, *Internationales Handelsrecht* 2006, 92 (modifications must be in writing due to article 96 where a party based in the Russian Federation is involved).

⁴ 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]; Amtsgericht Sursee, Switzerland, 12 September 2008, *Internationales Handelsrecht* 2009, 63. See also CLOUT case No. 614 [California [state] Court of Appeal, United States, 13 December 2002] (questioning modification of oral contract by forum selection clause on later invoices); CLOUT case No. 696 [U.S. District Court, Northern District of Illinois, United States, 7 July 2004] (oral agreement sufficient); see also CLOUT case No. 846 [U.S. Court of Appeals for the Third Circuit, 19 July 2007] (mere allegation that modification was a “take it or leave it” proposition does not undermine agreement).

⁵ CLOUT case No. 120 [Oberlandesgericht Köln Germany 22 February 1994]; CLOUT case No. 332 [Obergericht des Kantons Basel-Landschaft, Switzerland, 11 June 1999]. However, silence combined with a certain behaviour can amount to consent and bring about an agreement: CLOUT case No. 1017 [Hof van Beroep Gent, Belgium, 15 May 2002].

⁶ CLOUT case No. 120 [Oberlandesgericht Köln, Germany, 22 February 1994].

⁷ CLOUT case No. 153 [Cour d’appel, Grenoble, France, 29 March 1995].

⁸ CLOUT case No. 5 [Landgericht Hamburg, Germany, 26 September 1990] (see full text of the decision).

⁹ CLOUT case No. 990 [China International Economic and Trade Arbitration Commission, People’s Republic of China, 19 December 1997].

¹⁰ CLOUT case No. 592 [Oberlandesgericht Düsseldorf, Germany, 28 May 2004]; Amtsgericht Sursee, Switzerland, 12 September 2008, *Internationales Handelsrecht* 2009, 63.

¹¹ CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996]; CLOUT case No. 990 [China International Economic and Trade Arbitration Commission, People’s Republic of China, 19 December 1997]; CLOUT case No. 635 [Oberlandesgericht Karlsruhe, Germany, 10 December 2003] and the cases cited in fn. 4.

¹² CLOUT case No. 413 [U.S. 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; CLOUT case No. 696 [U.S. District Court, Northern District of Illinois, United States, 7 July 2004].

¹³ For a similar case see *Rechtbank van Koophandel, Hasselt, Belgium, 2 May 1995*, available on the Internet at www.law.kuleuven.be/ipr/eng/cases/1995-05-02.html.

¹⁴ Information Letter No. 29 of the High Arbitration Court of the Russian Federation, Russian Federation, 16 February 1998, *Unilex*.

¹⁵ CLOUT case No. 422 [Oberster Gerichtshof, Austria, 29 June 1999], *Zeitschrift für Rechtsvergleichung* 2000, 33.

¹⁶ CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (see full text of the decision). See also CLOUT case No. 696 [U.S. District Court, Northern District of Illinois, United States, 7 July 2004] (oral agreement sufficient).

¹⁷ Amtsgericht Sursee, Switzerland, 12 September 2008, *Internationales Handelsrecht* 2009, 63.

¹⁸ Court of Arbitration of the International Chamber of Commerce, Switzerland, March 1998, *ICC International Court of Arbitration Bulletin*, 2000, 83. The reservation under article 96 can have the same effect: Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 25 March 1997, *Internationales Handelsrecht* 2006, 92.

¹⁹ CLOUT case No. 86 [U.S. District Court, Southern District of New York, United States, 22 September 1994].

²⁰ Court of Arbitration of the International Chamber of Commerce, Switzerland, March 1998, *ICC International Court of Arbitration Bulletin*, 2000, 83.

²¹ CLOUT case No. 94 [Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft–Wien, Austria, 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. Together with article 53, the provision has been found to contain an implicit definition of sale.¹ 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.²

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.³

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.⁴

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,⁵ 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.⁶

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. Moreover, the contract can always provide for further obligations of the seller—for instance, to install the sold goods.⁷

Notes

¹See, e.g., CLOUT case No. 916 [High Commercial Court, Croatia, 19 December 2006]. Article 30 is often cited merely to state the basis for the seller’s duty to deliver: see, e.g., CLOUT case No. 680 [China International Economic and Trade Arbitration Commission, People’s Republic of China, 8 March 1996]; CLOUT case No. 683 [China International Economic and Trade Arbitration Commission, People’s Republic of China, 1 January 1999]; CLOUT case No. 684 [China International Economic and Trade Arbitration Commission, People’s Republic of China, 12 April 1999]; CLOUT case No. 732 [Audiencia Provincial de Palencia, Spain, 26 September 2005]; CLOUT case No. 652 [Tribunale di Padova, Italy, 10 January 2006]; CLOUT case No. 959 [Economic Court of Grodno Region, Belarus, 23 July 2008].

²See, e.g., CLOUT case No. 2 [Oberlandesgericht Frankfurt, Germany, 17 September 1991], *Neue Juristische Wochenschrift* 1992, 633.

³Compare, 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.

⁴The seller’s obligation to hand over documents relating to the goods is further particularized in article 34. It has been held that, in a documentary sale, the buyer is generally not entitled to require delivery of the documents before payment: CLOUT case No. 864 [China International Economic and Trade Arbitration Commission, People’s Republic of China, 25 June 2007].

⁵CLOUT case No. 226 [Oberlandesgericht Koblenz, Germany, 16 January 1992]; Landgericht Freiburg, Germany, 22 August 2002, *Internationales Handelsrecht* 2003, 22 (if according to the applicable law property in a stolen car cannot be transferred, the seller has not fulfilled its duty).

⁶CLOUT case No. 308 [Federal Court of Australia, Australia, 28 April 1995].

⁷See, e.g., CLOUT case No. 940 [Gerechtshof Arnhem, Netherlands, 15 August 2006].

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 goods⁵ 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

¹Article 31 and decisions applying it also shed light on what constitutes delivery. See the Digest for article 31, paragraphs 1, 7, 9 and 10.

²The matters covered in article 32 are the seller’s obligation to give notice of shipment (article 32 (1)), to arrange for appropriate means of delivery using “usual” terms (article 32 (2)), and to provide information the buyer needs to effect insurance if the seller itself is not obligated to insure the shipment (article 32 (3)).

³See articles 31 (a), 32.

⁴See the Digest for Chapter IV of Part III, paragraph 2.

⁵See the Digest for article 31, paragraph 4.

⁶See the Digest for article 33, paragraph 2.

⁷See the Digest for article 31, paragraph 2.

⁸See the Digest for article 30, paragraph 2; the Digest for article 31, paragraph 3; the Digest for article 33, paragraph 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 (former) 1968 Brussels and 1988 Lugano Conventions,² article 31 could be the basis for jurisdiction.³ Such jurisdiction extended to claims concerning breach of the duty to deliver, as well as claims relating to the delivery of non-conforming goods.⁴ Since 1 March 2002 when the Brussels I Regulation entered into force its new article 5 (1) (b) first indent introduced an autonomous definition of the place of performance (place "where, under the contract, the goods were delivered or should have been delivered"). Under this provision, it has been held that article 31 CISG can no longer serve as basis for jurisdiction.⁵ Unless the place of performance can be inferred from the contract, the place of performance has been deemed to be "where the physical transfer of the goods took place, as a result of which the purchaser obtained, or should have obtained, actual power of disposal over those goods at the final destination of the sales transaction."⁶

3. The rules formulated in article 31 apply only when the parties have not agreed otherwise, as party autonomy prevails over article 31.⁷ 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.⁸ 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.⁹

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)).¹⁰ 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.¹¹

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.¹² Carriage of the goods is presumed to be involved if the parties have envisaged (or if it is clear from the circumstances)¹³ 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—under Incoterms 2010 now DAP—or other D-terms as defined in the Incoterms) involve carriage of the goods.¹⁴

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).¹⁵ When applicable, article 31 (a) does not imply that the seller itself must deliver the goods to the destination; it has been stated that the provision does not create such a duty.¹⁶ 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.¹⁷ If several carriers are involved in delivering the goods, handing over to the first carrier constitutes delivery under article 31 (a).¹⁸

7. "Handing over," as the phrase is used in article 31 (a), means that the carrier is given possession of the goods.¹⁹ 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.²⁰

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.²¹

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."²² 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.²³

OTHER CASES (Article 31 (c))

10. Article 31 (c) is a "residuary rule".²⁴ 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.²⁵

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).²⁶ Under the term DDP ("delivered, duty paid"), it has been held that the place of delivery is the buyer's place of business.²⁷ 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.²⁸ The clause "free delivery (buyer's place of business)" has been interpreted in different ways. Several courts considered that clause to be a mere allocation of costs that under the circumstances of the case did not address the place of performance.²⁹ Other courts have stated the contrary.³⁰ In a case where the order provided for "franco Skanderborg" and the acceptance for "F.CO DOMIC. NON SDOG." (meaning "Franco domicilio non sdoganato" = free domicile without customs) the court found that no place of delivery was agreed upon.³¹ 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.³² 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.³³ 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.³⁴

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.³⁵ 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.³⁶ Similarly, if goods are loaded on board a vessel in the designated port the seller has performed its duty of delivery.³⁷

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.³⁸

Notes

¹In 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 Costituzionale, Italy, 19 November 1992].

²Under that article, jurisdiction existed at the place of performance. Under this provision, the place where the obligation should have been performed had to be determined according to the applicable law, whether that law was domestic or uniform international law. See thereto CLOUT case No. 298 [European Court of Justice, Luxembourg, 29 June 1994 (C-288/92)].

³E.g., CLOUT case No. 268 [Bundesgerichtshof, Germany, 11 December 1996]; CLOUT case No. 834 [Hoge Raad, the Netherlands, 26 September 1997]; 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; Bundesgericht, Switzerland, 26 June 2009, *Internationales Handelsrecht* 2010, 112 (under the former Lugano Convention, which was changed in 2007 and adapted to the Brussels I Regulation).

⁴Applying the former law that was changed on 1 March 2002: 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]; CLOUT case No. 832 [Hoge Raad, the Netherlands, 21 May 1999]; CLOUT case No. 940 [Gerechthof Arnhem, the Netherlands, 15 August 2006].

⁵See European Court of Justice, Luxembourg, 25 February 2010 (C-381/08), *Internationales Handelsrecht* 2010, 170; Bundesgerichtshof, Germany, 23 June 2010, *Internationales Handelsrecht* 2010, 217.

⁶European Court of Justice, Luxembourg, 25 February 2010 (C-381/08), *Internationales Handelsrecht* 2010, 170; see also Bundesgerichtshof, Germany, 23 June 2010, *Internationales Handelsrecht* 2010, 217 (the final national decision in the proceedings referred to the ECJ); see also Corte di Cassazione, Italy, 5 October 2009, CISG-online No. 2105.

⁷CLOUT case No. 430 [Oberlandesgericht München, Germany, 3 December 1999], also in *Recht der Internationalen Wirtschaft* 2000, 712; CLOUT case No. 829 [Court of Appeals of the Hague, the Netherlands, 29 September 2006] (delivery address on invoices regarded as agreed place of delivery).

⁸See, e.g., CLOUT case No. 317 [Oberlandesgericht Karlsruhe, Germany, 20 November 1992] ("free delivery" in conjunction with further circumstances means buyer's place of business); CLOUT case No. 398 [Cour d'appel d'Orléans, France, 29 March 2001] ("ex-works Ancona" = place of performance); CLOUT case No. 607 [Oberlandesgericht Köln, Germany, 16 July 2001] (delivery "free farm" under the circumstances of the case deemed only an allocation of the transport costs); CLOUT case No. 998 [Højesteret, Denmark, 15 February 2001] ("franko Skanderborg" = place of delivery at that town).

⁹CLOUT 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].

¹⁰Oberster 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 carriage of the goods, damage to goods that occurred during transport back to the seller was seller's responsibility).

¹¹Ibid.

¹²See CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000]; see also the references supra n. 6.

¹³CLOUT Case No. 834 [Hoge Raad, the Netherlands, 26 September 1997].

¹⁴See 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, paragraph 5.

¹⁵See also the Secretariat Commentary to (then) article 29, at p. 29, paragraphs 5 and 8.

¹⁶See CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999]; CLOUT case No. 1019 [Appellate Court of Montenegro, Montenegro, 20 February 2007].

¹⁷CLOUT 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).

¹⁸Ibid. The Convention's rules on passing of risk confirm this point. See article 67 (1).

¹⁹CLOUT case No. 247 [Audiencia Provincial de Córdoba, Spain, 31 October 1997] (loading on board).

²⁰Secretariat Commentary to (then) article 29, at p. 29, paragraph 9. Specifics of the seller's obligation to hand over documents are provided by article 34.

²¹See, 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)). See also CLOUT case No. 338 [Oberlandesgericht Hamm, Germany, 23 June 1998] (no delivery where the seller did not place the goods at the buyer's disposal).

²²Secretariat Commentary to (then) article 29, at p. 30, paragraph 16.

²³CLOUT case no. 338 [Oberlandesgericht Hamm, Germany, 23 June 1998].

²⁴Secretariat Commentary to (then) article 29, at p. 30, paragraph 15.

²⁵See CLOUT case No. 338 [Oberlandesgericht Hamm, Germany, 23 June 1998].

²⁶CLOUT 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.

²⁷CLOUT case No. 340 [Oberlandesgericht Oldenburg, Germany, 22 September 1998].

²⁸Ibid.

²⁹CLOUT case No. 268 [Bundesgerichtshof, Germany, 11 December 1996]; Oberster Gerichtshof, Austria, 10 September 1998, Unilex; Oberlandesgericht Koblenz, Germany, 4 October 2002, *Internationales Handelsrecht* 2003, 66 (delivery "frei Baustelle" [free construction site]); see also the references supra nn. 5 and 6.

³⁰CLOUT case No. 317 [Oberlandesgericht Karlsruhe, Germany, 20 November 1992]; CLOUT case No. 311 [Oberlandesgericht Köln, Germany, 8 January 1997], also in Unilex; Bundesgericht, Switzerland, 26 June 2009, *Internationales Handelsrecht* 2010, 112 („Lieferadresse: Magazin (Käufer)“ [„delivery address: store (buyer)“] = place of delivery).

³¹CLOUT case No. 998 [Højesteret, Denmark, 15 February 2001].

³²CLOUT case No. 430 [Oberlandesgericht München, Germany, 3 December 1999], also in *Recht der Internationalen Wirtschaft* 2000, 712.

³³Ibid.

³⁴CLOUT case No. 430 [Oberlandesgericht München, Germany, 3 December 1999] (place of assembly of window manufacturing unit = place of performance); CLOUT case No. 646 [Corte di Cassazione, Italy, 10 March 2000], see also *Recht der Internationalen Wirtschaft* 2001, 308; CLOUT case No. 647 [Corte di Cassazione, Sezioni Unite, Italy, 19 June 2000] (sale, assembly and installation of a plant for steel production = place of delivery there); CLOUT case No. 652 [Tribunale di Padova, Italy, 10 January 2006] (sale and installation of two merry-go-rounds; delivery place deemed there).

³⁵See the Convention's rules on passing of risk (Part III, Chapter IV, articles 66-70).

³⁶CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999]; similarly CLOUT case No. 377 [Landgericht Flensburg, Germany, 24 March 1999].

³⁷CLOUT case No. 247 [Audiencia Provincial de Córdoba, Spain, 31 October 1997].

³⁸CLOUT 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, it must make reasonable arrangements (paragraph 2); if the seller is not bound to arrange for insurance covering the carriage of goods, it must nevertheless, at the buyer's request, provide the buyer "all available information" needed for the buyer to procure such insurance (paragraph 3).

3. There is little case law on article 32.² Three decisions have applied article 32 (2).³ 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 one of the decisions, the buyer in that 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.⁴ The second decision stated that the price-delivery term CFR ("cost, freight") obliges the seller to arrange for the transport contract. The third decision held that a seller who is obliged to arrange for the transport of the goods does not fulfil this duty if it does not inform the carrier of the correct address of the buyer to whom the goods must be shipped.⁵

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.⁶

Notes

¹The rules of article 32 (1) also relate to the Convention's rules on the passing of risk where carriage of the goods is involved. See article 67 (2).

²As of March 2011, CLOUT reports no decisions, and the website at www.cisg.law.pace.edu/ only 12 decisions, on article 32, most of which merely quote the provision.

³See CLOUT case No. 261 [Bezirksgericht der Sanne, Switzerland, 20 February 1997]; Tribunal Cantonal Vaud, Switzerland, 26 May 2000, CISG-online No. 1840; Cixi People's Court, Zhejiang Province, People's Republic of China, 18 July 2001, CISG-online No. 1507.

⁴CLOUT case No. 261 [Bezirksgericht der Sanne, Switzerland, 20 February 1997].

⁵Cixi People's Court, Zhejiang Province, People's Republic of China, 18 July 2001, CISG-online No. 1507.

⁶CLOUT case No. 261 [Bezirksgericht der Sanne, Switzerland, 20 February 1997] (the buyer failed to prove an agreement that the goods should 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 2011”) 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. It has been held that a date can be inferred from the contract if the parties agreed that delivery should be made after the opening of a letter of credit.⁴

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.⁵ If the buyer does not request delivery, however, the seller is not in breach.⁶

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”.⁷ 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”,⁸ delivery any time between 1 January 1993 and 31 December 1994 constitutes timely performance.⁹ Where the contract provides for a delivery period the right to choose the specific date of delivery generally rests with the seller.¹⁰ For the buyer to have the right to specify a delivery date within the period, an agreement to that effect is necessary,¹¹ as the last clause of article 33 (b) suggests. Where the parties agreed on delivery “ex factory” a court held that the buyer could choose at which date during the delivery period to take the goods.¹² In one case, a court assumed *arguendo* that a contract provision calling for delivery in “July, August, September + -” might require delivery of one third of the contracted-for quantity during each of the specified months.¹³ Another court held that a delivery period “autumn 1993” was sufficiently specific, and it obliged and allowed delivery to occur until the end of the meteorological autumn (21 December).¹⁴

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.¹⁵ It was held that a delivery time of 10 months in the case of a loader whose agreed refurbishment could last 120 to 180 days might be reasonable under the circumstances.¹⁶ Where a contract concluded in January contained the delivery term “April, delivery date remains reserved”,¹⁷ 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.¹⁸ Article 33 (c) has been also applied to interpret a standard contract term that allowed the seller to change the agreed delivery date:¹⁹ by this approach, the court found that the term must be understood to limit the seller to dates that resulted in delivery within a reasonable period after the conclusion of the contract.²⁰

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.²¹

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 49.²² 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.²³ The parties, however, can provide in their contract that any delay in delivery is to be treated as a fundamental breach.²⁴

10. It has been held, however, that no breach of contract occurred where the seller failed to meet a delivery date, mentioned during negotiations, that was prior to the time the contract was concluded: citing article 33 (c), the court held that "the CISG requires delivery within a reasonable time after the conclusion of the contract, not before."²⁵

11. 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 71.²⁶

BURDEN OF PROOF

12. A party asserting that a date or a period for delivery has been agreed upon must prove such agreement.²⁷ 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.²⁸ In a case where the parties did not specify the delivery date in the contract, a court held that if the buyer accepts the goods without protest that was an expression that delivery was made within a reasonable time.²⁹

Notes

¹CLOUT case No. 338 [Oberlandesgericht Hamm, Germany, 23 June 1998].

²See the example in Corte di Appello di Milano, Italy, 20 March 1998, Unilex ("Delivery: 3rd December, 1990").

³See the Secretariat Commentary to (then) article 31, p. 31, paragraph 3.

⁴Tribunale di Forlì, Italy, 16 February 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090216i3.html>.

⁵CLOUT case No. 338 [Oberlandesgericht Hamm, Germany, 23 June 1998] (see full text of the decision). See also CLOUT case No. 883 [Kantonsgericht Appenzell Ausserrhoden, Switzerland, 10 March 2003] (parties agreed that delivery date should be fixed later; after seller postponed fixing a date several times, the buyer fixed a date that the court accepted as delivery date).

⁶CLOUT case No. 338 [Oberlandesgericht Hamm, Germany, 23 June 1998] (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).

⁷See Court of Arbitration of the International Chamber of Commerce, January 1997 (Arbitral award No. 8786), *ICC International Court of Arbitration Bulletin* 2000, 70.

⁸See Court of Arbitration of the International Chamber of Commerce, France, March 1998 (Arbitral award No. 9117), *ICC International Court of Arbitration Bulletin* 2000, 83.

⁹Ibid. See also U.S. District Court, New Jersey, United States, 4 April 2006 (Valero Marketing & Supply Company v. Greeni Trading Oy), available on the Internet at <http://cisgw3.law.pace.edu/cases/060404u1.html>, reversed on other grounds in CLOUT case No. 846 [U.S. Court of Appeals for the Third Circuit, United States, 19 July 2007].

¹⁰Court of Arbitration of the International Chamber of Commerce, France, March 1998 (Arbitral award No. 9117), *ICC International Court of Arbitration Bulletin* 2000, 83.

¹¹Ibid.; impliedly also CLOUT case No. 338 [Oberlandesgericht Hamm, Germany, 23 June 1998].

¹²Tribunal Supremo, Spain, 9 December 2008, available on the Internet at <http://turan.uc3m.es/cisg/respan76.htm>.

¹³CLOUT case No. 7 [Amtsgericht Oldenburg in Holstein, Germany, 24 April 1990].

¹⁴CLOUT case No. 943 [Hof 's-Hertogenbosch, the Netherlands, 20 December 2005].

¹⁵CLOUT 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 [Audiencia Provincial, Barcelona, Spain, 20 June 1997].

¹⁶U.S. District Court, Colorado, United States, 6 July 2010 (Alpha Prime Development Corporation v. Holland Loader Company, LLC), available on the Internet at <http://cisgw3.law.pace.edu/cases/100706u1.html> (the buyer had no immediate need for the loader and the court decided only that summary judgment was inappropriate).

¹⁷CLOUT case No. 362 [Oberlandesgericht Naumburg, Germany, 27 April 1999].

¹⁸CLOUT case No. 362 [Oberlandesgericht Naumburg, Germany, 27 April 1999] (the court found that 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).

¹⁹CLOUT case No. 362 [Oberlandesgericht Naumburg, Germany, 27 April 1999] (see full text of the decision).

²⁰Ibid.

²¹See the Secretariat Commentary to (then) article 31, p. 31, paragraph 2. See also Landgericht Oldenburg, Germany, 27 March 1996, Unilex.

²²Court of Arbitration of the International Chamber of Commerce, January 1997 (Arbitral award No. 8786), *ICC International Court of Arbitration Bulletin* 2000, 70.

²³Landgericht Oldenburg, Germany, 27 March 1996, Unilex. See also Rechtbank Arnhem, the Netherlands, 29 July 2009, English editorial remarks available on the Internet at <http://cisgw3.law.pace.edu/cases/090729n1.html>. (if the buyer complains of a two day delay after first having accepted the goods (a minibus), no right of avoidance exists).

²⁴Court of Arbitration of the International Chamber of Commerce, January 1997 (Arbitral 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).

²⁵U.S. District Court, Western District of Pennsylvania, United States, 25 July 2008 (Norfolk Southern Railway Co. v. Power Source Supply, Inc.), available on the Internet at <http://cisgw3.law.pace.edu/cases/080725u1.html>.

²⁶Court of Arbitration of the International Chamber of Commerce, January 1997 (Arbitral award No. 8786), *ICC International Court of Arbitration Bulletin* 2000, 72.

²⁷CLOUT case No. 362 [Oberlandesgericht Naumburg, Germany, 27 April 1999] (see full text of the decision).

²⁸Court of Arbitration of the International Chamber of Commerce, France, March 1998 (Arbitral award No. 9117), *ICC International Court of Arbitration Bulletin* 2000, 90.

²⁹CLOUT case No. 210 [Audiencia Provincial de Barcelona sección 16ª, Spain, 20 June 1997].

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. The provision does not create such an obligation, but presupposes it. The obligation can follow from the contract, practices between the parties or trade usages.
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 ("free on board") 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 price-delivery term 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 Where a buyer requested partial deliveries, a court regarded the seller's handing over of 'delivery orders' instead of the bills of lading as sufficient.⁸

NON-CONFORMING DOCUMENTS

7. The handing over of non-conforming documents constitutes a breach of contract to which the normal remedies apply.⁹ Provided the breach is of sufficient gravity it can amount to a fundamental breach, thus permitting the buyer to declare the contract avoided.¹⁰ However, delivery of non-conforming documents (a false certificate of origin and a faulty certificate of chemical analysis) has been found not to constitute a fundamental breach if the buyer itself can easily cure the defect by requesting accurate documents from the producer.¹¹ Another court has held that a quality certificate was not defective even if it did not state that, with time, the sold juice would become darker in colour.¹² However, the omission of certificates proving the bio-quality of the goods has been regarded as a breach of contract.¹³

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.¹⁴

Notes

¹COMPROMEX Arbitration, Mexico, 29 April 1996, Unilex.

²Secretariat Commentary to (then) article 32, p. 31, paragraph 2. See also CLOUT case No. 216 [Kantonsgericht St. Gallen, Switzerland, 12 August 1997] (see full text of the decision).

³CLOUT case No. 171 [Bundesgerichtshof, Germany, 3 April 1996] (certificate of origin and certificate of chemical analysis); CLOUT case No. 488 [Audiencia Provincial Barcelona, sección 14ª, Spain, 12 February 2002] (certificate of origin); Tribunal of International Commercial Arbitration of the Ukrainian Chamber of Commerce and Trade, Ukraine, 5 July 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050705u5.html> (consignment note, quality certificate, insurance policy, invoice and packing list); China International Economic & Trade Arbitration Commission, People's Republic of China, September 2006 (Arbitral award No. CISGT 2006 14), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060900c4.html> (spare parts case; digital copy of airway bill not a sufficient document); CLOUT case No. 1037 [Audiencia Provincial de Barcelona, Spain, 24 March 2009] (export license, health and quality certificates, customs documentation for frozen cuttlefish); see also Secretariat Commentary to (then) article 32, p. 31, paragraph 2.

⁴CLOUT case No. 216 [Kantonsgericht St. Gallen, Switzerland, 12 August 1997].

⁵See also Court of Arbitration of the International Chamber of Commerce, France, March 1995 (Arbitral award No. 7645), *ICC International Court of Arbitration Bulletin* 2000, 34.

⁶*Ibid.*

⁷Secretariat Commentary to (then) article 32, p. 31, paragraph 3.

⁸Hof Antwerpen, Belgium, 14 April 2006 (Lothringer Gunther Grosshandelsgesellschaft für Bauelemente und Holzwerkstoffe GmbH v. Fepeco International N.V.), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060424b1.html>.

⁹CLOUT case No. 171 [Bundesgerichtshof, Germany, 3 April 1996]; CLOUT case No. 808 [China International Economic & Trade Arbitration Commission, People's Republic of China, 4 June 1999] (typing error in letter of credit ["1999" instead of "1998"] may be a breach, but is not a fundamental breach and does not give rise to a right to avoidance).

¹⁰CLOUT case No. 171 [Bundesgerichtshof, Germany, 3 April 1996].

¹¹*Ibid.*

¹²Tribunal Supremo, Spain, 9 December 2008, available on the Internet at <http://turan.uc3m.es/cisg/respan76.htm>.

¹³Oberlandesgericht München, Germany, 13 November 2002, CISG-online No. 786.

¹⁴Court of Arbitration of the International Chamber of Commerce, France, March 1998 (Arbitral 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 ..."¹

Notes

¹See, e.g., the Digest for article 27, paragraph 2,

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. The provision thus defines the seller's obligations with respect to these crucial aspects of contractual performance. Courts have stated that the unitary notion of conformity defined in article 35 displaces the concepts of "warranty" found in some domestic laws,¹ and that, under the CISG, delivery of goods of a different type from those required by the contract ("aliud") constitutes delivery of goods that lack conformity.² It has also been stated that the CISG provides the exclusive remedy for a lack of conformity in the goods, and that it thus pre-empts not only domestic law breach of contract claims, but also domestic law rules that invalidate a contract on the basis of mistake concerning the quality of the goods or on the basis of tort/delict for violation of a pre-contractual duty to provide information.³

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,⁴ 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.⁵ Delivery of false documents relating to the origin of the goods has been found to be a violation of article 35.⁶ Another court has stated: "Although the seller is obliged to deliver goods which conform in quantity, quality and to contractual specifications according to trade practices, differences in quantity and contractual requirements can only be regarded as non-conforming goods under article 35 CISG if the defects

reach a certain level of seriousness. . . ."⁷ A seller's breach of its obligations under article 35 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.⁸

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. 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.⁹ It has also been found that a shipment of goods containing less than the quantity specified in the contract breached article 35 (1), since the provision expressly states that a lack of "conformity" encompasses both a lack of quality in the goods delivered and a lack of quantity;¹⁰ partial deliveries, however, were held not to violate article 35 (1) where the contract allowed them and the buyer had accepted them without complaint.¹¹ 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).¹² And where a contract required that potting soil contain 40 kg of clay per cubic metre of potting soil, but the goods delivered contained a different proportion of clay, the court found a violation of article 35 (1).¹³ 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.¹⁴

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;¹⁵ it has been held, however, that the question whether a seller waived time limitations in a contractual provision governing the quality of the goods was, pursuant to article 7 (2) CISG, governed by applicable domestic law.¹⁶ In this connection, one court, on appeal of the decision concerning shellfish with high cadmium levels cited 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.¹⁷ 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.¹⁸ It has also been held that a seller's previous deliveries to the buyer, some of which involved different kinds of goods and during which the goods had not been damaged, did not constitute an implied agreement concerning the packaging of the goods.¹⁹

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 may (in the words of article 35) "agree[...] otherwise."²⁰ Unless the parties exercise their autonomous power to contract out the standards of article 35 (2), they are bound by them.²¹ Whether the parties agreed to contractual terms that excluded the seller's obligations under article 35 (2), it has been asserted, is governed by the Convention's rules on interpretation.²² It has been held 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;²³ other decisions, however, suggest that an express article 35 (1) agreement concerning the quality of the goods excludes the implied quality obligations imposed by article 35 (2), even if the parties have not otherwise indicated that the article 35 (2) obligations are inapplicable.²⁴ Some decisions have applied domestic law to determine the validity of agreements to exclude a seller's obligations under article 35 (2).²⁵

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." This obligation has been equated with certain obligations imposed on sellers under domestic law.²⁶ It has been held that the standard of article 35 (2) (a) was violated when the seller delivered a refrigeration unit that broke down soon after it was first put into operation.²⁷ 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,²⁸ as well as when the seller delivered chaptalized wine.²⁹ 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."³⁰ The standard was also held violated where a dust ventilator diffused dust rather than removing it, and contained components that caused the ventilator to shut down prematurely;³¹ where machinery failed to produce the intended product rapidly or reliably;³² where "pocket ash trays" came equipped with excessively sharp and dangerous blades;³³ where the seller delivered coloured phenol that was not fit for all the ordinary purposes of the contractually-required "colourless phenol";³⁴ and where machinery for the production of textiles failed to produce a product of consistent weight.³⁵

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.³⁶ Thus it was held that plants which were generally fit to prosper, but which were not fit for the local climate where the buyer placed them, did not violate the requirements of article 35 (2) (a).³⁷ The standard of article 35 (2) (a) has been variously described as requiring goods of "average" quality, "marketable" quality, or "reasonable" quality.³⁸ It has also been stated that resaleability (tradability) of the goods is an aspect of their fitness for ordinary purposes under article 35 (2) (a),³⁹ that foodstuff intended for human consumption must at least not be harmful to health, and that mere suspicion that the goods are harmful to health may give rise to a breach of article 35 (2) (a).⁴⁰

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).⁴¹ 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).⁴² 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.⁴³ 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.⁴⁴ 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.⁴⁵ 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. According to another decision, the fact that the seller had previously advertised and sold the good in the buyer's jurisdiction could have constituted "special circumstances" that would, under the approach in the aforementioned mussels case, oblige the seller to comply with regulations of the buyer's jurisdiction; in the particular case, however, the seller had made it clear to the buyer that the buyer was responsible for assuring regulatory compliance.⁴⁶ 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;⁴⁷ 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." This obligation has been equated with certain obligations imposed on sellers under domestic law.⁴⁸ A court has also found a violation of article 35 (2) (b) where machinery that the buyer had purchased to mass produce buyer's environmentally-friendly packaging for cassettes malfunctioned and did not produce the packaging "rapidly or reliably,"⁴⁹ and where inflatable arches used for advertising were not suitably safe.⁵⁰ On the other hand, where the goods were made to work properly one year after delivery, it was found that a seller had not violated its article 35 (2) (b) obligation.⁵¹ It has been held that a buyer who proved that the goods failed to perform the particular purpose conveyed to the seller at the time the contract was concluded did not have to prove the cause of such failure in order to establish a breach of article 35 (2) (b).⁵²

11. 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. One court held 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.⁵³ 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." Where a seller agreed during negotiations that the goods would meet safety standards applicable in the buyer's jurisdiction, a court held that article 35 (2) (b) obligated the seller to deliver goods that complied with those standards.⁵⁴ And where the seller agreed to deliver plants to a particular place, a court found that buyer had conveyed to the seller the particular purpose of using the plants at that place (although the court also found that the seller was not liable under article 35 (2) (b) because the buyer had not reasonably relied on the seller's skill and judgment).⁵⁵ Where the buyer's order described its requirements for the goods, furthermore, a court found that seller was obligated to meet those requirements under article 35 (2) (b).⁵⁶ And where it was "crystal clear" that the buyer intended to use the goods—large, heavy and expensive globes—as long term advertising furniture for its offices, it was implied under article 35 (2) (b) that the goods would have an operational lifetime of at least three years.⁵⁷ On the other hand, where the contract contained no indication of the specific purpose for which the goods would be used, there was no obligation under article 35 (2) (b).⁵⁸ And where the buyer revealed its particular purpose only to a travelling sales representative of the seller, a court has found that the requirements of article 35 (2) (b) were not satisfied.⁵⁹

12. 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." A court has held that a buyer did not reasonably rely on the seller's skill and judgment where the buyer was itself an experienced importer of the goods.⁶⁰ And it has been held that a buyer is not deemed to have relied on the seller's skill and judgment where the buyer possessed skill concerning and knowledge of the goods equal to or greater than that of the seller.⁶¹ With regard to the 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.⁶² 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.⁶³ On the other hand, a court has held that the seller violated article 35 (2) (b) by delivering a child's play apparatus that did not comply with safety regulations of the buyer's jurisdiction.⁶⁴

ARTICLE 35 (2) (c)

13. Article 35 (2) (c) states 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 tribunals have found that delivered goods violated this provision.⁶⁵ Where a seller supplied a sample of the wood to be used to fabricate doors, however, a court found that the sample was too small to indicate to the buyer that the wood in the completed doors would be evenly coloured.⁶⁶ 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.” It has been stated that the goods must conform to a model only if there is an express agreement in the contract that the goods will do so.⁶⁷ 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.⁶⁸

ARTICLE 35 (2) (d)

14. 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.” One decision stated that article 35 (2) (d) applies where the parties have failed to provide for packaging requirements in their contract, and that the provision generally refers to packaging standards prevailing in the seller’s country.⁶⁹ 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).⁷⁰ 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.⁷¹ Where marble panels were damaged during transport because of improper packaging, a court found that seller had breached article 35 (2) (d).⁷² Another decision held that, even though the buyer bore risk of loss while bottles were being transported by truck, the seller’s breach of its obligation to package the goods adequately meant that the seller was responsible for damage that occurred during transport.⁷³

ARTICLE 35 (3)

15. 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.⁷⁴ 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), although 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 required as to the quality of the goods.⁷⁵ It has been held that the seller bears the burden of proving the elements of article 35 (3).⁷⁶

16. Under article 35 (3), a buyer has been held to have assumed the risk of defects in a used bulldozer that the buyer inspected and tested before purchasing.⁷⁷ 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.”⁷⁸ The rule of article 35 (3), however, is not without limits.⁷⁹ 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.⁸⁰ 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

17. A number of decisions have discussed which party bears the burden of proving that goods fail to conform to the contract under article 35.⁸¹ Some decisions indicate that the seller bears that burden.⁸² On the other hand, other tribunals have concluded that the buyer bears the burden of proving lack of conformity,⁸³ although decisions adopt different theories to reach that result. For example, some tribunals have applied domestic law to allocate the burden to the buyer as the party alleging a lack of conformity.⁸⁴ 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 contract⁸⁵ and, according to at least one decision, an allocation to the seller of the burden to prove that the goods were conforming if the seller claims a right to the price for goods delivered.⁸⁶ Some decisions suggest that the burden of proof varies with the context. Thus it has been stated that the buyer bears the burden of proving a lack of conformity if it has taken delivery of the goods,⁸⁷ or if it has done so without giving immediate notice of non-conformity.⁸⁸ Similarly, it has been 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.⁸⁹ It has been noted that authorities are in conflict over which party bears the burden of proof with respect to the reliance requirement in article 35 (2) (b).⁹⁰ With respect to article 35 (3), it has been held that the seller bears the burden of proving the elements of an exemption from liability under this provision.⁹¹

EVIDENCE OF LACK OF CONFORMITY

18. Many decisions address evidentiary issues relating to a lack of conformity under article 35. Some decisions indicate that the question of proper proof of a violation of article 35 is a matter governed by applicable domestic law.⁹² A seller’s admission that the goods were non-conforming has been accepted as sufficient evidence.⁹³ Direct evidence that the standards of article 35 were violated has

been adduced and accepted by courts in several instances.⁹⁴ Thus proof that glue used in shoes dissolved, leather cracked, seams and soles were partially loose, and leather material was too short constituted sufficient proof of lack of conformity.⁹⁵ And 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.⁹⁶ Similarly, a 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.⁹⁷ Testimony by witnesses with knowledge of the goods has been found sufficient to establish lack of conformity.⁹⁸ Independent expert opinion on lack of conformity has also been accepted⁹⁹—and even required for the buyer to carry the burden of proof with regard to an alleged technical defect in complex goods¹⁰⁰—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.¹⁰¹

19. 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.¹⁰² 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.¹⁰³ 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.¹⁰⁴ A court has held that scratches and other minor damage did not prove that the seller breached a promise that cars would be in good condition and not involved in accidents.¹⁰⁵ Another court 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.¹⁰⁶ It has also been found that a seller's offer to remedy any defects in the goods did not constitute an admission that the goods lacked conformity.¹⁰⁷

JURISDICTIONAL ISSUES

20. 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.¹⁰⁸

Notes

¹CLOUT case No. 802 [Tribunal Supremo, Spain, 17 January 2008] (see full text of the decision); 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).

²CLOUT case No. 802 [Tribunal Supremo, Spain, 17 January 2008] (see full text of the decision); Landgericht Stuttgart, Germany, 4 June 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020604g1.html>; Amtsgericht Viechtach, Germany, 11 April 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020411g1.html>.

³Rechtbank van Koophandel Hasselt, Belgium, 19 April 2006 (Brugen Deuren BVBA v. Top Deuren VOF), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060419b1.html>. But see CLOUT case No. 847 [U.S. District Court, District of Minnesota, United States, 31 January 2007] (Travelers Property Casualty Company of America et al. v. Saint-Gobain Technical Fabrics Canada Limited) (analysing the conformity of delivered goods under U.S. domestic sales law, even though the CISG governed the transaction, because the parties had not argued on the basis of the CISG and because the court believed that case law interpreting U.S. domestic sales could "inform" interpretation of the CISG).

⁴See, 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).

⁵CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998].

⁶CLOUT case No. 1022 [Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, 23 January 2008], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080123sb.html>.

⁷Oberlandesgericht Düsseldorf, Germany, 21 April 2004, available on the Internet at <http://cisgw3.law.pace.edu/cases/040421g2.html>.

⁸E.g., CLOUT case No. 724 [Oberlandesgericht Koblenz, Germany, 14 December 2006]; 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).

⁹Landgericht Paderborn, Germany, 25 June 1996, Unilex.

¹⁰CLOUT case No. 894 [Bundesgericht, Switzerland, 7 July 2004] (see full text of the decision); CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997].

¹¹Hof van Beroep Antwerpen, Belgium, 24 April 2006 (GmbH Lothringer Gunther Grosshandelsgesellschaft für Bauelemente und Holzwerkstoffe v. NV Fepco International), Unilex.

¹²CLOUT case No. 168 [Oberlandesgericht Köln, Germany, 21 March 1996].

¹³CLOUT case No. 941 [Hof Arnem, Belgium, 18 July 2006].

¹⁴CLOUT case No. 84 [Oberlandesgericht Frankfurt a.M., Germany, 20 April 1994].

¹⁵Polimeles Protodikio Athinon, Greece, 2009 (docket no. 4505/2009), English editorial analysis available on the Internet at <http://cisgw3.law.pace.edu/cases/094505gr.html>; Audiencia Provincial Madrid, Spain, 22 March 2007, Unilex. General rules for construing the parties' agreement 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). For decisions addressing trade usages and the seller's obligations under article 35 (1), see CLOUT case Nos. 477 & 536 [Oberster Gerichtshof, Austria, 27 February 2003].

¹⁶CLOUT case No. 574 [U.S. District Court, Northern District of Illinois, United States, 29 January 2003].

¹⁷CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995] (see full text of the decision).

¹⁸Ibid. (see full text of the decision). For other cases following the approach of this decision see High Court of New Zealand, 30 July 2010, available on the Internet at <http://cisgw3.law.pace.edu/cases/100730n6.html>; Rechtsbank Rotterdam, the Netherlands, 15 October 2008 (Eyroflam S.A. v. P.C.C. Rotterdam B.V.), abstract published in *European Journal of Commercial Contract Law*; Oberster Gerichtshof, Austria, 19 April 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070419a3.html>; CLOUT case no. 752 [Oberster Gerichtshof, Austria, 25 January 2006]; Cour d'appel Versailles, France, 13 October 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051013f1.html>; CLOUT case no. 774 [Bundesgerichtshof, Germany, 2 March 2005] (see full text of the decision).

¹⁹Oberlandesgericht Saarbrücken, Germany, 17 January 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070117g1.html>.

²⁰The 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 article 6).") (see full text of the decision).

²¹One 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.

²²U.S. District Court, Southern District of New York, United States, 23 August 2006 (TeeVee Toons, Inc. v. Gerhard Schubert GmbH), available on the Internet at <http://cisgw3.law.pace.edu/cases/060823u1.html>.

²³CLOUT case No. 237 [Arbitration Institute of the Stockholm Chamber of Commerce, Sweden, 5 June 1998] (see full text of the decision). Compare China International Economic and Trade Arbitration Commission, People's Republic of China, 13 April 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080418c1.html> (seller had an obligation under article 35 (1) to deliver goods conforming to the technical requirements of the contract as well as an obligation under article 35 (2) (a) to deliver goods fit for their ordinary purposes, both of which the seller violated); CLOUT case No. 999 [Ad Hoc Arbitral Tribunal, Denmark, 10 November 2000] (buyer of machine provided seller with specifications that products produced by the machine would have to meet, and seller "guaranteed" that the machine would function, but seller was also bound by the implied obligations in articles 35 (2) (a) and (b)).

²⁴Landgericht Aschaffenburg, Germany, 20 April 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060420g1.html> ("Article 35 (2) CISG only applies if the parties have not themselves expressly or impliedly stipulated the required performance conforming to their contract, or when such duty to perform in the sense of article 35 (1) has not been sufficiently specified"); Supreme Court, Czech Republic, 29 March 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060329cz.html> (where the parties' contract specified "ADOS type carpets," article 35 (2) (b) did not apply because the parties had agreed on the quality requirements for the carpet). See also Tribunale di Forlì, Italy, 16 February 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090216i3.html>; *Polimeles Protodikio Athinon*, Greece, 2009 (docket no. 4505/2009), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/094505gr.html>; Tribunale di Forlì, Italy, 11 December 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081211i3.html>; Oberlandesgericht Koblenz, Germany, 21 November 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071121g1.html>; CLOUT case No. 938 [Kantonsgericht Zug, Switzerland, 30 August 2007], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070830s1.html>; Landgericht Coburg, Germany, 12 December 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061212g1.html>; CLOUT case No. 752 [Oberster Gerichtshof, Austria, 25 January 2006] (see full text of decision); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 2 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040202r1.html>; CLOUT case No. 892 [Kantonsgericht Schaffhausen, Switzerland, 27 January 2004].

²⁵CLOUT case No. 168 [Oberlandesgericht Köln, Germany, 21 March 1996]; U.S. District Court, Western District of Pennsylvania, United States, 25 July 2008 (Norfolk Southern Railway Company v. Power Source Supply, Inc.), available on the Internet at <http://cisgw3.law.pace.edu/cases/080725u1.html>. See also CLOUT case No. 617 [U.S. District Court, Northern District of California, United States, 30 January 2001] (Supermicro Computer, Inc. v. Digitechnic), wherein a United States trial 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.

²⁶U.S. District Court, Western District of Pennsylvania, United States, 25 July 2008 (Norfolk Southern Railway Company v. Power Source Supply, Inc.), available on the Internet at <http://cisgw3.law.pace.edu/cases/080725u1.html> (equating article 35 (2) (a) with the implied warranty of merchantability” under U.S. domestic law); Supreme Court of Victoria, Australia, 24 April 2003 (Playcorp Pty. Ltd. v. Taiyo Kogyo Limited), available on the Internet at <http://cisgw3.law.pace.edu/cases/030424a2.html> (equating article 35 (2) (a) with sellers’ obligations under Australian domestic law); Supreme Court of Western Australia, Australia, 17 January 2003 (Ginza Pty. Ltd. v. Vista Corporation Pty Ltd), available on the Internet at <http://cisgw3.law.pace.edu/cases/030117a2.html> (equating article 35 (2) (a) with sellers’ obligations under Australian domestic law); China International Economic and Trade Arbitration Commission, People’s Republic of China, 18 July 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020718c1.html> (equating article 35 (2) (a) with sellers’ obligations under Chinese domestic law),

²⁷CLOUT case No. 204 [Cour d’appel, Grenoble, France, 15 May 1996].

²⁸CLOUT case No. 170 [Landgericht Trier, Germany, 12 October 1995].

²⁹Cour de Cassation, France, 23 January 1996, Unilex.

³⁰CLOUT case No. 237 [Arbitration Institute of the Stockholm Chamber of Commerce, Sweden, 5 June 1998] (see full text of the decision).

³¹Oberlandesgericht München, Germany, 17 November 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061117g1.html>.

³²U.S. District Court, Southern District of New York, United States, 23 August 2006 (TeeVee Toons, Inc. v. Gerhard Schubert GmbH), available on the Internet at <http://cisgw3.law.pace.edu/cases/060823u1.html>.

³³Bundesgericht, Switzerland, 10 October 2005, Unilex.

³⁴Hovioikeus / hovrätt Helsinki, Finland, 31 May 2004 (Crudex Chemicals Oy v. Landmark Chemicals S.A.), English editorial analysis available on the Internet at <http://cisgw3.law.pace.edu/cases/040531f5.html>.

³⁵Court of Arbitration of the International Chamber of Commerce, 2002 (Arbitral award No. 10377), *Yearbook Commercial Arbitration*, vol. 31, p. 72 (2006).

³⁶Rechtbank van Koophandel Hasselt, Belgium, 28 June 2006 (Drukkerij Moderna NV v. IVA Groep BV), English summary available on the Internet at <http://cisgw3.law.pace.edu/cases/060628b1.html> (minor damage to goods did not render them unfit for the purposes for which they would ordinarily be used); Court of Arbitration of the International Chamber of Commerce, June 1996 (Arbitral award No. 8247), *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 comprehensibility 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).

³⁷Landgericht Coburg, Germany, 12 December 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061212g1.html>.

³⁸Landgericht Coburg, Germany, 12 December 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061212g1.html> (goods that meet the expectation of the average user); Supreme Court of Western Australia, Australia, 17 January 2003 (Ginza Pty. Ltd. v. Vista Corporation Pty. Ltd.), available on the Internet at <http://cisgw3.law.pace.edu/cases/030117a2.html> (merchantability standard); Netherlands Arbitration Institute, the Netherlands, 15 October 2002 (Arbitral award, No. 2319), Unilex (reasonable quality rather than average or merchantable quality); CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995] (see full text of the decision) (either average or marketable quality); Landgericht Berlin, Germany, 15 September 1994, Unilex (average quality, not merely marketable quality).

³⁹CLOUT case No. 774 [Bundesgerichtshof, Germany, 2 March 2005]. See also China International Economic and Trade Arbitration Commission, People’s Republic of China, 3 June 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030603c1.html> (the fact that the goods were not resalable, even at a discounted price, established a violation of article 35 (2) (a)); Rechtbank van Koophandel Mechelen, Belgium, 18 January 2002, Unilex (article 35 (2) (a) required that goods be fit for resale).

⁴⁰CLOUT case No. 774 [Bundesgerichtshof, Germany, 2 March 2005].

⁴¹CLOUT 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). For other cases following the approach of this decision see High Court of New Zealand, 30 July 2010, available on the Internet at <http://cisgw3.law.pace.edu/cases/100730n6.html>; Rechtsbank Rotterdam, the Netherlands, 15 October 2008 (Eyroflam S.A. v. P.C.C. Rotterdam B.V.), abstract published in *European Journal of Commercial Contract Law*; Oberster Gerichtshof, Austria, 19 April 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070419a3.html>; CLOUT case No. 752 [Oberster Gerichtshof, Austria, 25 January 2006]; Cour d’appel Versailles, France, 13 October 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051013f1.html>; CLOUT case No. 774 [Bundesgerichtshof, Germany, 2 March 2005] (see full text of the decision).

⁴²Ibid. 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.

⁴³In 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).

⁴⁴One 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."

⁴⁵CLOUT case No. 418 [U.S. District Court, Eastern District of Louisiana, United States, 17 May 1999].

⁴⁶High Court of New Zealand, 30 July 2010, available on the Internet at <http://cisgw3.law.pace.edu/cases/100730n6.html>.

⁴⁷CLOUT case No. 202 [Cour d'appel, Grenoble, France 13 September 1995].

⁴⁸U.S. District Court, Southern District of Ohio, United States, 3 April 2009 (Miami Valley Paper, LLC v. Lebbing Engineering & Consulting GmbH), available on the Internet at <http://cisgw3.law.pace.edu/cases/090326u1.html> (equating article 35 (2) (b) with the "implied warranty of fitness for particular purposes" under U.S. domestic sales law); U.S. District Court, Western District of Pennsylvania, United States, 25 July 2008 (Norfolk Southern Railway Company v. Power Source Supply, Inc.), available on the Internet at <http://cisgw3.law.pace.edu/cases/080725u1.html> (equating article 35 (2) (b) with the "implied warranty of fitness for particular purposes" under U.S. domestic sales law); CLOUT case No. 532 [Supreme Court of British Columbia, Canada, 21 August 2003] (equating article 35 (2) (b) to the "statutory warranty of fitness" under Canadian domestic sales law); Supreme Court of Victoria, Australia, 24 April 2003 (Playcorp Pty. Ltd. v Taiyo Kogyo Limited), available on the Internet at <http://cisgw3.law.pace.edu/cases/030424a2.html> (equating article 35 (2) (b) with sellers' obligations under Australian domestic law); Supreme Court of Western Australia, Australia, 17 January 2003 (Ginza Pty Ltd. v. Vista Corporation Pty. Ltd), available on the Internet at <http://cisgw3.law.pace.edu/cases/030117a2.html> (equating article 35 (2) (b) with sellers' obligations under Australian domestic law).

⁴⁹U.S. District Court, Southern District of New York, United States, 23 August 2006 (TeeVee Toons, Inc. v. Gerhard Schubert GmbH), available on the Internet at <http://cisgw3.law.pace.edu/cases/060823u1.html>.

⁵⁰CLOUT case No. 882 [Handelsgericht Aargau, Switzerland, 5 November 2002].

⁵¹CLOUT case No. 532 [Supreme Court of British Columbia, Canada, 21 August 2003].

⁵²CLOUT case No. 882 [U.S. Court of Appeals for the Fourth Circuit, United States, 21 June 2002].

⁵³Helsinki 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 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.

⁵⁴Oberster Gerichtshof, Austria, 19 April 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070419a3.html>.

⁵⁵Landgericht Coburg, Germany, 12 December 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061212g1.html>.

⁵⁶CLOUT case No. 492 [Cour d'appel Lyon, France 18 December 2003].

⁵⁷Landgericht München, Germany, 27 February 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020227g1.html>.

⁵⁸Chambre Arbitrale de Paris, France, 2007, available on the Internet at <http://cisgw3.law.pace.edu/cases/079926f1.html>.

⁵⁹CLOUT case No. 555 [Audiencia Provincial Barcelona, Spain, 28 January 2004].

⁶⁰High Court of New Zealand, New Zealand, 30 July 2010, available on the Internet at <http://cisgw3.law.pace.edu/cases/100730n6.html>. The court noted that it reached this conclusion irrespective of which party bore the burden of proof concerning the reliance element of article 35 (2) (b), since it found that authorities were in conflict concerning which party bore that burden.

⁶¹Landgericht Coburg, Germany, 12 December 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061212g1.html>.

⁶²CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995]. For other cases following the approach of this decision see High Court of New Zealand, New Zealand, 30 July 2010, available on the Internet at <http://cisgw3.law.pace.edu/cases/100730n6.html>; Rechtsbank Rotterdam, the Netherlands, 15 October 2008 (Eyroflam S.A. v. P.C.C. Rotterdam B.V.), abstract published in *European Journal of Commercial Contract Law*; Oberster Gerichtshof, Austria, 19 April 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070419a3.html>; CLOUT case no. 752 [Oberster Gerichtshof, Austria, 25 January 2006]; Cour d'appel Versailles, France, 13 October 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051013f1.html>; CLOUT case no. 774 [Bundesgerichtshof, Germany, 2 March 2005] (see full text of the decision).

⁶³CLOUT case No. 84 [Oberlandesgericht Frankfurt a.M., Germany, 20 April 1994], opinion described in CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995].

⁶⁴Pretore del Distretto Lugano, Switzerland, 19 April 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070419s1.html>.

⁶⁵Cour d'appel Versailles, France, 13 October 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051013f1.html> (where the seller provided the buyer a sample of a toy intended for young children and included a designation indicating it was safe for young children, article 35 (2) (c) was violated when delivered goods did not meet safety regulations); U.S. District Court, Southern District of New York, United States, 23 August 2006 (TeeVee Toons, Inc. v. Gerhard Schubert GmbH), available on the Internet at <http://cisgw3.law.pace.edu/cases/060823u1.html> (unlike a properly functioning model shown to the buyer, the machinery seller delivered malfunctioned and failed to produce products reliably or rapidly); 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 [U.S. Court of Appeals for the Second Circuit, United States, 6 December 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).

⁶⁶Rechtbank van Koophandel Hasselt, Belgium, 19 April 2006 (Brugen Deuren BVBA v. Top Deuren VOF), available on the Internet at <http://cisgw3.law.pace.edu/cases/060419b1.html>.

⁶⁷Landgericht Berlin, Germany, 15 September 1994, Unilex.

⁶⁸Rechtbank van Koophandel, Belgium, 14 September 2005, English summary available on the Internet at <http://cisgw3.law.pace.edu/cases/050914b1.html> (buyer provided a model document to the seller/printer and ordered printed media in conformity); Landgericht Aschaffenburg, Germany, 20 April 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060420g1.html> (buyer specified the required seam slippage strength of material for use in mattresses by providing the seller a sample produced by another manufacturer); CLOUT case No. 175 [Oberlandesgericht Graz, Austria, 9 November 1995] (see full text of the decision).

⁶⁹Oberlandesgericht Saarbrücken, Germany, 17 January 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070117g1.html>. The court found that the seller’s previous deliveries to the buyer, some of which involved different kinds of goods and during which the goods had not been damaged, did not constitute an implied agreement concerning the packaging of the goods.

⁷⁰CLOUT case No. 202 [Cour d’appel, Grenoble, France, 13 September 1995] (see full text of the decision).

⁷¹Comisión para la Protección del Comercio Exterior de Mexico (Compromex), Mexico, 29 April 1996 (Conservas La Costella S.A. de C.V. v. Lanín San Luis S.A. & Agroindustrial Santa Adela S.A.), Unilex. The Compromex decision did not specifically cite CISG article 35 (2) (*d*).

⁷²Oberlandesgericht Saarbrücken, Germany, 17 January 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070117g1.html>.

⁷³CLOUT case No. 724 [Oberlandesgericht Koblenz, Germany, 14 December 2006].

⁷⁴Chambre Arbitrale de Paris, France, 2007, available on the Internet at <http://cisgw3.law.pace.edu/cases/079926f1.html> (seller was not liable under article 35 CISG because the buyer knew of the non-standard quality of the cargo and could have been aware of the cargo’s condition by carrying out inspections).

⁷⁵Secretariat Commentary to (then) article 33 of the Convention, p. 32, paragraph 14.

⁷⁶Oberlandesgericht Saarbrücken, Germany, 17 January 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070117g1.html>.

⁷⁷CLOUT 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).

⁷⁸CLOUT case No. 256 [Tribunal Cantonal du Valais, Switzerland, 29 June 1998] (see full text of the decision).

⁷⁹See, e.g., U.S. District Court, Southern District of Ohio, United States, 3 April 2009 (Miami Valley Paper, LLC v. Lebbing Engineering & Consulting GmbH), available on the Internet at <http://cisgw3.law.pace.edu/cases/090326u1.html> (buyer presented sufficient evidence that it was unaware of lack of conformity when contract was concluded).

⁸⁰CLOUT case No. 168 [Oberlandesgericht Köln, Germany, 21 March 1996].

⁸¹See High Court, New Zealand, New Zealand, 30 July 2010 (RJ & AM Smallmon v. Transport Sales Limited and Grant Alan Miller), available on the Internet at <http://cisgw3.law.pace.edu/cases/100730n6.html> (finding “a conflict in the authorities on the Convention” over which party bore the burden of proof with respect to conformity of the goods).

⁸²Oberlandesgericht Köln, Germany, 12 January 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070112g1.html>; High People’s Court of Shandong Province, People’s Republic of China, 27 June 2005 (Norway Royal Supreme Seafoods v. China Rizhao Jixiang Ocean Food Co. and China Rizhao Shanfu Food Co.), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050627c1.html>. Rechtbank van Koophandel Kortrijk, Belgium, 6 October 1997, Unilex; Rechtbank van Koophandel Kortrijk, Belgium, 16 December 1996, available on the Internet at www.law.kuleuven.ac.be/int/tradelaw/WK/1996-12-16.htm.

⁸³U.S. District Court, Western District of Washington, United States, 3 April 2009 (Barbara Berry S.A. de C.V. v. Ken M Spooner Farms, Inc.), available on the Internet at <http://cisgw3.law.pace.edu/cases/090403u1.html>; Juzgado de Primera Instancia e Instrucción, no. 5 de La Laguna, Spain, 23 October 2007, Unilex; Arbitral Institute of the Stockholm Chamber of Commerce, Sweden, 5 April 2007, Unilex; Cour d’appel de Rouen, France, 19 December 2006 (Société Agrico v. Société SIAC), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061219f1.html>, affirmed by CLOUT case No. 1028 [Cour de Cassation, France, 16, September 2008]; Rechtbank van Koophandel Hasselt, Belgium, 19 April 2006 (Brugen Deuren BVBA v. Top Deuren VOF), available on the Internet at <http://cisgw3.law.pace.edu/cases/060419b1.html>; Hovioikeus / hovrätt Helsinki, Finland, 31 May 2004 (Crudex Chemicals Oy v. Landmark Chemicals S.A.), available on the Internet at <http://cisgw3.law.pace.edu/cases/040531f5.html>.

⁸⁴U.S. Court of Appeals for the Seventh Circuit, United States, 23 May 2005 (Chicago Prime Packers, Inc. v. Northam Food Trading Co.), available on the Internet at <http://cisgw3.law.pace.edu/cases/050523u1.html>; Oberlandesgericht Köln, Germany, 12 January 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070112g1.html>; Chambre Arbitrale de Paris, France, 2007 (Arbitral award No. 9926), available on the Internet at <http://cisgw3.law.pace.edu/cases/079926f1.html>. CLOUT case No. 103 [Court of Arbitration of the International Chamber of Commerce, 1993 (Arbitral award No. 6653)]. 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].

⁸⁵CLOUT case No. 934 [Tribunal Cantonal Valais, Switzerland, 27 April 2007] (see full text of the decision); CLOUT case No. 721 [Oberlandesgericht Karlsruhe, Germany, 8 February 2006]; CLOUT case No. 894 [Bundesgericht, Switzerland, 7 July 2004] (see full text of the decision); CLOUT case No. 885 [Bundesgericht, Switzerland, 13 November 2003]; 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, the Netherlands, 15 October 2002 (Arbitral award, No. 2319), 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). See also the Digest for article 4, paragraph 4.

⁸⁶CLOUT case No. 885 [Bundesgericht, Switzerland, 13 November 2003]. Because this approach can result in allocating the burden of proof to both parties, the court indicated that the burden ultimately should be allocated on the basis of the “proof proximity” principles, so that the burden of proving lack of conformity is allocated to a buyer that has received and taken control of the goods.

⁸⁷CLOUT case No. 934 [Tribunal Cantonal Valais, Switzerland, 27 April 2007] (see full text of the decision); Hovioikeus / hovrätt Helsinki, Finland, 31 May 2004 (Crudex Chemicals Oy v. Landmark Chemicals S.A.), English editorial analysis available on the Internet at <http://cisgw3.law.pace.edu/cases/040531f5.html>; CLOUT case No. 894 [Bundesgericht, Switzerland, 7 July 2004] (see full text of the decision); CLOUT case No. 891 (Bundesgericht, Switzerland, 13 January 2004, Unilex); CLOUT case No. 885 [Bundesgericht, Switzerland, 13 November 2003]; Arrondissementsrechtbank Zwolle, the Netherlands, 21 May 2003 (Remeha B.V. v. Keramab N.V.), available on the Internet at www.rechtspraak.nl/uitspraak/show_detail.asp?ui_id=52092; Hof van Beroep Antwerpen, Belgium, 16 December 2002, available on the Internet at <http://cisgw3.law.pace.edu/cases/021216b1.html>.

⁸⁸CLOUT case No. 590 [Landgericht Saarbrücken, Germany, 1 June 2004 (see full text of the decision); Hovioikeus / hovrätt Helsinki, Finland, 31 May 2004 (Crudex Chemicals Oy v. Landmark Chemicals S.A.), English editorial analysis available on the Internet at <http://cisgw3.law.pace.edu/cases/040531f5.html>; 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].

⁸⁹Appellationshof Bern, Switzerland, 11 February 2004, available on the Internet at <http://cisgw3.law.pace.edu/cases/040211s1.html>. 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). Compare Polimeles Protodikio Athinon, Greece, 2009 (docket no. 4505/2009), English editorial analysis available on the Internet at <http://cisgw3.law.pace.edu/cases/094505gr.html> (“After the buyer takes over the goods (CISG article 60 (b)), if a matter of non-conformity arises, he is the one who must prove that the goods did not correspond to the contract at the time of transfer of risk (CISG article 36 (1) and articles 67-69). Nevertheless, if the buyer, following receipt of the goods, examines the goods within as short a period as is practicable in the circumstances (CISG article 38 (1), discovers a non-conformity [and gives notice to the seller] specifying the nature of the lack of conformity, events for which he bears the burden of proof, then, the burden of proof is shifted and it is for the seller to prove that at the time of transfer of risk the goods conformed to the contract of sale”).

⁹⁰High Court of New Zealand, New Zealand, 30 July 2010, available on the Internet at <http://cisgw3.law.pace.edu/cases/100730n6.html>.

⁹¹Oberlandesgericht Saarbrücken, Germany, 17 January 2007, available on the Internet at <http://cisgw3.law.pace.edu/cases/070117g1.html>.

⁹²CLOUT case No. 636 [Cámara Nacional de Apelaciones en lo Comercial de Buenos Aires, Argentina, 21 July 2002]; CLOUT case No. 580 [U.S. Court of Appeals for the Fourth Circuit, United States, 21 June 2002].

⁹³CLOUT case No. 1029 [Cour d'appel Rennes, France, 27 May 2008], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080527f1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 6 June 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030606r1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 17 February 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030217r1.html>.

⁹⁴See, e.g., Appellationsgericht Basel-Stadt, Switzerland, 26 November 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080926s1.html>.

⁹⁵Oberlandesgericht Koblenz, Germany, 21 November 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071121g1.html>.

⁹⁶CLOUT case No. 170 [Landgericht Trier, Germany, 12 October 1995] (see full text of the decision).

⁹⁷CLOUT case No. 204 [Cour d'appel, Grenoble, France 15 May 1996].

⁹⁸Arrondissementsrechtbank Arnhem, the Netherlands, 28 June 2006 (Silicon Biomedical Instruments B.V. v. Erich Jaeger GmbH), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060628n1.html>; Landgericht München, Germany, 29 November 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051129g1.html>.

⁹⁹Gerechtshof Arnhem, the Netherlands, 7 October 2008 (Arens Sondermaschinen GmbH v. Smit Draad/Draad Nijmegen B.V.), English abstract available in *European Journal of Commercial Contract Law*; China International Economic and Trade Arbitration Commission, People's Republic of China, 18 April 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080418c1.html>; Obergericht Zug, Switzerland, 5 July 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050705s1.html>; Hovioikeus / hovrätt Helsinki, Finland, 31 May 2004 (Crudex Chemicals Oy v. Landmark Chemicals S.A.), English editorial analysis available on the Internet at <http://cisgw3.law.pace.edu/cases/040531f5.html>; 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, *inter alia*, Hof van Beroep Gent, Belgium, 10 May 2004 (N.V. Maes Roger v. N.V. Kapa Reynolds), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040510b1.html>; 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 www.law.kuleuven.ac.be/int/tradelaw/WK/1996-12-16.htm.

¹⁰⁰Arbitral Institute of the Stockholm Chamber of Commerce, Sweden, 5 April 2007, Unilex.

¹⁰¹Helsinki Court of Appeal, Finland, 29 January 1998, available on the Internet at www.utu.fi/oik/tdk/xcisg/tap4.html#engl.

¹⁰²CLOUT case No. 237 [Arbitration Institute of the Stockholm Chamber of Commerce, Sweden, 5 June 1998] (see full text of the decision).

¹⁰³CLOUT case No. 341 [Ontario Superior Court of Justice, Canada, 31 August 1999] (see full text of the decision).

¹⁰⁴CLOUT case No. 50 [Landgericht Baden-Baden, Germany, 14 August 1991] (see full text of the decision).

¹⁰⁵CLOUT case No. 802 [Tribunal Supremo, Spain, 17 January 2008] (see full text of decision).

¹⁰⁶CLOUT case No. 481 [Cour 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 non-conforming goods where a pre-shipment inspection reported that they were conforming).

¹⁰⁷CLOUT case No. 97 [Handelsgericht des Kantons Zürich, Switzerland, 9 September 1993] (see full text of the decision).

¹⁰⁸CLOUT 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]. See also Hof van Beroep Antwerpen, Belgium, 22 January 2007 (B.V.B.A. I.T.M. v. S.A. Montanier), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070122b2.html> (asserting that the parties' use of an INCOTERM does not directly determine where the seller's obligation to deliver goods in conformity with article 35 is performed for purposes of jurisdiction under article 5 (1) of the Brussels Convention, but nevertheless holding that the performance of that obligation occurs at the place where risk of loss for the goods passes from seller to buyer—a question governed by the parties' INCOTERM). For discussion of jurisdiction under article 5 (1) of the Lugano Convention when the buyer claims that the goods seller delivered lack conformity, see Obergericht Zürich, Switzerland, 6 February 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090206s1.html>.

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.¹ 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.² 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.³ 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).⁴ 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.⁵ And where regulations restricting the buyer's ability to import pork were issued after the contract was formed, a court has held that the seller was responsible for such regulations only if the regulations existed when the risk passed (as provided in article 36 (1)) or if the seller had issued a specific guarantee as provided in article 36 (2).⁶

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." Tribunals have invoked article 36 (1) to establish the time and place at which to determine whether the goods lacked conformity under article 35

CISG.⁷ 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).⁸ One court decision involving the sale of cocoa beans from Ghana illustrates the general operation of article 36 (1).⁹ 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.¹⁰ 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" ("cost, freight") 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).¹¹

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.¹² Where, after pork was delivered, regulations were issued that prevented the buyer from reselling the goods because of suspicion of dioxin contamination (although such contamination was never actually detected), a court found that the goods were non-conforming at the time risk passed, although the lack of conformity only became apparent later.¹³ 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.¹⁴ 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.¹⁵

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.¹⁶ 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;¹⁷ in the particular case the court did not have to resolve this disagreement because both approaches placed the burden on the buyer.¹⁸ 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;¹⁹ the appeals court, however, held that the lower court decision

had not reversed the burden of proof and dismissed the appeal.²⁰ Other courts appear to have taken a factual approach to the question. Thus, it has been asserted 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.²¹ On the other hand, where a refrigeration unit broke down shortly after it was delivered, the court presumed the defect existed when the goods were shipped, and the seller bore the burden of proving it was not responsible for the lack of conformity.²²

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.²³ 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.²⁴ And a court has held that, although the buyer bore the risk when goods (wine bottles) were damaged or contaminated in transit, the seller was responsible because the damage was due to seller’s breach of its article 35 (2) (d) obligation to package the goods in manner adequate for truck transport.²⁵ 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.²⁶ Where a buyer signed an acknowledgment of delivery that indicated the goods conformed to the contract, but the goods later suffered breakdowns, a court stated that the buyer bore the burden of proving that the breakdowns resulted from a breach by the seller that was not apparent at the time the goods were received.²⁷ 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 time²⁸ the goods will remain fit for their ordinary purpose²⁹ or for some particular purpose³⁰ 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.³¹ And a court placed the burden on the buyer to prove that the goods had breached a five-year guarantee given by the seller.³²

Notes

¹Where there is no lack of conformity for which the seller could be liable, it has been stated that article 36 is irrelevant. *Chambre Arbitrale de Paris, France*, 2007, available at <http://cisgw3.law.pace.edu/cases/079926f1.html>. See also *Inalta Curte de Casatie si Justitie, Romania*, 6 June 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030606ro.html>.

²Rules 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.

³The 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.”

⁴CLOUT case No. 107 [Oberlandesgericht Innsbruck, Austria, 1 July 1994].

⁵CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000] (see full text of the decision).

⁶Rechtbank van Koophandel Ieper, Belgium, 18 February 2002, Unilex.

⁷U.S. District Court, Colorado, United States, 6 July 2010 (Alpha Prime Development Corp. v. Holland Loader), available on the Internet at <http://cisgw3.law.pace.edu/cases/100706u1.html>; CLOUT case No. 1037 [Audiencia Provincial de Barcelona, Spain, 24 March 2009], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090324s4.html>; Oberlandesgericht Linz, Austria, 23 January 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060123a3.html>, modified on other grounds in Oberster Gerichtshof, Austria, 4 July 2007, Unilex; High People's Court of Shandong Province, People's Republic of China, 27 June 2005 (Norway Royal Supreme Seafoods v. China Rizhao Jixiang Ocean Food Co. and China Rizhao Shanfu Food Co.), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050627c1.html>; Appellationshof Bern, Switzerland, 11 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040211s1.html>; Rechtbank van Koophandel Ieper, Belgium, 18 February 2002, Unilex.

⁸Under 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 lack of conformity within a reasonable time after he has discovered it or ought to have discovered it."

⁹CLOUT case No. 253, Switzerland, 1998 (see full text of the decision).

¹⁰CLOUT case No. 774 [Bundesgerichtshof, Germany, 2 March 2005]; Cour d'appel de Paris, France, 25 February 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050225f1.html>; CLOUT case No. 575 [U.S. Court of Appeals for the Fifth Circuit, United States, 11 June 2003] (see full text of the decision); 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).

¹¹CLOUT case No. 191 [Cámara Nacional de Apelaciones en lo Comercial, Argentina, 31 October 1995]. To similar effect, see U.S. District Court, Colorado, United States, 6 July 2010 (Alpha Prime Development Corp. v. Holland Loader), available on the Internet at <http://cisgw3.law.pace.edu/cases/100706u1.html>; CLOUT case No. 1037 [Audiencia Provincial de Barcelona, Spain, 24 March 2009], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090324s4.html>; Oberlandesgericht Linz, Austria, 23 January 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060123a3.html>, modified on other grounds in Oberster Gerichtshof, Austria, 4 July 2007, Unilex; High People's Court of Shandong Province, People's Republic of China, 27 June 2005 (Norway Royal Supreme Seafoods v. China Rizhao Jixiang Ocean Food Co. and China Rizhao Shanfu Food Co.), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050627c1.html>; Inalta Curte de Casatie si Justitie, Romania, 6 June 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030606ro.html>; Tribunal de commerce Namur, Belgium, 15 January 2002 (SA P. v. AWS), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020115b1.html>; 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].

¹²CLOUT 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); Comisión para la Protección del Comercio Exterior de Mexico (Compromex), Mexico, 29 April 1996 (Conservas La Costeña S.A. de C.V. v. Lanín San Luis S.A. & Agroindustrial Santa Adela S.A.), Unilex.

¹³CLOUT case no. 774 [Bundesgerichtshof, Germany, 2 March 2005] (see full text of the decision. Contrast Rechtbank van Koophandel Ieper, Belgium, 18 February 2002, Unilex (holding that the seller was responsible under article 36 (1) for regulations restricting the import of pork only if the regulations existed at the time risk passed). For other decisions addressing, under article 36 (1), defects that become apparent only after risk passed, see Cour d'appel de Paris, France, 25 February 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050225f1.html>; CLOUT case No. 575 [U.S. Court of Appeals for the Fifth Circuit, United States, 11 June 2003] (see full text of the decision).

¹⁴Arrondissementsrechtbank 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.

¹⁵This 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.

¹⁶This 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, paragraph 17.

¹⁷For a decision allocating to buyer the burden of proving that goods were non-conforming at the time risk passed, based (apparently) on a burden of proof rule derived from the Convention itself (although the court invokes an analogy to domestic law burden of proof rules), see U.S. Court of Appeals for the Seventh Circuit, United States, 23 May 2005 (Chicago Prime Packers, Inc. v. Northam Food Trading Co.), available on the Internet at <http://cisgw3.law.pace.edu/cases/050523u1.html>. Compare Polimeles Protodikio Athinon, Greece, 2009 (docket no. 4505/2009), English editorial remarks available on the Internet at <http://cisgw3.law.pace.edu/cases/094505gr.html> (stating that the buyer bears the burden of proving that the goods were non-conforming at the time risk passed). See also CLOUT case No. 1037 [Audiencia Provincial de Barcelona, Spain, 24 March 2009], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090324s4.html> (apparently allocating to buyer the burden of proving that goods were non-conforming at time risk passed); High People's Court of Shandong Province, People's Republic of China, 27 June 2005 (Norway Royal Supreme Seafoods v. China Rizhao Jixiang Ocean Food Co. and China Rizhao Shanfu Food Co.), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050627c1.html> (same).

¹⁸CLOUT case No. 253 [Cantone del Ticino Tribunale d'appello, Switzerland, 15 January 1998].

¹⁹Compare Appellationshof Bern, Switzerland, 11 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040211s1.html> (stating that the burden of proof rests on the seller only until the time that risk passes).

²⁰CLOUT case No. 494 [Cour de Cassation, France, 24 September 2003], on appeal from CLOUT case No. 481 [Cour d'appel Paris, France, 14 June 2001].

²¹Hovioikeus/hovrätt Helsinki, Finland, 31 May 2004 (Crudex Chemicals Oy v. Landmark Chemicals S.A.), English editorial analysis available on the Internet at <http://cisgw3.law.pace.edu/cases/040531f5.html>; Tribunal de commerce Namur, Belgium, 15 January 2002 (SA P. v. AWS), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020115b1.html>; CLOUT case No. 377 [Landgericht Flensburg, Germany, 24 March 1999].

²²CLOUT 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].

²³For general discussion of the operation of article 36 (2), see U.S. District Court, Southern District of New York, United States, 23 August 2006 (TeeVee Toons, Inc. v. Gerhard Schubert GmbH), available on the Internet at <http://cisgw3.law.pace.edu/cases/060823u1.html>.

²⁴Comisión para la Protección del Comercio Exterior de Mexico (Compromex), Mexico, 29 April 1996 (Conservas La Costeña S.A. de C.V. v. Lanín San Luis S.A. & Agroindustrial Santa Adela S.A.), Unilex.

²⁵CLOUT case No. 724 [Oberlandesgericht Koblenz, Germany, 14 December 2006].

²⁶CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000].

²⁷Tribunal de commerce Namur, Belgium, 15 January 2002 (SA P. v. AWS), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020115b1.html>.

²⁸For general discussion of guarantees of future performance under article 36 (2) see CLOUT case No. 800 [Tribunal Supremo, Spain, 16 May 2007]; Rechtbank van Koophandel Ieper, Belgium, 18 February 2002, Unilex.

²⁹Article 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.” For a decision holding that a breach of article 35 (2) (a) implicates article 36 (2), see Hof van Beroep Gent, Belgium, 10 May 2004 (N.V. Maes Roger v. N.V. Kapa Reynolds), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040510b1.html>.

³⁰Article 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”.

³¹CLOUT case No. 107 [Oberlandesgericht Innsbruck, Austria, 1 July 1994].

³²CLOUT case No. 800 [Tribunal Supremo, Spain, 16 May 2007].

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 goods¹ 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.

2. Failure by the seller to remedy a lack of conformity pursuant to article 37 has been described as a pre-condition to a buyer’s right to reduce the price of delivered goods under article 50 CISG.⁴

Notes

¹A 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.

²A 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.

³CLOUT case No. 141 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 25 April 1995 (Arbitral award No. 200/1994)].

⁴Audiencia Provincial de Barcelona, Spain, 24 March 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090324s4.html>. To similar effect, Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 23 March 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050323r1.html>.

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 redispached 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 redispach, 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. Where a buyer accepted delivered goods without any examination, choosing to rely on the seller's sales manager—who had previously been employed by the buyer's previous supplier—to deliver goods of the same kind and quality as those provided by the previous supplier, the court found that the buyer failed to comply with article 38.¹ 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.² Where the buyer actually examined goods at their point of origin, however, it has been held that article 38 (2) does not apply.³ Article 38 (3) contains another special rule, applicable if the buyer redirects goods while they are in transit or redispaches 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 redispach when the contract was concluded. Where the buyer reasonably could have examined the goods while they were in the buyer's possession before being redispached to the buyer's customer, however, it has been held that article 38 (3) was inapplicable.⁴

2. As the Secretariat Commentary relating to article 38⁵ and numerous cases⁶ 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.⁷ On the other hand, where the buyer could not detect the lack of conformity during an examination of the goods following delivery, its reasonable time for giving notice of lack of conformity under article 39 (1) does not begin to run at that time.⁸ It has been stated that failure to examine the goods as required by article 38 has no consequences when an examination would not have revealed the lack of conformity in question; but where the lack of conformity might have been detected by a reasonable examination, and the buyer failed to conduct any examination before accepting the goods, the buyer lost its right to rely on the lack of conformity for failing to give timely notice under article 39, even though it was possible that a proper article 38 examination (through sampling of goods delivered in large quantities) might not have detected the defect.⁹ And if a buyer gives timely article 39 notice despite having failed to conduct a proper article 38 examination, it has been stated that "it is irrelevant whether the examination has taken place within a reasonable time and in a reasonable form."¹⁰

3. The obligation to examine under article 38 (and to give notice of lack of conformity under article 39) applies to non-conformities under CISG article 35, including defects in both quantity and quality,¹¹ and also to non-conformities under contractual provisions that derogate from article 35.¹² Where the seller, following the buyer's initial complaints, attempted to repair non-conforming goods, article 38 (1) has been held to require examination of the repaired goods to determine if the repair was effective.¹³ 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.¹⁴ On the other hand, it has been held that

the buyer had no duty to examine video screen machinery to determine whether they lacked basic electrical safety features.¹⁵

4. Decisions have stated that 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;¹⁶ to prevent disputes over whether the goods changed condition after delivery¹⁷ and “to enable the parties to take appropriate measures”;¹⁸ and “to put the buyer in a position to check whether or not the acquired goods are in conformity with the contract. . . , to prepare for a notification and to rectify asymmetric levels of information between buyer and seller.”¹⁹ 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 Convention²⁰ article 38, however, is a provision of international uniform law distinct from similar domestic rules,²¹ and is to be interpreted (pursuant to article 7 (1)) from an international perspective and with a view to promoting uniformity in its application.²² It has been asserted that the requirements of article 38 are to be strictly applied.²³

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.²⁴ 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.²⁵ It has been stated that the circumstances of the particular case determine both the time within which the buyer must examine the goods and the type of examination that must be conducted.²⁶ It has also been asserted: “The extent required for an examination will be determined by the goods and their proposed use, and also by the buyer itself and by the general circumstances at the place where the examination takes place. The actual examination may take from a couple of hours up to several months and can vary between a mere visual check and an in-depth inspection by expert personnel.”²⁷

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 (the existence of which, it has been held, the buyer bears the burden of proving²⁸) has been found to supersede the usual rules of article 38.²⁹ An agreement by a seller to reimburse the buyer for services provided to its customers, to the extent such services related to defective goods exceeding a specified percentage of those sold to the buyer, was held to constitute an agreement to derogate from article 38, and to eliminate the buyer’s obligation to examine the goods under that provision.³⁰ 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 38.³¹ It has also been held that a buyer’s unilateral decision to delay a certain type of examination until after it had conducted other tests did not constitute a derogation from article 38 and did not bind the seller.³² Derogation from article 38 can also occur by trade usage,³³ although the express terms of the agreement may negate the applicability of a usage.³⁴

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,³⁵ or it may be estopped from asserting such right.³⁶ 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.³⁷

8. Evidentiary questions can play a crucial role in determining whether a buyer has met its obligations under article 38 (1). A number of decisions have asserted that the buyer bears the burden of proving that it conducted a proper examination³⁸ and that the alleged lack of conformity was not reasonably discoverable in such an examination.³⁹ 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.”⁴⁰ 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.⁴¹ 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.⁴²

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. One court stated: “The examination pursuant to article 38 CISG may be conducted by the buyer himself, its employees, or others. The buyer and the seller may examine the goods together, or may agree to leave the examination to an institution suitable for inspections of that kind.”⁴³ 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,⁴⁴ subcontractor,⁴⁵ an expert appointed by the buyer,⁴⁶ or proper public authorities.⁴⁷ It has also been held, however, that the buyer bears ultimate responsibility under article 38 for examinations carried out by others.⁴⁸

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;⁴⁹ in the absence of such indicators, a

“reasonable” examination,⁵⁰ “thorough and professional”, is required, although “costly and expensive examinations are unreasonable.”⁵¹ It has also been asserted that the extent and intensity of the examination are determined by the type of goods,⁵² packaging and the capabilities of the typical buyer;⁵³ that the examination “should concern all aspects of conformity of the goods and be such as to reveal all non-conformities that a buyer should discover”;⁵⁴ and that in the case of generic goods the buyer has an obligation “to randomly inspect and analyse the goods.”⁵⁵ Issues relating to the method or manner of examination that have been addressed in decisions include: whether a simple visual examination was adequate⁵⁶ or required;⁵⁷ the impact of the buyer’s expertise on the level of examination required;⁵⁸ the impact of a risk of large foreseeable consequential damages on the level of examination required;⁵⁹ the impact of preliminary testing suggesting that the goods may not conform;⁶⁰ whether spot or random testing or “sampling” is required⁶¹ (particularly where the examination would alter the goods or render them unfit for their uses),⁶² or whether such testing is adequate;⁶³ the effect of the packaging or shipping condition of the goods on the type of examination the buyer should conduct;⁶⁴ whether goods to be used in production processes must be subject to a test run;⁶⁵ whether an outside expert can or must be utilized;⁶⁶ and whether the presence or absence of defects in earlier deliveries or transactions should affect the manner of examination.⁶⁷

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”—a standard that has been described as a “factual” one that “depends on the circumstances of the case.”⁶⁸ 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,⁶⁹ and to permit prompt clarification of whether the buyer accepts the goods as conforming;⁷⁰ 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.⁷¹

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 redispached (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 goods⁷²—which in general corresponds to the time risk of loss passes to the buyer.⁷³ 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 goods are delivered in instalments, it has been stated that the buyer has an obligation to examine each instalment delivery separately;⁷⁴ although where an initial delivery was insufficient for the buyer to begin producing complete products using the goods, it has been held that the buyer could postpone examination until a sufficient quantity of goods had been delivered to begin using them

in production.⁷⁵ If the seller is obligated to install delivered goods, the time for examination of the goods has been held to commence when installation is complete.⁷⁶ 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.⁷⁷

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.⁷⁸ It has also been asserted that the phrase is to be strictly interpreted,⁷⁹ although this has also been denied in more recent cases.⁸⁰ 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.⁸¹ 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.⁸²

14. As the aforementioned statement indicates, the perishable⁸³ or seasonal⁸⁴ nature of goods is a factor that tribunals have considered in determining the period for examination. Other factors that the decisions recognize as relevant include the professionalism and/or expertise of the buyer;⁸⁵ the buyer’s reasonable opportunity (and the availability of necessary facilities) to examine the goods;⁸⁶ the timing and nature of the buyer’s expected use or resale of the goods;⁸⁷ the buyer’s knowledge of the seller’s need for speedy notice of lack of conformity;⁸⁸ whether the goods had passed a pre-delivery inspection;⁸⁹ whether there were non-business days during the period for examination;⁹⁰ the complexity of the goods;⁹¹ the difficulty of conducting an examination;⁹² whether there were defects in prior deliveries;⁹³ the fact that the buyer had requested expedited delivery of the goods;⁹⁴ the obviousness (or non-obviousness) of the lack of conformity;⁹⁵ the volume of goods delivered by the seller;⁹⁶ the risk that the goods would be mixed up with those from other suppliers unless examined immediately after delivery;⁹⁷ “cultural differences”;⁹⁸ whether examining the goods would entail disassembling them or removing them from packaging;⁹⁹ and whether the goods are subject to major fluctuations in price¹⁰⁰ or rapid change in condition.¹⁰¹ On the other hand, the fact that deliveries arrived while the buyer was still examining an earlier shipment of the goods did not delay the buyer’s obligation to examine the later deliveries; the court explained that “[i]n the international context, diligence is the first duty of all involved.”¹⁰²

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.¹⁰³ Other decisions have set presumptive examination periods ranging from three or four days¹⁰⁴ to two weeks,¹⁰⁵ to two to three weeks,¹⁰⁶ to a month.¹⁰⁷ It has been stated that perishable and generic goods must be examined immediately upon delivery or within the next days.¹⁰⁸

16. Based on the facts of the particular case, examinations have been found timely when they were conducted at the following times: within one month after delivery;¹⁰⁹ within approximately two weeks of the first delivery under the contract;¹¹⁰ within one week after delivery;¹¹¹ within a few days after delivery at the port of destination;¹¹² within three days after the goods were handed over to the buyer;¹¹³ within two days after delivery;¹¹⁴ and on the day of delivery.¹¹⁵ 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.¹¹⁶

17. Examinations in the following periods have been found to be untimely in the particular circumstances: more than two years after delivery of non-perishable goods (suggesting that an examination slightly over one year after delivery would also have been too late);¹¹⁷ five and one-half months after delivery;¹¹⁸ four months after delivery;¹¹⁹ over two months after delivery, which was almost two months after the buyer had a particular opportunity to examine the goods;¹²⁰ two months after delivery;¹²¹ seven weeks after delivery;¹²² one month or longer after delivery in the case of perishable goods;¹²³ three weeks after delivery of uncomplicated goods where a visual examination of a sample would have detected the lack of conformity and where examination did not require difficult technical processes or destruction of packaging;¹²⁴ two weeks after delivery of perishable foodstuffs;¹²⁵ more than 10 days following delivery;¹²⁶ beyond one week to 10 days after delivery;¹²⁷ nine days after delivery;¹²⁸ beyond one week following delivery;¹²⁹ more than six days after delivery (where there was a risk that the goods would become confused with those from other suppliers unless the goods were examined immediately after delivery);¹³⁰ more than a few days after delivery;¹³¹ after three or four days following delivery;¹³² beyond three days after delivery;¹³³ after the day of arrival at the port of destination;¹³⁴ any time later than immediately following delivery.¹³⁵ Where the buyer failed to examine the goods at the port of destination, and the goods were not properly examined until they were resold and shipped to the buyer's customer, it was held that the buyer failed to comply with article 38.¹³⁶

LATENT LACK OF CONFORMITY

18. The issue of the buyer's obligation to examine the goods for a hidden or latent lack of conformity not discernible during an initial inspection¹³⁷ 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). It has been held that the buyer had no duty to examine video screen machinery to determine whether they lacked basic electrical safety features.¹³⁸ 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.¹³⁹ 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,¹⁴⁰ whereas the period for examination of obvious defects begins to run immediately upon delivery.¹⁴¹ 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 38.¹⁴²

19. 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 38.¹⁴³ It has been held that the buyer bears the burden of proving that a lack of conformity constituted a latent defect.¹⁴⁴

ARTICLE 38 (2)

20. 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.¹⁴⁵ 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 31.¹⁴⁶ 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.¹⁴⁷ 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,"¹⁴⁸ and the buyer's period for examining the goods begins to run when it receives the goods there.¹⁴⁹ The goal of this provision, it has been asserted, is "to give the buyer the opportunity to carefully inspect the goods,"¹⁵⁰ and where the buyer actually examined goods at their point of origin, it has been

held that article 38 (2) does not apply.¹⁵¹ 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.¹⁵² Another decision held that, where the sales contract included a “C & F Shanghai” term, the buyer was entitled under article 38 (2) to rely on an inspection certificate issued at the goods’ final destination, and was not required to examine the goods in Shanghai because examination at that place would have been impracticable and a waste of money.¹⁵³ On the other hand, article 38 (2) is subject to the contrary agreement of the parties.¹⁵⁴ 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 (Torballi)” 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.¹⁵⁵

ARTICLE 38 (3)

21. 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.¹⁵⁶ Specifically, where the goods are “redirected in transit” or “redispached by the buyer¹⁵⁷ without a reasonable opportunity for examination by him,”¹⁵⁸ 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 redispach” when the contract was concluded.¹⁵⁹ Analysis in decisions suggests that, in order to invoke article 38 (3), the buyer bears the burden of proving that the seller was aware of the possibility that the goods would be redirected in transit¹⁶⁰ and that the buyer did not have a reasonable opportunity to examine the goods before they were redispached.¹⁶¹

22. Under article 38 (3), an examination of a delivery of rare hard woods that the buyer (with the seller’s knowledge) redispached to the buyer’s customer could be deferred until the goods arrived at the customer’s facilities.¹⁶² And where the seller knew that the buyer was a mere trading company, lacking facilities of its own to receive, store, or transport the goods, it was held that the seller knew or ought to have know that the goods would be redirected or redispached, and thus article 38 (3) applied.¹⁶³ Where a buyer conducted a simple visual examination when the goods were delivered to the buyer, it has been held that article 38 (3) permitted the buyer to defer a more thorough examination until the goods were delivered to the buyer’s customer.¹⁶⁴ Several decisions 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.¹⁶⁵ 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 redispached, or redirected in transit, and then only if the buyer does not have a reasonable opportunity to examine the delivery.¹⁶⁶

Notes

¹Landgericht Aschaffenburg, Germany, 20 April 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060420g1.html>.

²Landgericht Landshut, Germany, 5 April 1995. See also Rechtbank Breda, Netherlands, 16 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090116n1.html> (where the contract of sale did not involve carriage of the goods, article 38 (2) was inapplicable and article 38 (1) determined when the buyer was obligated to examine the goods).

³CLOUT case No. 802 [Tribunal Supremo, Spain, 17 January 2008] (see full text of decision).

⁴Oberlandesgericht Dresden, Germany, 8 November 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071108g1.html> (buyer had reasonable opportunity to examine goods during three months they were in buyer’s possession before being redispached; article 38 (3), therefore, was inapplicable); Rechtbank van Koophandel Hasselt, Belgium, 6 January 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040106b1.html> (buyer had ample time to examine the goods during the six weeks they were in its possession before being redispached to its customer, although whether buyer had reasonable opportunity to examine them before redispach depends on whether examination would require removing packaging, or seals or other proof of authenticity, necessary for transport to its customer; because buyer failed to prove that removal of such items was required, buyer could not invoke article 38 (3)).

⁵Secretariat Commentary to draft counterpart to final article 38, p. 34, paragraph 2.

⁶E.g., Tribunale di Forlì, Italy, 16 February 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090216i3.html>; Rechtbank Breda, Netherlands, 16 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090116n1.html>; CLOUT case No. 867 [Tribunale di Forlì, Italy, 11 December 2008], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081211i3.html>; CLOUT case No. 828 [Gerechthof ’s-Hertogenbosch, the Netherlands, 2 January 2007]; Landgericht Hamburg, Germany, 6 September 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040906g1.html>; CLOUT case No. 773 [Bundesgerichtshof, Germany, 30 June 2004] (see full text of the decision); CLOUT case No. 590 [Landgericht Saarbrücken, Germany, 1 June 2004] (see full text of the decision); U.S. District Court, Northern District of Illinois, United States, 21 May 2004 (Chicago Prime Packers, Inc. v. Northam Food Trading Co.), available on the Internet at <http://cisgw3.law.pace.edu/cases/040521u1.html>; Landgericht Bielefeld, Germany, 15 August 2003, English translation available on the Internet at

<http://cisgw3.law.pace.edu/cases/030815g1.html>; CLOUT case No. 608 [Tribunale Rimini, Italy, 26 November 2002] (see full text of the decision); Landgericht Saarbrücken, Germany, 2 July 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020702g1.html>; Rechtbank van Koophandel Hasselt, Belgium, 6 March 2002 (Roelants Europrint v. Beltronic Engineering International), UNILEX; Landgericht München, Germany, 27 February 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020227g1.html>; Kantonsgericht Schaffhausen, Switzerland, 25 February 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020225s1.html>; CLOUT case No. 997 [Sø og Handelsretten, Denmark, 31 January 2002]; CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995]; CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000]; Arbitration Court of the International Chamber of Commerce, June 1996 (Arbitral award No. 8247), *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]. See also CLOUT case No. 944 [Gerechtshof 's-Hertogenbosch, the Netherlands, 11 October 2005] (see full text of the decision) (buyer is obliged to examine separately each instalment delivery in an instalment contract; the reasonable time for buyer to give notice of lack of conformity under article 39 (1) began to run from the time buyer ought to have discovered the lack of conformity in an instalment delivery, not from the time the seller had completed all deliveries under the contract).

⁷See, e.g., CLOUT case No. 1057 [Oberster Gerichtshof, Austria, 2 April 2009], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090402a3.html>; CLOUT case No. 802 [Tribunal Supremo, Spain, 17 January 2008] (see full text of decision); Landgericht Aschaffenburg, Germany, 20 April 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060420g1.html>; CLOUT case No. 775 [Landgericht Frankfurt, Germany, 11 April 2005] (see full text of the decision); CLOUT case No. 634 [Landgericht Berlin, Germany 21 March 2003]; CLOUT case No. 4 [Landgericht Stuttgart, Germany, 31 August 1989]; CLOUT case No. 833 [Hoge Raad, the Netherlands, 20 February 1998]; 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 articles 39, 40 and 44.

⁸Regional Court Zilina, Slovakia, 25 October 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071025k1.html>.

⁹Landgericht Aschaffenburg, Germany, 20 April 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060420g1.html>.

¹⁰Landgericht München, Germany, 29 November 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051129g1.html>. Accord, CLOUT case No. 608 [Tribunale Rimini, Italy, 26 November 2002] (see full text of the decision).

¹¹Handelsgericht St. Gallen, Switzerland, 11 February 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030211s1.html>.

¹²CLOUT case No. 237 [Arbitration Institute of the Stockholm Chamber of Commerce, Sweden, 5 June 1998].

¹³Hof van Beroep Ghent, Belgium, 14 November 2008 (Volmari Werner v. Isocab NV), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081114b1.html>.

¹⁴Gerechtshof Arnhem, the Netherlands, 17 June 1997, Unilex.

¹⁵Landgericht München, Germany, 27 February 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020227g1.html>.

¹⁶CLOUT case No. 538 [Oberlandesgericht Innsbruck, Austria, 26 April 2002]; CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999], also available on the Internet at 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.

¹⁷Oberlandesgericht Köln, Germany, 31 August 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060831g1.html>; U.S. District Court, Northern District of Illinois, United States, 21 May 2004 (Chicago Prime Packers, Inc. v. Northam Food Trading Co.), available on the Internet at <http://cisgw3.law.pace.edu/cases/040521u1.html>. Compare Oberlandesgericht Schleswig, Germany, 22 August 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020822g2.html> (livestock had to be examined immediately after delivery because of the possibility of rapid change in their condition).

¹⁸Oberlandesgericht Köln, Germany, 31 August 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060831g1.html>.

¹⁹Appellationshof Bern, Switzerland, 11 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040211s1.html>, reasoning upheld in CLOUT case No. 894 [Bundesgericht, Switzerland, 7 July 2004] (see full text of the decision).

²⁰CLOUT case No. 45 [Arbitration Court of the International Chamber of Commerce, 1989 (Arbitral award No. 5713)].

²¹CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997] (see full text of the decision).

²²CLOUT case No. 284 [Oberlandesgericht Köln, Germany 21 August 1997] (see full text of the decision).

²³Rechtbank van Koophandel Hasselt, Belgium, 6 March 2002 (Roelants Europrint v. Beltronic Engineering International), UNILEX; CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994] (see full text of the decision).

²⁴See the discussion in paragraphs 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 paragraphs 20–23 *infra*. See also the discussion of latent defects in paragraph 18 *infra*.

²⁵See the discussion in paragraphs 9–10 *infra*.

²⁶Oberlandesgericht Köln, Germany, 12 January 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070112g1.html>. See also CLOUT case No. 828 [Gerechtshof 's-Hertogenbosch, the Netherlands, 2 January 2007] (“The length of the reasonable time depends on the circumstances of the case and the nature of the delivered goods”).

²⁷Appellationshof Bern, Switzerland, 11 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040211s1.html>, reasoning upheld in CLOUT case No. 894 [Bundesgericht, Switzerland, 7 July 2004] (see full text of the decision).

²⁸CLOUT case No. 944 [Gerechtshof –Hertogenbosch, Netherlands, 11 October 2005] (see full text of the decision).

²⁹Rechtbank Arnhem, the Netherlands 11 February 2009, UNILEX; CLOUT case No. 1057 [Oberster Gerichtshof, Austria, 2 April 2009], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090402a3.html>; Judicial Board of Szeged, Hungary, 5 December 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081205h1.html>; CLOUT case No. 94 [Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft—Wien, Austria, 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 www.cisg.at/1_22399x.htm; Arrondissementsrechtbank Zwolle, the Netherlands, 5 March 1997, Unilex (agreement as to time).

³⁰CLOUT case No. 591 [Oberlandesgericht Düsseldorf, Germany, 28 May 2004].

³¹CLOUT case No. 229 [Bundesgerichtshof, Germany, 4 December 1996].

³²Hof van Beroep Ghent, Belgium, 16 April 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070416b1.html>.

³³Helsinki Court of Appeal, Finland, 29 January 1998, available on the Internet at 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 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].

³⁴CLOUT case No. 292 [Oberlandesgericht Saarbrücken, Germany, 13 January 1993].

³⁵CLOUT 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 its 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 [Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft, Wien, Austria, 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).

³⁶CLOUT case No. 94 [Arbitration, Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft, Wien, Austria, 15 June 1994] (seller was estopped from asserting its rights under articles 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 articles 38 or 39).

³⁷CLOUT 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).

³⁸Polimeles Protodikio Athinon, Greece, 2009 (docket No. 4505/2009), English editorial analysis available on the Internet at <http://cisgw3.law.pace.edu/cases/094505gr.html>; Oberlandesgericht Köln, Germany, 12 January 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070112g1.html>; Appellationshof Bern, Switzerland, 11 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040211s1.html>, reasoning upheld in CLOUT case No. 894 [Bundesgericht, Switzerland, 7 July 2004] (see full text of the decision); U.S. District Court, Northern District of Illinois, United States, 21 May 2004 (Chicago Prime Packers, Inc. v. Northam Food Trading Co.), available on the Internet at <http://cisgw3.law.pace.edu/cases/040521u1.html>; 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 www.cisg.at/1_22399x.htm. See also CLOUT case No. 828 [Gerechtshof 's-Hertogenbosch, the Netherlands, 2 January 2007] (rejecting buyer's argument that a lack of conformity could not have been discovered during initial examination because buyer failed to support it with evidence); 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).

³⁹CLOUT case No. 590 [Landgericht Saarbrücken, Germany, 1 June 2004] (see full text of the decision).

⁴⁰CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999], also available on the Internet at www.cisg.at/1_22399x.htm.

⁴¹CLOUT 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).

⁴²CLOUT case No. 833 [Hoge Raad, the Netherlands, 20 February 1998] (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).

⁴³Landgericht Aschaffenburg, Germany, 20 April 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060420g1.html>.

⁴⁴Regional Court Zilina, Slovakia, 25 October 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071025k1.html>; Obergericht des Kantons Appenzell Auser Rhoden, Switzerland, 18 August 2008, UNILEX (examination by buyer's customers); Oberlandesgericht Düsseldorf, Germany, 23 January 2004, English translation available on the Internet at <http://cisgw3.law>.

pace.edu/cases/040123g1.html; 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). See also Landgericht München, Germany, 29 November 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051129g1.html> (leading doctrine suggests that article 38 examination may be conducted by a third party, but it was unnecessary to determine whether examination by the buyer's customer satisfied article 38 because in any event the buyer gave timely article 39 notice lack of conformity).

⁴⁵CLOUT case No. 359 [Oberlandesgericht Koblenz, Germany, 18 November 1999] (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).

⁴⁶CLOUT case No. 538 [Oberlandesgericht Innsbruck, Austria, 26 April 2002]; 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).

⁴⁷Supreme Court, Israel, 17 March 2009 (Pamesa Cerámica v. Yisrael Mendelson Ltd.), available on the Internet at <http://cisgw3.law.pace.edu/cases/090317i5.html>.

⁴⁸Oberlandesgericht Düsseldorf, Germany, 23 January 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040123g1.html>; CLOUT case No. 167 [Oberlandesgericht München, Germany, 8 February 1995].

⁴⁹CLOUT case No. 892 [Kantonsgericht Schaffhausen, Switzerland, 27 January 2004] (see full text of the decision); CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999], also available on the Internet at www.cisg.at/1_22399x.htm. For discussion of contractual provisions and usages relating to examination, see paragraph 6 *supra*.

⁵⁰CLOUT case No. 892 [Kantonsgericht Schaffhausen, Switzerland, 27 January 2004] (see full text of the decision) ("reasonable and usual" examination); CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999], also available on the Internet at www.cisg.at/1_22399x.htm.

⁵¹CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999], also available on the Internet at www.cisg.at/1_22399x.htm. See also Oberlandesgericht Dresden, Germany, 8 November 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071108g1.html> (random sampling and stress tests of goods required because it would not have involved much effort or excessive costs); Oberlandesgericht Köln, Germany, 12 January 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070112g1.html> (article 38 only requires an examination whose cost and effort is in reasonable proportion to the expected benefits of the examination); Landgericht Hamburg, Germany, 6 September 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040906g1.html> (buyer should have examined the bottom of containers because this would not have entailed "unacceptable expenses" for the buyer); CLOUT case No. 773 [Bundesgerichtshof, Germany, 30 June 2004] (see full text of the decision) (technical testing of goods not required because it was "economically unreasonable"); Landgericht Paderborn, Germany, 25 June 1996, Unilex (holding that the buyer need not conduct special chemical analyses of plastic compound), reasoning approved in CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002].

⁵²CLOUT case No. 892 [Kantonsgericht Schaffhausen, Switzerland, 27 January 2004] (see full text of the decision) (offering the following examples of the type of examinations required for different types of goods: "in case of textiles, ironing and washing tests (in order to examine the quality of the colors or the shrinking); in case of shoes and clothes, a wearing of the goods"); CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997], reversed on other grounds by CLOUT case No. 270 [Bundesgerichtshof, Germany, 25 November 1998]; CLOUT case No. 997 [Sø og Handelsretten, Denmark, 31 January 2002] (stating that buyer should have discovered that frozen fish were older than specified in the contract and in poor condition by examining time stamps on the packaging, and by thawing and examining samples).

⁵³CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997], reversed on other grounds by CLOUT case No. 270 [Bundesgerichtshof, Germany, 25 November 1998].

⁵⁴CLOUT case No. 828 [Gerechtshof 's-Hertogenbosch, the Netherlands, 2 January 2007]; CLOUT case No. 944 [Gerechtshof-Hertogenbosch, the Netherlands, 11 October 2005] (see full text of the decision). See also CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997], reversed on other grounds by CLOUT case No. 270 [Bundesgerichtshof, Germany, 25 November 1998] ("adequate to reveal possible deficiencies").

⁵⁵Oberlandesgericht Köln, Germany, 31 August 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060831g1.html>; CLOUT case No. 892 [Kantonsgericht Schaffhausen, Switzerland, 27 January 2004] (see full text of the decision).

⁵⁶Oberlandesgericht Dresden, Germany, 8 November 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071108g1.html> (simple visual examination was not adequate where random sampling and stress tests were reasonable and would have revealed the defects); Rechtbank van Koophandel Hasselt, Belgium, 6 January 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040106b1.html> (because visual examination would have suggested defects were present, buyer was obliged to conduct further examination).

⁵⁷Oberlandesgericht Köln, Germany, 12 January 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070112g1.html>.

⁵⁸CLOUT 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").

⁵⁹Landgericht Aschaffenburg, Germany, 20 April 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060420g1.html>.

⁶⁰Landgericht Aschaffenburg, Germany, 20 April 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060420g1.html>; Rechtbank van Koophandel Hasselt, Belgium, 6 January 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040106b1.html>.

⁶¹Oberlandesgericht Dresden, Germany, 8 November 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071108g1.html>; Landgericht Aschaffenburg, Germany, 20 April 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060420g1.html>; CLOUT case No. 997 [Sø og Handelsretten, Denmark, 31 January 2002]; 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, the 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 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).

⁶²Oberlandesgericht Köln, Germany, 12 January 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070112g1.html>.

⁶³Landgericht Aschaffenburg, Germany, 20 April 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060420g1.html> (sampling is sufficient for deliveries of large quantities of goods); CLOUT case No. 892 [Kantonsgericht Schaffhausen, Switzerland, 27 January 2004] (see full text of the decision) (stating that only random sampling is required for mass production items, but random sampling was not sufficient for the “small series” of goods in the case); Rechtbank van Koophandel Hasselt, Belgium, 6 January 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040106b1.html>; 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).

⁶⁴Regional Court Zilina, Slovakia, 25 October 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071025k1.html>; 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).

⁶⁵Landgericht Aschaffenburg, Germany, 20 April 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060420g1.html>.

⁶⁶Landgericht Aschaffenburg, Germany, 20 April 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060420g1.html>; CLOUT case No. 892 [Kantonsgericht Schaffhausen, Switzerland, 27 January 2004] (see full text of the decision); 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 www.cisg.at/1_22399x.htm; Landgericht Ellwangen, Germany, 21 August 1995, Unilex.

⁶⁷CLOUT case No. 892 [Kantonsgericht Schaffhausen, Switzerland, 27 January 2004] (see full text of the decision); 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).

⁶⁸U.S. District Court, Northern District of Illinois, United States, 21 May 2004 (Chicago Prime Packers, Inc. v. Northam Food Trading Co.), available on the Internet at <http://cisgw3.law.pace.edu/cases/040521u1.html>.

⁶⁹CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998].

⁷⁰CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997] (see full text of the decision).

⁷¹CLOUT 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); Arrondissementsrechtbank 's-Hertogenbosch, the Netherlands, 15 December 1997, Unilex (examination of furs not conducted until they had already undergone processing was not timely).

⁷²E.g. Tribunale di Forlì, Italy, 16 February 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090216i3.html>; Rechtbank Breda, the Netherlands, 16 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090116n1.html>; CLOUT case No. 828 [Gerechthof 's-Hertogenbosch, the Netherlands, 2 January 2007]; Landgericht Hamburg, Germany, 6 September 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040906g1.html>; Appellationshof Bern, Switzerland, 11 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040211s1.html>, reasoning upheld in CLOUT case No. 894 [Bundesgericht, Switzerland, 7 July 2004] (see full text of the decision) (“The period of time under article 38 (1) CISG commences when the goods are at the disposal of the buyer at the stipulated location.”); CLOUT case No. 892 [Kantonsgericht Schaffhausen, Switzerland, 27 January 2004] (see full text of the decision) (the time for the buyer’s examination “is to be counted from the time the buyer has access to the goods at the place of delivery. . . . The time in which the goods are at the buyer’s disposal is decisive for the beginning of the period for examination.”); Rechtbank van Koophandel Hasselt,

Belgium, 6 January 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040106b1.html>; 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 decision); 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 article 38 and giving notice under article 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]. Where goods were delivered to the port designated by the contract’s FOB term but the buyer did not receive the bill of lading covering the goods until almost a month later, the court “assumed” that the period for examination did not begin to run until the buyer received the bill of lading. CLOUT case No. 775 [Landgericht Frankfurt, Germany, 11 April 2005] (see full text of the decision).

⁷³See CISG article 69; Hof van Beroep Antwerpen, Belgium, 22 January 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070122b2.html>.

⁷⁴CLOUT case No. 944 [Gerechtshof –Hertogenbosch, the Netherlands, 11 October 2005] (see full text of the decision).

⁷⁵Hof van Beroep Antwerpen, Belgium, 14 February 2002 (NV Carta Mundi v. Index Syndicate Ltd.), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020214b1.html>.

⁷⁶Obergericht Zug, Switzerland, 19 December 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061219s1.html>.

⁷⁷CLOUT 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 which held 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 article 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.”); CLOUT case No. 833 [Hoge Raad, the Netherlands, 20 February 1998] (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 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).

⁷⁸Oberlandesgericht Köln, Germany, 31 August 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060831g1.html> (examination of generic goods [chlorine tablets] was required immediately after delivery); Arbitration Court of the International Chamber of Commerce, June 1996 (Arbitral award No. 8247), *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).

⁷⁹Regional Court Zilina, Slovakia, 25 October 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071025k1.html> (packaging of goods made it difficult to examine goods before resale, and thus buyer was not required to examine goods immediately upon delivery); 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].

⁸⁰Appellationshof Bern, Switzerland, 11 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040211s1.html>, reasoning upheld in CLOUT case No. 894 [Bundesgericht, Switzerland, 7 July 2004] (see full text of the decision) (“It is beyond doubt that the buyer has to act in due course. . . . Neither the wording nor the historical background of article 38 CISG requires that a strict standard has to be applied to the time limit for the examination. Instead, the buyer should not be burdened with strict legal standards when a breach of contract by the seller is at issue.”); CLOUT case No. 892 [Kantonsgericht Schaffhausen, Switzerland, 27 January 2004] (see full text of the decision). It has also been asserted that strict examination periods imposed by domestic law are inapplicable under article 38. CLOUT case No. 775 [Landgericht Frankfurt, Germany, 11 April 2005] (see full text of the decision).

⁸¹See, e.g., Rechtbank Breda, Netherlands, 16 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090116n1.html> (where goods were perishable fruit, the buyer was obliged to examine them before they were shipped to its customers); CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002] (see full text of the decision).

⁸²CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999], also available on the Internet at www.cisg.at/1_22399x.htm. The opinion continues by asserting that “the reasonable periods pursuant to articles 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).

⁸³Rechtbank Arnhem, the Netherlands 11 February 2009, UNILEX; Oberster Gerichtshof; Rechtbank Breda, the Netherlands, 16 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090116n1.html>; CLOUT case No. 849 [Audiencia Provincial de Pontevedra, Spain, 19 December 2007] (see full text of the decision); Hof van Beroep Ghent, Belgium, 16 April 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070416b1.html>; Obergericht Zug, Switzerland, 19 December 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061219s1.html>; Appellationshof Bern, Switzerland, 11 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040211s1.html>, reasoning upheld in CLOUT case No. 894 [Bundesgericht, Switzerland, 7 July 2004] (see full text of the decision); Rechtbank van Koophandel Veurne, Belgium, 19 March 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030319b1.html> (fresh vegetables); 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).

⁸⁴Hof van Beroep Gent, Belgium, 12 May 2003, English editorial remarks available on the Internet at <http://cisgw3.law.pace.edu/cases/030512b1.html>.

⁸⁵Kantonsgericht Schaffhausen, Switzerland, 25 February 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020225s1.html> (“the position of the buyer in its trade”); 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. See also U.S. District Court, Northern District of Illinois, United States, 21 May 2004 (Chicago Prime Packers, Inc. v. Northam Food Trading Co.), available on the Internet at <http://cisgw3.law.pace.edu/cases/040521u1.html> (“the skill of the [buyer’s] employees”).

⁸⁶CLOUT case No. 775 [Landgericht Frankfurt, Germany, 11 April 2005] (see full text of the decision); Landgericht Hamburg, Germany, 6 September 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040906g1.html>. See also U.S. District Court, Northern District of Illinois, United States, 21 May 2004 (Chicago Prime Packers, Inc. v. Northam Food Trading Co.), available on the Internet at <http://cisgw3.law.pace.edu/cases/040521u1.html> (time for examination varies with “the method of . . . delivery” of the goods); Kantonsgericht Schaffhausen, Switzerland, 25 February 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020225s1.html> (“the general circumstances and the infrastructure at the place of examination”).

⁸⁷CLOUT 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); Arrondissementsrechtbank ’s-Hertogenbosch, the Netherlands, 15 December 1997, Unilex (examination of furs not conducted until they had already undergone processing was not timely).

⁸⁸Landgericht 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).

⁸⁹Compare Helsinki Court of First Instance, Finland, 11 June 1995, available on the Internet at www.cisg.law.pace.edu/cisg/wais/db/cases/2/980630f5.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).

⁹⁰CLOUT 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 (three days for examining delivery of ham was sufficient even though Christmas holidays interfered with examination). But see CLOUT case No. 833 [Hoge Raad, the Netherlands, 20 February 1998] (despite buyer’s summer vacation, it should not have delayed in examining the goods when its customer complained in July).

⁹¹CLOUT case No. 775 [Landgericht Frankfurt, Germany, 11 April 2005] (see full text of the decision); U.S. District Court, Northern District of Illinois, United States, 21 May 2004 (Chicago Prime Packers, Inc. v. Northam Food Trading Co.), available on the Internet at <http://cisgw3.law.pace.edu/cases/040521u1.html>; (time for examination influenced by “the complexity of the machinery . . . [and] the need for training and ongoing repairs with respect to the machinery”); CLOUT case No. 892 [Kantonsgericht Schaffhausen, Switzerland, 27 January 2004] (see full text of the decision); Handelsgericht St. Gallen, Switzerland, 11 February 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030211s1.html>; Kantonsgericht Schaffhausen, Switzerland, 25 February 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020225s1.html>; 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).

⁹²CLOUT case No. 849 [Audiencia Provincial de Pontevedra, Spain, 19 December 2007] (see full text of the decision); CLOUT case No. 775 [Landgericht Frankfurt, Germany, 11 April 2005] (see full text of the decision); Landgericht Hamburg, Germany, 6 September 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040906g1.html>; CLOUT case No. 892 [Kantonsgericht Schaffhausen, Switzerland, 27 January 2004] (see full text of the decision); Handelsgericht St. Gallen, Switzerland, 11 February 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030211s1.html>; 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).

⁹³CLOUT case No. 892 [Kantonsgericht Schaffhausen, Switzerland, 27 January 2004] (see full text of the decision); Rechtbank van Koophandel Hasselt, Belgium, 6 March 2002 (Roelants Euro sprint v. Beltronic Engineering International), UNILEX; 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 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”).

⁹⁴CLOUT case No. 634 [Landgericht Berlin, Germany 21 March 2003].

⁹⁵Regional Court Zilina, Slovakia, 25 October 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071025k1.html>. (defects in clothing could not be detected until worn by the buyer’s retail customers); CLOUT case No. 775 [Landgericht Frankfurt, Germany, 11 April 2005] (see full text of the decision); U.S. District Court, Northern District of Illinois, United States, 21 May 2004 (Chicago Prime Packers, Inc. v. Northam Food Trading Co.), available on the Internet at <http://cisgw3.law.pace.edu/cases/040521u1.html>; CLOUT case No. 892 [Kantonsgericht Schaffhausen, Switzerland, 27 January 2004] (see full text of the decision); Handelsgericht St. Gallen, Switzerland, 11 February 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030211s1.html>; Landgericht München, Germany, 27 February 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020227g1.html> (no duty to examine video machinery for basic electrical safety features); 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).

⁹⁶Regional Court Zilina, Slovakia, 25 October 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071025k1.html>.

⁹⁷CLOUT case No. 828 [Gerechtshof ’s-Hertogenbosch, Netherlands, 2 January 2007].

⁹⁸Kantonsgericht Schaffhausen, Switzerland, 25 February 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020225s1.html>.

⁹⁹CLOUT case No. 775 [Landgericht Frankfurt, Germany, 11 April 2005] (see full text of the decision).

¹⁰⁰Obergericht Zug, Switzerland, 19 December 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061219s1.html>.

¹⁰¹Oberlandesgericht Schleswig, Germany, 22 August 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020822g2.html> (livestock had to be examined immediately after delivery because of the possibility of rapid change in their condition).

¹⁰²Hof van Beroep Ghent, Belgium, 16 April 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070416b1.html>.

¹⁰³Appelationshof Bern, Switzerland, 11 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040211s1.html>, reasoning upheld in CLOUT case No. 894 [Bundesgericht, Switzerland, 7 July 2004] (see full text of the decision) (“As a rough yardstick, which needs adjustment in either direction according to the circumstances of each case, a period for examination of one week—five working days—can apply”; although suggesting elsewhere that the period for examining non-perishable goods should be set at 2-3 weeks); CLOUT case No. 892 [Kantonsgericht Schaffhausen, Switzerland, 27 January 2004] (see full text of the decision) (“As far as the period of time for the examination is concerned, roughly a week is adequate. . . For examination and notification a period of time of 14 days [seven days for exam, seven days for notice] is an orientation”—although court found that period was inadequate on the facts of the particular case); 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. 1057 [Oberster Gerichtshof, Austria, 2 April 2009], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090402a3.html> (“A period of 14 days would be reasonable in order to examine the goods and give notice due to the lack of special circumstances”); Oberlandesgericht Hamburg, Germany, 25 January 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080125g1.html> (14 days up to a maximum of one month after receipt of the goods is a reasonable time for examination and notice of lack of conformity, except where particular circumstances lead to a shorter or longer period); Oberlandesgericht Linz, Austria, 1 June 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050601a3.html> (an examination and notification period of 14 days is reasonable, absent special circumstances). CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999] (see full text of the decision) (unless special circumstances suggest otherwise, buyer has a total of approximately 14 days to examine and give notice of defects).

¹⁰⁴CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997]. See also U.S. District Court, Northern District of Illinois, United States, 21 May 2004 (Chicago Prime Packers, Inc. v. Northam Food Trading Co.), available on the Internet at <http://cisgw3.law.pace.edu/cases/040521u1.html> (citing with approval decisions that, as a general rule, require examination within three to four days of delivery, as well as decisions requiring examination immediately upon delivery). Compare Handelsgericht St. Gallen, Switzerland, 11 February 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030211s1.html> (“within a few working days”); Landgericht Düsseldorf, Germany, 23 June 1994, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/940623g1.html> (a few working days).

¹⁰⁵Obergericht des Kantons Appenzell Auserroden, Switzerland, 18 August 2008, Unilex (examination period of two weeks is reasonable where the buyer’s customers discovered the defects); Obergericht Zug, Switzerland, 19 December 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061219s1.html> (as a basic rule for examination of non-perishable goods not subject to major price fluctuations, two weeks (but not less than one week or five working days) after delivery).

¹⁰⁶Appelationshof Bern, Switzerland, 11 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040211s1.html>, reasoning upheld in CLOUT case No. 894 [Bundesgericht, Switzerland, 7 July 2004] (see full text of the decision) (“In the absence of further circumstances justifying either a shorter or longer period and in the absence of particular practices or usages, the period granted for examination of non-perishable goods should be set as two-three weeks”; although also indicating “[a]s a rough yardstick, which needs adjustment in either direction according to the circumstances of each case, a period for examination of one week—five working days—can apply”).

¹⁰⁷Kantonsgericht Schaffhausen, Switzerland, 25 February 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020225s1.html>; CLOUT case No. 284 [Oberlandesgericht Köln, Germany, 21 August 1997].

¹⁰⁸CLOUT case No. 849 [Audiencia Provincial de Pontevedra, Spain, 19 December 2007] (see full text of the decision); Oberlandesgericht Köln, Germany, 31 August 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060831g1.html>.

¹⁰⁹CLOUT case No. 484 [Audiencia Provincial de la Pontevedra, Spain, 3 October 2002] (frozen fish).

¹¹⁰Obergericht des Kantons Appenzell Auserroden, Switzerland, 18 August 2008, Unilex; CLOUT case No. 315 [Cour de Cassation, France, 26 May 1999] (see full text of the decision).

¹¹¹CLOUT case No. 885 [Bundesgericht, Switzerland, 13 November 2003] (see full text of the decision).

¹¹²China International Economic and Trade Arbitration Commission, People’s Republic of China, 23 February 1995, Unilex, English translation available on the Internet at www.cisg.law.pace.edu/cisg/wais/db/cases2/950223c1.html.

¹¹³Appelationshof Bern, Switzerland, 11 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040211s1.html>, reasoning upheld in CLOUT case No. 894 [Bundesgericht, Switzerland, 7 July 2004] (see full text of the decision).

¹¹⁴Hovioikeus / hovrätt Helsinki, Finland, 31 May 2004 (Crudex Chemicals Oy v. Landmark Chemicals S.A.), English editorial analysis available on the Internet at <http://cisgw3.law.pace.edu/cases/040531f5.html>.

¹¹⁵CLOUT case No. 46 [Landgericht Aachen, Germany, 3 April 1990] (see full text of the decision). See also Supreme Court, Israel, 17 March 2009 (Pamesa Cerámica v. Yisrael Mendelson Ltd.), English text available on the Internet at <http://cisgw3.law.pace.edu/cases/090317i5.html> (examination immediately upon the goods arrival deemed timely); CLOUT case No. 867 [Tribunale di Forlì, Italy, 11 December 2008], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081211i3.html> (same).

¹¹⁶CLOUT case No. 45 [Arbitration Court of the International Chamber of Commerce, 1989 (Arbitral award No. 5713)] (see full text of the decision).

¹¹⁷Oberlandesgericht Köln, Germany, 12 January 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070112g1.html>.

¹¹⁸Obergericht Luzern, Switzerland, 29 July 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020729s1.html> (complex machinery).

¹¹⁹Oberlandesgericht Köln, Germany, 31 August 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060831g1.html>; Landgericht Düsseldorf, Germany, 23 June 1994 Unilex.

¹²⁰CLOUT 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).

¹²¹CLOUT case No. 608 [Tribunale Rimini, Italy, 26 November 2002] (see full text of the decision).

¹²²CLOUT case No. 634 [Landgericht Berlin, Germany 21 March 2003].

¹²³CLOUT case No. 849 [Audiencia Provincial de Pontevedra, Spain, 19 December 2007] (see full text of the decision).

¹²⁴CLOUT case No. 775 [Landgericht Frankfurt, Germany, 11 April 2005] (see full text of the decision).

¹²⁵Hof van Beroep Ghent, Belgium, 16 April 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070416b1.html>.

¹²⁶CLOUT case No. 192 [Obergericht des Kantons Luzern, Switzerland, 8 January 1997] (see full text of the decision).

¹²⁷CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland 30 November 1998].

¹²⁸U.S. District Court, Northern District of Illinois, United States, 21 May 2004 (Chicago Prime Packers, Inc. v. Northam Food Trading Co.), available on the Internet at <http://cisgw3.law.pace.edu/cases/040521u1.html>.

¹²⁹CLOUT case No. 285 [Oberlandesgericht Koblenz, Germany, 11 September 1998]; Landgericht Mönchengladbach, Germany, 22 May 1992, available on the Internet at www.cisg-online.ch/cisg/urteile/56.htm; CLOUT case No. 359 [Oberlandesgericht Koblenz, Germany, 18 November 1999].

¹³⁰CLOUT case No. 828 [Gerechtshof 's-Hertogenbosch, Netherlands, 2 January 2007].

¹³¹Landgericht, Köln, Germany, 11 November 1993, Unilex.

¹³²CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997].

¹³³Amtsgericht Riedlingen, Germany, 21 October 1994, Unilex; Landgericht Landshut, Germany, 5 April 1995, Unilex (examination for proper quantity of sports clothing).

¹³⁴Arbitration Court of the International Chamber of Commerce, 1996 (Arbitral award No. 8247), Unilex.

¹³⁵CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994].

¹³⁶Dalian Maritime Court, People's Republic of China, 29 June 2005 (Minermet S.p.A. Italy v. China Metallurgical Import & Export Dalian Company, China Shipping Development Co., Ltd Tramp Co.), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050629c1.html>.

¹³⁷For 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].

¹³⁸Landgericht München, Germany, 27 February 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020227g1.html>.

¹³⁹See, e.g., CLOUT case No. 944 [Gerechtshof 's-Hertogenbosch, the Netherlands, 11 October 2005] (see full text of the decision) (reasonable time for giving article 39 notice regarding defects that ought to have been discovered during a “simple examination” when the goods were delivered to the buyer began to run from the time of the simple examination; reasonable time for giving article 39 notice regarding defects that could not be discovered until a “more thorough” examination when the goods arrived at the premises of the buyer's customer began to run from the time of the more thorough examination).

¹⁴⁰See footnote 46 *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).

¹⁴¹See footnote 44 *supra* and accompanying text; footnote 93 *supra* and accompanying text.

¹⁴²Under 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 Digest for article 39.

¹⁴³Landgericht 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. 590 [Landgericht Saarbrücken, Germany, 1 June 2004] (see full text of the decision) (“the reasonable period of time commences for hidden defects without further examination periods, as soon as the buyer discovers the lack of conformity”); CLOUT case No. 280 [Oberlandesgericht Jena, Germany, 26 May 1998] (failure to examine goods as provided in article 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 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 article 38); Landgericht Ellwangen, Germany, 21 August 1995, Unilex (suggesting that buyer satisfied its article 38 obligations by examining the goods without a chemical analysis that, when conducted later, revealed a latent defect).

¹⁴⁴CLOUT case No. 590 [Landgericht Saarbrücken, Germany, 1 June 2004] (see full text of the decision).

¹⁴⁵See footnote 43 *supra* and accompanying text.

¹⁴⁶See Landgericht Landshut, Germany, 5 April 1995, Unilex (stating that the article 38 examination must usually be conducted at the place for the performance of the obligation to deliver under article 31).

¹⁴⁷This 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.

¹⁴⁸Where the contract provided for delivery “FOB Mombassa, Kenya,” the court held that under article 38 (2) the buyer was required to examine the goods in Mombassa (rather than in Uganda, where the goods were eventually transhipped) because Mombassa was the destination of the goods as per the terms of the contract. CLOUT case No. 775 [Landgericht Frankfurt, Germany, 11 April 2005] (see full text of the decision). Where the contract does not involve transport of the goods by a third party carrier, however, article 38 (2) does not apply. Rechtbank Breda, the Netherlands, 16 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090116n1.html>.

¹⁴⁹Handelsgericht St. Gallen, Switzerland, 11 February 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030211s1.html>; CLOUT case No. 608 [Tribunale Rimini, Italy, 26 November 2002] (see full text of the decision).

¹⁵⁰CLOUT case No. 608 [Tribunale Rimini, Italy, 26 November 2002] (see full text of the decision).

¹⁵¹CLOUT case No. 802 [Tribunal Supremo, Spain, 17 January 2008] (see full text of decision).

¹⁵²Helsinki Court of Appeal, Finland, 29 January 1998, available on the Internet at 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); Arbitration Court of the International Chamber of Commerce, June 1996 (Arbitral award No. 8247), *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, People's Republic of 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).

¹⁵³CLOUT abstract No. 984 [China International Economic and Trade Arbitration Commission, People's Republic of China, 4 November 2002] (see full text of the decision).

¹⁵⁴Not 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.

¹⁵⁵CLOUT case No. 48 [Oberlandesgericht Düsseldorf, Germany, 8 January 1993] (see full text of the decision).

¹⁵⁶Unless 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 paragraph 20 *supra*.

¹⁵⁷According 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 "redispached" is as follows: "'Redispached' 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, paragraph 18; Note to Secretariat Commentary on article 38 (article 36 of the draft Convention) available on the internet at www.cisg.law.pace.edu/cisg/text/secomm/secomm-38.html.

¹⁵⁸Thus where the buyer reasonably could have examined the goods while they were in the buyer's possession before being redispached to the buyer's customer, article 38 (3) is inapplicable. Oberlandesgericht Dresden, Germany, 8 November 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071108g1.html> (buyer had reasonable opportunity to examine goods during three months they were in buyer's possession before being redispached; article 38 (3), therefore, was inapplicable); Rechtbank van Koophandel Hasselt, Belgium, 6 January 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040106b1.html> (buyer had ample time to examine the goods during the six weeks they were in its possession before being redispached to its customer, although whether buyer had reasonable opportunity to examine them before redispach depends on whether examination would require removing packaging, or seals or other proof of authenticity, necessary for transport to its customer; because buyer failed to prove that removal of such items was required, buyer could not invoke article 38 (3)).

¹⁵⁹For an example where a court found all requirements for application of article 38 (3) had been satisfied, see Oberlandesgericht Düsseldorf, Germany, 23 January 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040123g1.html>.

¹⁶⁰Amtsgericht Viechtach, Germany, 11 April 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020411g1.html>. The fact that the seller knew the buyer was located in a county different from the one where the goods were delivered, it has been suggested (in dicta), did not mean that the seller was or ought to have been aware that goods would be transhipped. CLOUT case No. 775 [Landgericht Frankfurt, Germany, 11 April 2005] (see full text of the decision).

¹⁶¹Rechtbank van Koophandel Hasselt, Belgium, 6 January 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040106b1.html>. The fact that the Ugandan buyer would have had to fly to Kenya in order to examine the goods at the place of delivery before they were transhipped to Uganda, and that such an examination might have triggered Kenyan custom duties, was found not to prevent the buyer from having a reasonable opportunity to examine the goods in Kenya: the Ugandan buyer could have avoided the expense of flying to Kenya by employing an agent to examine the goods, the buyer had ample time to have the goods examined in Kenya, and examination would not have required difficulty in removing the goods from their packaging; the buyer, furthermore, failed to prove that examination would have triggered Kenyan customs duties. In addition, the buyer assumed the risk of Kenyan custom duties and the expense of travel to Kenya by agreeing to a price-delivery term providing for delivery in Kenya. CLOUT case No. 775 [Landgericht Frankfurt, Germany, 11 April 2005] (see full text of the decision).

¹⁶²CLOUT case No. 120 [Oberlandesgericht Köln, Germany, 22 February 1994], see also Unilex.

¹⁶³U.S. District Court, Northern District of Illinois, United States, 21 May 2004 (Chicago Prime Packers, Inc. v. Northam Food Trading Co.), available on the Internet at <http://cisgw3.law.pace.edu/cases/040521u1.html>.

¹⁶⁴CLOUT case No. 944 [Gerechthof –Hertogenbosch, the Netherlands, 11 October 2005] (see full text of the decision).

¹⁶⁵CLOUT case No. 292 [Oberlandesgericht Saarbrücken, Germany, 13 January 1993].

¹⁶⁶CLOUT 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. As noted in Paragraphs 5, 7, 9, 14 and 19 below, other provisions of the CISG—including those governing interpretation of the parties' statements and conduct (article 8), the effect of practices established between the parties and trade usages (article 9), form requirements (articles 11 and 29), contract formation (articles 14-24), and the effectiveness of properly transmitted notice (article 27)—govern aspects of notice under article 39.¹

SCOPE OF ARTICLE 39

2. The notice obligation imposed by article 39 applies if the buyer claims that delivered goods² suffer from a lack of conformity, regardless of the cause of such non-conformity.³ 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, including that the goods were not adequately contained or packaged as required by article 35 (2) (*d*).⁴ 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 35.⁵ On the other hand, where the seller had agreed to reimburse the buyer's costs in servicing goods (television sets) resold to the buyer's customers to the extent that the defect rate in the delivered goods exceeded five per cent, the court held that this provision "does not amount to a warranty agreement in the classical sense, to which articles . . . 38 and 39 CISG

would be applicable"; the buyer's failure to examine and give notice as required by articles 38 and 39 CISG, therefore, did not relieve the seller of its obligations under this clause.⁶ Article 39 has been applied where the claimed lack of conformity was a failure to provide proper instruction manuals to accompany the goods,⁷ and where a buyer claimed that the seller's attempts to repair delivered goods (attempts made after the buyer had originally notified the seller of a lack of conformity) were unsuccessful.⁸ A buyer's allegation that the seller breached not only its obligations under article 35 but also a duty to provide information about the lack of conformity did not eliminate the buyer's obligation to give notice under article 39, according to one decision.⁹ It has been held that article 39 requires notice when the buyer claims that an inadequate quantity (as opposed to quality) of goods was delivered,¹⁰ as well as when the buyer claims that the seller delivered too many goods.¹¹ Each separate lack of conformity (with respect to each delivery, in the case of instalment contracts) is subject to the notice requirement,¹² 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.¹³

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,¹⁴ the right to claim damages,¹⁵ the right to reduce the price,¹⁶ and the right to avoid the contract,¹⁷ although one court appears to have permitted a buyer to partially avoid the contract based on a lack of conformity that had not been timely noticed.¹⁸ Failure to satisfy the notice requirements of article 39 eliminates a buyer's defence, based on a lack of conformity in delivered goods, to a seller's claim for payment of the price.¹⁹ One court has stated that, where a buyer fails to satisfy the notice requirements of article 39, "[t]he buyer remains obliged to perform all obligations under the contract, namely, to accept the goods with any defects and to pay the purchase price as a consequence thereto."²⁰ 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 44.²¹

BURDEN OF PROOF AND EVIDENCE

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 expressly²² and by implication.²³ Although several decisions have invoked domestic legal rules to justify allocating the burden to the buyer,²⁴ a larger number have based their allocation on the CISG itself.²⁵ Decisions by Italian courts, for example, have expressly rejected reliance on domestic law in determining the burden of proof, and have discovered a general CISG principle (in the sense of article 7 (2)) requiring the buyer to prove valid notice.²⁶ One decision explained that, to carry its burden, a buyer must prove when the non-conformity was discovered, the time and exact addressee of the notice of non-conformity, and the way in which the non-conformity was described in the notice; the court held that the buyer's general statement that it had notified the seller that many deliveries were non-conforming was not sufficient because the statement failed to identify the specific deliveries and non-conformities covered.²⁷ Another decision declared that a buyer "must prove when he became aware of the defects and to whom and how he gave notice."²⁸ Yet another decision held that the buyer failed to carry its burden of proving timely notice where its allegations of oral notice were denied by the seller, and the buyer had failed to indicate precisely when it gave notice or the specific deliveries to which such alleged notice related.²⁹ The buyer's proof also failed where witnesses could not confirm that notice had in fact been faxed because the witnesses had not personally sent the fax and were not present when it was allegedly dispatched; furthermore, the witnesses disagreed as to the addressee of the alleged fax.³⁰ Testimony by witnesses concerning a phone call made in their presence but in a foreign language has also been deemed inadequate proof.³¹ On the other hand, where a buyer submitted delivery notes showing when the goods had been returned to the seller, along with copies of accompanying letters that specified the lack of conformity which prompted the return, the court found that the buyer had shown that it satisfied the requirements of article 39.³²

FORM OF NOTICE

5. Article 39 does not specify the form of notice required, although the parties can by agreement require a particular form.³³ Absent such an agreement it has been stated that, in light of articles 11, 29 and 7 (2) CISG, "the buyer is free to use any form in order to notify a non-conformity."³⁴ Notice in written form, specifically including fax messages and registered mail³⁵ or email,³⁶ has been found satisfactory. Notice given by filing a cross-claim in a law suit, it has been implied, could satisfy the requirements of article 39—although on the facts of the case such notice was held to be untimely.³⁷ The contents of a series of communications have been combined in order to satisfy the article 39 requirement;³⁸ similarly, in determining the propriety of a

buyer's written notice of a pony's lack of conformity, a court took into account the fact that the buyer had, before a "final diagnosis" of the pony's condition was made, "continuously advised the seller" of the pony's worsening condition;³⁹ another decision indicated that, if the buyer's notice left the seller unclear concerning the nature or extent of the claimed lack of conformity, "the seller can be expected to inquire of the buyer."⁴⁰ It has been suggested that a buyer's cross-claim alleging delivery of non-conforming goods, filed in response to the seller's law suit to collect the purchase price of the goods, might constitute notice of lack of conformity under article 39 (1), although such notice was held to be untimely.⁴¹

6. 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.⁴² Oral notice by telephone has also been found sufficient,⁴³ although in several cases evidentiary issues have caused a buyer's claim to have given telephonic notice to fail.⁴⁴ It has been held that a buyer claiming to have given notice by telephone must prove when the call took place, to whom the buyer spoke, and the information conveyed concerning the lack of conformity; failure to prove these elements prevents a buyer from establishing that the article 39 notice requirement was satisfied.⁴⁵ 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.⁴⁶ Where the buyer's representative testified with particularity as to the time, manner and content of telephonic notice, as well as to the specifics of related information discussed in the phone call, and the seller's employee who allegedly received the call testified merely that she did not recall the conversation, a court held that the buyer had provided sufficient evidence of notice.⁴⁷ 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.⁴⁸

TO WHOM AND BY WHOM MUST NOTICE BE GIVEN

7. Article 39 states that the required notice of lack of conformity must be given to the seller.⁴⁹ 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.⁵⁰ Notice given to the manufacturer of the goods, rather than the seller, has also been held insufficient, unless it was shown that the manufacturer conveyed the information to the seller within the reasonable time specified in article 39 (1).⁵¹ 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.⁵² 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.⁵³ 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.⁵⁴ And notice given to a member of the seller's corporate group was found sufficient where the entity that received the notice shared responsibility for the sale with the seller.⁵⁵

8. Article 39 specifies that it is the buyer who is required to give the seller notice of a lack of conformity. Nevertheless, notice sent by the buyer's customer to the seller has been held to satisfy the requirements of article 39 where that notice contained a clear and timely complaint about the quality of goods that the seller had delivered to the buyer, and the seller accepted the complaints as notice of lack of conformity in its delivery to the buyer by responding with questions to the buyer about the defect as well as a request to examine the goods in the buyer's control.⁵⁶

AGREEMENTS RELATING TO NOTICE

9. Article 39 is subject to the parties' power under article 6 to derogate from or vary the effect of any provision of the Convention.⁵⁷ 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.⁵⁸ 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.⁵⁹ 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,⁶⁰ and/or they suggest that the contract provisions are enforceable only to the extent they are judged reasonable by the standards of article 39.⁶¹ 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.⁶² Parties also have been found not to have derogated from article 39 just by agreeing to an 18-month contractual warranty,⁶³ to a provision requiring the goods to be delivered in "ready-for-use condition,"⁶⁴ or to a guaranty agreement that did not expressly address the buyer's obligation to give notice of lack of conformity.⁶⁵ 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 9.⁶⁶ It has been 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;⁶⁷ and that the seller's standard terms requiring notice of lack of conformity within five days after delivery became part of the contract where the buyer, without objection, signed and returned an invoice containing those terms.⁶⁸ On the other hand, a court found it unnecessary to determine whether the notice period specified in the seller's standard terms had become part of the contract where application of the "reasonable time" period for giving notice under article 39 (1) led to the same result.⁶⁹ 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.⁷⁰

WAIVER BY THE SELLER OR THE BUYER

10. 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.⁷¹ 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.⁷² 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.⁷³ 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.⁷⁴ 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 times the price for the goods—supported the conclusion that the seller had waived its right to object to late notice.⁷⁵ And where a seller had acknowledged that it had delivered the wrong goods, and had offered to provide the correct item, a court found that the seller had waived its right to rely on a lack of notice under article 39.⁷⁶ On the other hand, where the seller entered into settlement negotiations but never acknowledged that it had delivered non-conforming goods, denied any responsibility for the claimed

deficiency, and never indicated any willingness to pay any compensation, the court found that the seller had not implicitly waived its rights under article 39.⁷⁷

11. 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.⁷⁸

12. 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.⁷⁹ 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.⁸⁰ And a buyer who paid outstanding invoices with bank cheques and then stopped payment on the cheques before they were honoured was deemed to have lost its right to complain of defects known when the cheques were provided.⁸¹

ARTICLE 39 (1)—PURPOSES

13. 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.⁸² 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,⁸³ and more specifically to facilitate the seller's cure of defects,⁸⁴ or "to take the necessary measures, such as to send a representative to the buyer to examine the goods, to secure the necessary evidence for potential disputes regarding conformity of the goods, to offer exchange, additional delivery or cure the defect, or to have recourse against a supplier."⁸⁵ In the case of an instalment contract it has been suggested that one purpose of article 39 notice is to clarify whether the buyer can expect the seller make further deliveries.⁸⁶ One decision states that the purpose is to promote the quick settlement of disputes and to assist the seller in defending

himself.⁸⁷ It has also been suggested that article 39 (1) assists the seller in defending himself against invalid claims.⁸⁸ The notice requirement has also been associated with a buyer's obligation of good faith.⁸⁹ One 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).⁹⁰

CONTENTS OF NOTICE; SPECIFICITY REQUIRED

14. 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. Article 8 of the CISG, governing interpretation of the parties' statements and conduct, has been applied in determining whether a buyer's notice was sufficiently specific.⁹¹ Where the seller was a professional, notice was found to be adequate because it employed precise technical terms and prompted the seller to examine the goods—itsself an indication that the notice was a sufficient communication.⁹² Several decisions 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;⁹³ that mere general formulations are insufficient, and the notice "must be precise,"⁹⁴ although the notice need not "specify the shortcomings in detail,"⁹⁵ that notice whose content did not prevent the seller from having an opportunity to cure the lack of conformity is sufficiently specific;⁹⁶ 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;⁹⁷ that notice should be specific enough to allow the seller to comprehend the buyer's claim and to take appropriate steps in response,⁹⁸ e.g., to examine the goods, to secure necessary evidence for potential disputes, to arrange for a substitute delivery or otherwise remedy the lack of conformity, or to have recourse against a supplier;⁹⁹ that the notice must give the seller "a complete picture of the complaints";¹⁰⁰ 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;¹⁰¹ that notice should be sufficiently detailed that misunderstanding by the seller would be impossible and the seller could determine unmistakably what the buyer meant¹⁰² without further investigation;¹⁰³ 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;¹⁰⁴ that "[t]he buyer will be expected to identify whether and to which extent he relies on an insufficient delivery, which specific deviations in terms of quality are complained about, and in what respect the delivered goods form a mere *aliud* compared with the goods owed under the contract;"¹⁰⁵ and that notification "must enable the other party to recognize the intention to complain about the condition of the goods and must specify the nature of the lack of conformity so as to enable the seller to understand what the buyer is complaining about."¹⁰⁶

15. Several decisions have emphasized that the notice should identify the particular goods claimed to be non-conforming;¹⁰⁷ 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.¹⁰⁸ 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.¹⁰⁹ It has been stated that discrepancies in the quantity of goods delivered must be specified with precision.¹¹⁰ The specificity requirement has been applied to oral notice of lack of conformity.¹¹¹ On the other hand, it has been stated that notice which informs the seller of the “main result of an examination . . . so that he is able to assess the deficiency” is sufficient;¹¹² several decisions, furthermore, have warned against setting up an overly-demanding standard of specificity,¹¹³ and a decision has indicated that, if the buyer’s notice left the seller unclear concerning the nature or extent of the claimed lack of conformity, “the seller can be expected to inquire of the buyer.”¹¹⁴ 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;¹¹⁵ and that the specificity standard includes “both objective and subjective elements” and “takes the positions of both the buyer and the seller in their commercial transaction into account, any possible cultural differences as well as, in particular, the nature of the goods.”¹¹⁶ It has also been held 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.¹¹⁷

16. The following descriptions of a lack of conformity have been found to be sufficiently specific to satisfy article 39 (1): “detailed notice” that included photographs showing defects in the goods (shoes);¹¹⁸ letters stating, “right boot dissolves on the side, insufficient leather”, “left boot front leather bulges, bothers while walking”, “boot dissolves on the right side, material insufficient, cannot be repaired” or “right boot top in the middle, loose seam”;¹¹⁹ notice specifying that pallets of bottles had been incorrectly piled and the surrounding foil had been torn apart;¹²⁰ notice specifying that frozen pepper slices were “yellow and glassy,” 36 per cent were broken, their length was less than 3 cm, and they were sticky and icy;¹²¹ notice indicating the goods (a machine) were not functional;¹²² a detailed description of the physical condition of sheep that had been warranted as ready for slaughter, along with a declaration that they did not comply with applicable national regulations governing sheep for slaughter and could not be accepted by the buyer—by which the seller should have understood that the buyer was objecting to the weight of the sheep;¹²³ notice that glass game pieces delivered by the seller were broken, that some of the delivered game pieces were “half pieces,” and that the contents of plastic bags containing the pieces were faulty;¹²⁴ 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;¹²⁵ 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;¹²⁶ notice that floor tiles suffered from serious premature wear and discoloration;¹²⁷ notice that occurred when the seller was actually shown the non-conforming goods on the premises of the buyer’s customer.¹²⁸ It has also been held, with respect to a sale of various species of plants, that notice describing the lack of conformity by species was sufficient—the buyer did not have to specify the defects in each individual plant.¹²⁹

17. The following descriptions in notices have been found not to satisfy article 39 (1) because they were insufficiently specific:¹³⁰ notice stating that the goods, poppy seeds, were contaminated by caraway, whereas they were in fact contaminated by feverfew;¹³¹ notice merely reminding the seller that the machines had not yet been installed in ready-for-use condition;¹³² “general complaints (‘not alright’, ‘inadequate characteristics’, ‘wrong delivery’, ‘poor quality’, ‘bad construction’) as well as any general statements of dissatisfaction (‘not according to our expectations’)”;¹³³ a telephone call in which the buyer merely ordered new goods and, at most, communicated that the goods had undergone damage;¹³⁴ notice that merely mentions the lack of conformity incidentally among several matters, and that indicates the lack of conformity is no longer of importance;¹³⁵ a general complaint that goods were missing from deliveries, without specify precisely which goods were lacking;¹³⁶ a communication that the buyer’s customer had complained about the goods, without further details;¹³⁷ notice stating particular functional faults and missing parts in machinery, but failing to state that the goods were non-functional based on construction;¹³⁸ the buyer’s entry of a reduced price on contract records;¹³⁹ notice stating merely that the buyer would not settle its account with the seller concerning a delivery;¹⁴⁰ notice that glass game pieces delivered by the seller were broken, but that failed to state that some of the delivered game pieces were “half pieces,” and that the contents of plastic bags containing the pieces were faulty;¹⁴¹ 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;¹⁴² 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);¹⁴³ notice that cotton cloth was of bad quality;¹⁴⁴ notice that furniture had wrong parts and much breakage;¹⁴⁵ notice of poor workmanship and improper fitting as to fashion goods;¹⁴⁶ notice that failed to specify that cheese was infested with maggots;¹⁴⁷ 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;¹⁴⁸ notice that agricultural machinery failed to function properly but that did not specify the serial number or the delivery date of the machine;¹⁴⁹

notice that truffles had softened when they in fact contained worms, even though most professional sellers would understand that softness implied worms;¹⁵⁰ notice that shoes were not of the quality required by the contract, but which did not describe the nature of the defects;¹⁵¹ notice that frozen bacon was rancid, but which did not specify whether all or only a part of the goods were spoiled;¹⁵² 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;¹⁵³ notice that sheets of vulcanized rubber for shoe soles had problems or contained defects;¹⁵⁴ 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;¹⁵⁵ 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.¹⁵⁶ A buyer's notice stating that it rejected the seller's invoice for repair of goods was found insufficiently specific to satisfy article 39 (1) with respect to the failure of the seller to repair all defects.¹⁵⁷

18. 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.¹⁵⁸ 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);¹⁵⁹ another decision stated that a telephone call which merely informed the seller that the goods had suffered damage was not sufficient article 39 notice because "it was not possible for [Seller] to understand the telephone call as a notification about a lack of conformity;"¹⁶⁰ yet another decision declared that the notice must "contest the conformity of the goods" and demonstrate the buyer's "intention to object."¹⁶¹

TIMELY NOTICE IN GENERAL

19. Where the parties have not agreed on a time for notice to be given,¹⁶² 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.¹⁶³ It has also been suggested that, in instalment contracts, requiring notice within a reasonable time prevents economically-wasteful subsequent deliveries of non-conforming goods. Framing the time for notice in terms of a reasonable time is designed to promote flexibility,¹⁶⁴ and the period depends on the facts of each case.¹⁶⁵ Several decisions have indicated that the reasonable time standard is a strict one.¹⁶⁶ Another decision, however, suggests that the determination of a reasonable time for notice must take into account the interests of both the

buyer and the seller: "[R]egard must be had to the seller's interest not to be subject to non-conformity claims for an indefinite period of time after delivery. On the other hand, justified claims on the part of the buyer should not be excluded by erecting overly formalistic legal barriers. These interests must be given consideration when determining the meaning of 'reasonable'."¹⁶⁷ It has also been held that notice whose timing did not prevent the seller from having an opportunity to cure the lack of conformity is timely.¹⁶⁸ And it has been suggested that the requirement of notice within a reasonable time helps the seller preserve its ability to pursue claims against its own suppliers for a lack of conformity.¹⁶⁹ 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.¹⁷⁰ 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).¹⁷¹ It has also been stated that, pursuant to article 27 CISG, it is sufficient to show that notice was dispatched in timely fashion.¹⁷²

WHEN TIME FOR NOTICE BEGINS TO RUN— RELATION TO ARTICLE 38

20. 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.¹⁷³ For example, a buyer's reasonable time for giving article 39 (1) notice that the goods were delivered on inadequate pallets was deemed to begin at the time of delivery where a representative of the buyer was at the site of delivery and should have discovered the inadequate pallets at that time, even though the buyer did not in fact learn of the lack of conformity until a later time.¹⁷⁴ And where a buyer employed an independent service to inspect the goods before they were loaded for shipment, and such inspection should have revealed the lack of conformity, the buyer's reasonable time for notice was deemed to begin at the time of such inspection.¹⁷⁵ On the other hand, where a buyer's proper article 38 examination did not reveal the presence of a latent or hidden lack of conformity, the buyer's reasonable time for giving notice under article 39 (1) did not begin to run until it actually learned of the non-conformity through customer complaints.¹⁷⁶ It has been held that the buyer's time for giving notice begins to run when it discovers or ought to have discovered the lack of conformity, even if the non-conformity had not at that time caused the buyer any damage;¹⁷⁷ on the other hand, where a lack of conformity arose from the fact that a used car had been initially registered at an earlier date than represented, it was held that the buyer's reasonable time for giving article 39 (1) notice did not begin to run until the

buyer learned of its customer's reaction to this fact, even if the buyer should have known about the situation several months earlier.¹⁷⁸

21. 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 defects¹⁷⁹ or there are objective facts proving when the buyer acquired such knowledge.¹⁸⁰ For example, documents of the buyer have been held to establish that it had discovered the lack of conformity immediately upon delivery.¹⁸¹ Complaints that the buyer received from customers to whom the goods were resold may establish actual knowledge.¹⁸² 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,¹⁸³ even if the buyer doubts their accuracy.¹⁸⁴ On the other hand, it has been held that mere suspicion of a lack of conformity does not constitute discovery of a lack of conformity for purposes of commencing the reasonable time period for notice under article 39 (1).¹⁸⁵ More generally, one decision has declared: "The buyer has discovered the non-conformity in terms of article 39 (1) CISG if such state of certainty is reached where a prudent buyer would be prompted to commence legal action. With particular regard to quantitative deviations, the required state of certainty exists as soon as the buyer becomes aware of the result of the quantity check."¹⁸⁶ On the other hand, it has been asserted that, for the buyer to actually discover a lack of conformity, it is not necessary that the lack of conformity have been ascertained by a court judgment or be undisputed: "[t]here need only be actual indications of deficiencies."¹⁸⁷

22. As is noted in the discussion of article 38,¹⁸⁸ 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.¹⁸⁹ 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".¹⁹⁰ 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,¹⁹¹ although some decisions do not appear to acknowledge the distinction.¹⁹² It has been stated that the reasonable time for the buyer's notice does not begin to run until the buyer ought to have acquired knowledge, and not mere suspicion, of the lack of conformity.¹⁹³

23. In the case of latent or hidden defects not reasonably detectable in a proper article 38 examination following

delivery,¹⁹⁴ 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.¹⁹⁵ 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.¹⁹⁶ 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.¹⁹⁷ 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.¹⁹⁸

PRESUMPTIVE PERIODS FOR NOTICE

24. 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 and will vary with the circumstances of the case,¹⁹⁹ a number of decisions have attempted to establish specific presumptive time periods as general guidelines or default rules.²⁰⁰ 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.²⁰¹ 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 eight days after delivery²⁰² (including where the goods were durable and non-seasonal²⁰³) 14 days for examination and notice,²⁰⁴ from two weeks to one month after delivery,²⁰⁵ one month after delivery,²⁰⁶ and six weeks after delivery²⁰⁷ 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: within a few days after the buyer discovered or ought to have discovered the lack of conformity;²⁰⁸ one week²⁰⁹ (following one week for examination under article 38);²¹⁰ eight days following discovery;²¹¹ two weeks²¹² (following one week for examination);²¹³ one month (following one week for examination).²¹⁴ 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.²¹⁵ Where the goods are perishable, some decisions have suggested very short presumptive notice periods.²¹⁶

FACTORS INFLUENCING REASONABLE TIME FOR NOTICE

25. It is clear that the reasonable time for notice will vary with the circumstances of the particular case.²¹⁷ 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.²¹⁸ The nature of the goods is another frequently-cited factor:²¹⁹ goods that are perishable²²⁰ or seasonal²²¹ require earlier notice of defects; notice with respect to durable or non-seasonal goods, in contrast, is subject to a longer notice period,²²² particularly if the goods are complex²²³ and require training and ongoing repairs.²²⁴ The buyer's plans to process the goods²²⁵ or otherwise handle them in a fashion that might make it difficult to determine if the seller was responsible for a lack of conformity²²⁶ may also shorten the time for notice. Delay that defeated the purposes of article 39 (1) notice—specifically, delay that deprived the seller of the opportunity to check the factual basis of the buyer's complaint and to remedy the alleged lack of conformity at minimal cost by repair or replacement—has been held to render notice untimely.²²⁷ On the other hand, it has been suggested that a lack of conformity of a fraudulent character triggers an extended notice period.²²⁸ It has also been asserted that the reasonable time for notice may vary depending on the remedy the buyer seeks, and that the notice period if the buyer wants to keep the goods and claim damages or a price reduction may be longer than where the buyer wishes to reject the goods.²²⁹ Trade usages²³⁰ as well as practices established between the parties²³¹ 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.²³² An expert or professional buyer has been found to be subject to a shorter period for notice.²³³ 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).²³⁴ 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.²³⁵ On the other hand, the fact that the buyer had earlier “continuously advised” the seller of the worsening condition of a pony was cited by the court in finding that the buyer's notice given immediately after the “final diagnosis” of the pony's condition was timely.²³⁶

APPLICATION OF REASONABLE TIME STANDARD

26. It has been found that a buyer who did not give any notice of a lack of conformity before filing a claim 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.²³⁷ On the other hand, it has been suggested that, theoretically, a buyer's claim in arbitration, or a cross-claim filed in response to the seller's law suit to collect the purchase price of the goods, might constitute notice of lack of conformity under article 39 (1), although such notices were held to be untimely on the particular facts of the cases.²³⁸ 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;²³⁹ 24 months;²⁴⁰ at least 19 months;²⁴¹ 18 months;²⁴² one year;²⁴³ nine months;²⁴⁴ seven to eight months;²⁴⁵ seven months;²⁴⁶ six months;²⁴⁷ five months;²⁴⁸ four months;²⁴⁹ three and one-half months;²⁵⁰ three months;²⁵¹ almost three months;²⁵² more than two and one-half months;²⁵³ more than two months;²⁵⁴ two months;²⁵⁵ two months in the case of one delivery and approximately seven weeks in the case of another delivery;²⁵⁶ “several months”;²⁵⁷ seven weeks;²⁵⁸ six weeks;²⁵⁹ one and one-half months;²⁶⁰ more than one month;²⁶¹ one month;²⁶² 25 days;²⁶³ 24 days;²⁶⁴ 23 days;²⁶⁵ 21 days;²⁶⁶ 20 days;²⁶⁷ 19 days;²⁶⁸ 16 days;²⁶⁹ 15 days (perishables—fresh mushrooms);²⁷⁰ a little more than two weeks (fresh fruit);²⁷¹ two weeks (foodstuffs);²⁷² almost two weeks;²⁷³ 12 days;²⁷⁴ four days;²⁷⁵ any time beyond the day of delivery (involving perishable flowers).²⁷⁶ 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: three years;²⁷⁷ more than 13 months;²⁷⁸ 12 months;²⁷⁹ 11 or 12 months;²⁸⁰ seven months;²⁸¹ at least six months;²⁸² more than four months;²⁸³ almost four months;²⁸⁴ three months;²⁸⁵ more than two months;²⁸⁶ almost two months;²⁸⁷ one and one-half months;²⁸⁸ seven weeks;²⁸⁹ six weeks;²⁹⁰ 32 days;²⁹¹ more than one month;²⁹² one month;²⁹³ one month (by fax) and three weeks (by telephone);²⁹⁴ four weeks;²⁹⁵ three weeks;²⁹⁶ two weeks;²⁹⁷ 10 days;²⁹⁸ eight days;²⁹⁹ seven days.³⁰⁰ Notice given 20 months after the seller replaced one part of the goods, which did not cure the problem, and 11 months after the seller had demanded payment for the goods, has been held untimely.³⁰¹ Where a buyer's notice that the seller's attempts to repair delivered goods had been unsuccessful came more than five months after the buyer's customers had informed the buyer of such failure, the court found that the notice was untimely under article 39 (1), and that the buyer had lost its right to rely on the ineffective repair.³⁰²

27. 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): “immediately” after the buyer received complaints from its customers;³⁰³ the same day as the buyer discovered a latent or hidden lack of conformity;³⁰⁴ notice to the seller's in-country representative on the same day the buyer discovered the lack of conformity through customer complaints, and notice to the seller itself the next day;³⁰⁵ immediate telephone notice when the buyer received customer complaints, followed one-week later by an email conveying laboratory test results;³⁰⁶ immediately after delivery of a machine, before assembly of the machine commenced;³⁰⁷ one day after the goods were handed over to the buyer;³⁰⁸ within 24 hours (perishable goods);³⁰⁹ one day after the goods were examined;³¹⁰ within several days of delivery of perishable goods (tomatoes);³¹¹ three days after delivery;³¹² four days after delivery;³¹³ six days after discovery of defect;³¹⁴ seven days after the buyer learned of the defects;³¹⁵ within eight days after the goods were examined;³¹⁶ eight days after an expert's report identified defects in the goods;³¹⁷ 11 days after delivery;³¹⁸ 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 11 months after delivery of another machine;³¹⁹ 19 days after delivery;³²⁰ 19–21 days after the examination of the goods;³²¹ 20–25 days after delivery of livestock;³²² three weeks after delivery;³²³ four weeks after the buyer should have known of the lack of conformity;³²⁴ within one month of delivery;³²⁵ within one month after the buyer discovered or ought to have discovered the lack of conformity;³²⁶ more than a month after delivery;³²⁷ one to two months after the buyer learned of the lack of conformity through customer complaints;³²⁸ one month and three weeks after delivery of video screen apparatus;³²⁹ two months after delivery, where the buyer examined the goods (frozen fish) in proper and timely fashion one month after delivery;³³⁰ two and one-half months after the buyer received the goods;³³¹ nine months after delivery (thus more than a year before the two-year period for notice under article 39 (2) expired);³³² Where the goods (Christmas trees) were seasonal, and earlier notice would not have permitted the seller to effectively cure the lack of conformity, notice was therefore deemed timely.³³³

ARTICLE 39 (2)

28. 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.³³⁴ The two-year period specified in article 39 (2), however, is not the equivalent of the reasonable time for notice specified in article 39 (1); it has been held that the two-year period for notice under article 39 (2) applies only when the article 39 (1) period is not shorter.³³⁵ Without the two-year limit for notice specified in article 39 (2), 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 (and subject to an exception if article 40 of the Convention applies),³³⁶ 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, even if the lack of conformity could not reasonably have been discovered at that point.³³⁷ 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, even where the seller has attempted to repair a lack of conformity after the goods were delivered, it has been held that the two-year period runs from the time the goods were first actually handed over to the buyer, and not from the time of the seller's attempts to repair.³³⁸ 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.³³⁹

29. 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.³⁴⁰ It has been held that notice given when the buyer began negotiations with the seller, within two years of delivery, to resolve a dispute over the conformity of delivered goods was sufficient to satisfy the notice requirement of article 39 (2).³⁴¹ 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). A number of decisions have attempted to reconcile a shorter limitations period in domestic law with the two-year notice period in article 39 (2): one decision held that, to avoid violating public international law, the shorter domestic limitations period should not be applied to cases where it would subject a claim to limitation before expiration of the two-year period for notice specified in article 39 (2),³⁴² other decisions hold that the shorter domestic limitations period does not begin to run until the buyer gives the notice required by article 39 CISG.³⁴³ 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.³⁴⁴ A number of decisions have involved claims that the parties had derogated from article 39 (2) by agreement.³⁴⁵ 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.³⁴⁶ 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).³⁴⁷ 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.³⁴⁸ 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.³⁴⁹ Where the buyer's claim for price reduction based on the non-conformity of delivered goods was cut-off by failure to give notice of the lack of conformity within the two years specified in article 39 (2), a court held that, for "equitable reasons," interest on the unpaid portion of the purchase price (article 78 of the Convention) should not begin to accrue until the expiration of the article 39 (2) period.³⁵⁰

Notes

¹E.g., Oberlandesgericht Hamburg, Germany, 25 January 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080125g1.html>; Rechtbank Arnhem, the Netherlands, 11 February 2009, Unilex; Amtsgericht Freiburg, Germany, 6 July 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070706g1.html> (stating that, pursuant to article 27 CISG, it is sufficient to show that notice was dispatched in timely fashion); Appellationshof Bern, Switzerland, 11 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040211s1.html>, reasoning upheld in CLOUT case No. 894 [Bundesgericht, Switzerland, 7 July 2004] (see full text of the decision) (stating that, in light of articles 11, 29 and 7 (2) CISG, notice of lack of conformity may be given in any form), and that in light of article 27 CISG the notice need only be properly dispatched).

²See CLOUT case No. 720 [Netherlands Arbitration Institute, the Netherlands, 15 October 2002] (see full text of the decision) (holding that article 39 does not apply when the seller did not make delivery).

³Landgericht Aschaffenburg, Germany, 20 April 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060420g1.html>.

⁴Oberlandesgericht Saarbrücken, Germany, 17 January 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070117g1.html>.

⁵CLOUT case No. 237 [Arbitration Institute of the Stockholm Chamber of Commerce, Sweden, 5 June 1998].

⁶CLOUT case No. 591 [Oberlandesgericht Düsseldorf, Germany, 28 May 2004] (see full text of the decision).

⁷CLOUT case No. 343 [Landgericht Darmstadt, Germany, 9 May 2000] (see full text of the decision).

⁸Hof van Beroep Ghent, Belgium, 14 November 2008 (Volmari Werner v. Isocab NV), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081114b1.html>.

⁹Hof van Beroep Antwerpen, Belgium, 14 April 2004 (ING Insurance v. BVBA HVA Koeling and Fagard Winand; HVA Koeling BVBA v. Fagard Winand and Besseling Agri-Technic BV), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040414b1.html>.

¹⁰Landgericht Köln, Germany, 5 December 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061205g1.html>; Landgericht Saarbrücken, Germany, 26 October 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/041026g1.html>; Landgericht München, Germany, 20 February 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020220g1.html>; 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. The article 39 notice requirement has also been applied, in a small number of cases, when the buyer complained that delivery was late. U.S. District Court, Eastern District of Kentucky, United States, 18 March 2008 (Sky Cast, Inc. v. Global Direct Distributions, LLC), available on the Internet at <http://cisgw3.law.pace.edu/cases/080318u1.html> (applying article 39 “by analogy” where the seller delivered goods late); Amtsgericht Augsburg, Germany, 29 January 1996, Unilex (late delivery of seasonal goods). Note that the CISG provision governing time of delivery (article 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).

¹¹Oberlandesgericht Rostock, Germany, 25 September 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020925g1.html>.

¹²Rechtbank Breda, the Netherlands, 16 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090116n1.html>; Handelsgericht Aargau, Switzerland, 26 November 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081126s1.html>; Obergericht des Kantons Appenzell Auserrhoden, Switzerland, 18 August 2008, Unilex (see full text of the decision); Arrondissementsrechtbank Zutphen, the Netherlands, 27 February 2008 (Frutas Caminito Sociedad Cooperativa Valenciana. v. Groente-En Fruithandel Heemskerk BV), English abstract available on the Internet at <http://cisgw3.law.pace.edu/cases/080227n2.html>; CLOUT case No. 939 [Gerechtshof 's-Hertogenbosch, the Netherlands, 19 September 2006]; CLOUT case No. 944 [Gerechtshof –Hertogenbosch, the Netherlands, 11 October 2005] (see full text of the decision); CLOUT case No. 597 [Oberlandesgericht Celle, Germany, 10 March 2004] (see full text of the decision); Appellationshof Bern, Switzerland, 11 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040211s1.html>, reasoning upheld in CLOUT case No. 894 [Bundesgericht, Switzerland, 7 July 2004] (see full text of the decision); Rechtbank van Koophandel Hasselt, Belgium, 6 January 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040106b1.html>; CLOUT case No. 885 [Bundesgericht, Switzerland, 13 November 2003] (see full text of the decision); Oberlandesgericht München, Germany, 13 November 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021113g1.html>.

¹³CLOUT case No. 944 [Gerechtshof–Hertogenbosch, the Netherlands, 11 October 2005] (see full text of the decision); CLOUT case No. 597 [Oberlandesgericht Celle, Germany, 10 March 2004] (see full text of the decision); Appellationshof Bern, Switzerland, 11 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040211s1.html>, reasoning upheld in CLOUT case No. 894 [Bundesgericht, Switzerland, 7 July 2004] (see full text of the decision); CLOUT case No. 885 [Bundesgericht, Switzerland, 13 November 2003] (see full text of the decision); Oberlandesgericht München, Germany, 13 November 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021113g1.html>; 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 www.cisg.at/1_22399x.htm; CLOUT case No. 597 [Oberlandesgericht Celle, Germany, 10 March 2004].

¹⁴CLOUT case No. 196 [Handelsgericht des Kantons Zürich, Switzerland, 26 April 1995].

¹⁵CLOUT 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].

¹⁶CLOUT 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 article 50 because it had given proper notice of lack of conformity) (see full text of the decision).

¹⁷CLOUT 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).

¹⁸CLOUT case No. 50 [Landgericht Baden-Baden, Germany, 14 August 1991].

¹⁹Handelsgericht Aargau, Switzerland, 26 November 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081126s1.html>; Rechtbank Breda, the Netherlands, 16 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090116n1.html>; Oberlandesgericht Linz, Austria, 1 June 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050601a3.html>.

²⁰CLOUT case No. 938 [Kantonsgericht Zug, Switzerland, 30 August 2007] (see full text of the decision).

²¹See the Digests for articles 40 and 44.

²²Landgericht Stuttgart, Germany, 15 October 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/091015g1.html>; District Court in Komarno, Slovakia, 12 March 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090312k1.html>; Rechtbank Breda, the Netherlands, 16 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090116n1.html>; Polimeles Protodikio Athinon, Greece, 2009 (docket No. 4505/2009), English editorial analysis available on the Internet at <http://cisgw3.law.pace.edu/cases/094505gr.html>; Handelsgericht Aargau, Switzerland, 26 November 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081126s1.html>; CLOUT case No. 934 [Tribunal Cantonal Valais, Switzerland, 27 April 2007] (see full text of the decision); Oberlandesgericht Köln, Germany, 12 January 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070112g1.html>; Obergericht Zug, Switzerland, 19 December 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061219s1.html>; CLOUT case No. 909 [Kantonsgericht Appenzell-Ausserrhoden, Switzerland, 9 March 2006] (see full text of the decision); Rechtbank van Koophandel Kortrijk, Belgium, 4 June 2004 (Steinbock-Bjonustan EHF v. N.V. Duma), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040604b1.html>; U.S. District Court, Northern District of Illinois, United States, 21 May 2004 (Chicago Prime Packers, Inc. v. Northam Food Trading Co.), available on the Internet at <http://cisgw3.law.pace.edu/cases/040521u1.html>; Appellationshof Bern, Switzerland, 11 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040211s1.html>, reasoning upheld in CLOUT case No. 894 [Bundesgericht, Switzerland, 7 July 2004] (see full text of the decision); Landgericht Bielefeld, Germany, 15 August 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030815g1.html>; CLOUT case No. 608 [Tribunale Rimini, Italy, 26 November 2002] (see full text of the decision); Kantonsgericht Schaffhausen, Switzerland, 25 February 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020225s1.html>; 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 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].

²³Rechtbank Arnhem, the Netherlands, 11 February 2009, Unilex; Amtsgericht Freiburg, Germany, 6 July 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070706g1.html>; Commercial Court of Donetsk Region, Ukraine, 13 April 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071211u5.html>, reinstated in Supreme Court of Ukraine 11 December 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071211u5.html> (implying that the buyer bears the burden of proving that it gave the required notice of lack of conformity within the two-year period specific in article 39 (2)); Landgericht Coburg, Germany, 12 December 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061212g1.html>; CLOUT case No. 825 [Oberlandesgericht Köln, Germany, 14 August 2006] (see full text of the decision); Cour de Justice [Appellate Court] de Genève, Switzerland, 20 January 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060120s1.html>; CLOUT case No. 748 [Oberster Gerichtshof, Austria, 24 May 2005]; Landgericht Bayreuth, Germany, 10 December 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/041210g1.html>; Landgericht Tübingen, Germany, 18 June 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030618g1.html>; Oberlandesgericht Rostock, Germany, 25 September 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020925g1.html>; Oberlandesgericht Schleswig, Germany, 22 August 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020822g2.html>; CLOUT case No. 538 [Oberlandesgericht Innsbruck, Austria, 26 April 2002]; 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); Arbitration Court of the International Chamber of Commerce, 1997 (Arbitral award No. 8611), Unilex; Arbitral Panel of the Zurich Chamber of Commerce, Switzerland, 31 May 1996 (Arbitral award No. ZHK 273/95), Unilex.

²⁴District Court in Komarno, Slovakia, 12 March 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090312k1.html>; Pretura di Torino, Italy, 30 January 1997, Unilex, also available on the INTERNET at www.cisg.law.pace.edu/cisg/wais/db/cases2/970130i3.html.

²⁵U.S. District Court, Northern District of Illinois, United States, 21 May 2004 (Chicago Prime Packers, Inc. v. Northam Food Trading Co.), available on the Internet at <http://cisgw3.law.pace.edu/cases/040521u1.html> (citing a German decision applying the CISG for the proposition that the buyer bears the burden of proof under article 39); CLOUT case No. 608 [Tribunale Rimini, Italy, 26 November 2002] (see full text of the decision); 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].

²⁶CLOUT case No. 608 [Tribunale Rimini, Italy, 26 November 2002] (see full text of the decision) (holding that the principle “*onus probandi incumbit ei qui dicit*” [the party seeking to establish his rights must carry the burden of proof] is a general principle on which

the CISG is based under article 7 (2), and results in the buyer bearing the burden of proving it gave proper notice); CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000].

²⁷Handelsgericht Aargau, Switzerland, 26 November 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081126s1.html>.

²⁸CLOUT case No. 934 [Tribunal Cantonal Valais, Switzerland, 27 April 2007] (see full text of the decision). Accord, Kantonsgericht Schaffhausen, Switzerland, 25 February 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020225s1.html>.

²⁹Rechtbank Breda, the Netherlands, 16 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090116n1.html>.

³⁰Amtsgericht Freiburg, Germany, 6 July 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070706g1.html>.

³¹Foreign Trade Court of Arbitration attached to the Yugoslav Chamber of Commerce, Serbia, 27 November 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021127sb.html> (requiring that notice by telephone be confirmed in writing within a reasonable time).

³²Oberlandesgericht Koblenz, Germany, 21 November 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071121g1.html>.

³³Landgericht Coburg, Germany, 12 December 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061212g1.html>; CLOUT case No. 222 [U.S. 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.

³⁴Appellationshof Bern, Switzerland, 11 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040211s1.html>, reasoning upheld in CLOUT case No. 894 [Bundesgericht, Switzerland, 7 July 2004] (see full text of the decision). See also CLOUT case No. 694 [U.S. Bankruptcy Court, District of Oregon, United States, 29 March 2004 (In re Siskiyou Evergreen, Inc.)] (see full text of the decision) (notice not required to be in any particular form); Hof van Beroep Gent, Belgium, 28 January 2004 (J.B. and G.B. v. BV H.V.), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040128b1.html> (notice "not bound by an specific formal requirements"); CLOUT case No. 879 [Handelsgericht Bern, Switzerland, 17 January 2002] (see full text of the decision).

³⁵Rechtbank Arnhem, the Netherlands, 11 February 2009, Unilex; Appellationshof Bern, Switzerland, 11 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040211s1.html>, reasoning upheld in CLOUT case No. 894 [Bundesgericht, Switzerland, 7 July 2004] (see full text of the decision) (fax).

³⁶CLOUT case No. 867 [Tribunale di Forlì, Italy, 11 December 2008], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081211i3.html>; Landgericht München, Germany, 29 November 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051129g1.html> (an email in English); Hoviokaus/hovrätt Turku, Finland, 24 May 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050524f5.html>.

³⁷Federal Court of Australia, Australia, 13 August 2010 (*Cortem SpA v. Controlmatic Pty Ltd.*), available on the Internet at www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2010/852.html. Compare CLOUT case No. 798 [Audiencia Provincial Girona, Spain, 6 November 2006], where the court held that notice given when the buyer began negotiations with the seller to resolve the dispute over the conformity of delivered goods was sufficient to satisfy the notice requirement of article 39 (2).

³⁸Hoviokaus/hovrätt Turku, Finland, 24 May 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050524f5.html> (notice by telephone that the buyer had received complaints about the goods from its customers, later followed by emails detailing laboratory test results); CLOUT case No. 225 [Cour d'appel, Versailles, France, 29 January 1998] (see full text of the decision). See also Cour d'appel Versailles, France, 13 October 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051013f1.html>, where the court took into account a series of communications from the buyer to the seller and its representative in determining that the seller was made aware of the lack of conformity.

³⁹CLOUT case No. 992 [Rettin i København, Denmark, 19 October 2007].

⁴⁰Landgericht Bamberg, Germany, 23 October 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061023g1.html>.

⁴¹Federal Court of Australia, Australia, 13 August 2010 (*Cortem SpA v. Controlmatic Pty Ltd.*), available on the Internet at www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2010/852.html.

⁴²CLOUT 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). But see Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, 6 November 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051106sb.html> (indicating that, although the Convention does specify the form of notice, it implies that notice should be in written form); Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce in Belgrade, Serbia, 23 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040223sb.html> (same); Foreign Trade Court of Arbitration attached to the Yugoslav Chamber of Commerce, Serbia, 27 November 2002, 27 November 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021127sb.html> (requiring that notice by telephone be confirmed in writing within a reasonable time). See also Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, 21 February 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050221sb.html> (avoiding question whether telephone notice was proper).

⁴³District Court in Komarno, Slovakia, 24 February 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090224k1.html>; CLOUT case No. 938 [Kantonsgericht Zug, Switzerland, 30 August 2007] (see full text of the decision); CLOUT case No. 724 [Oberlandesgericht Koblenz, Germany, 14 December 2006] (see full text of the decision); CLOUT case No. 825 [Oberlandesgericht Köln, Germany, 14 August 2006] (see full text of the decision); Hoviokaus/hovrätt Turku, Finland, 24 May 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050524f5.html>; Rechtbank van Koophandel Hasselt, Belgium,

4 February 2004 District Court Hasselt (N S.p.A. v. S NV). English case outline available on the Internet at <http://cisgw3.law.pace.edu/cases/040204b1.html>; CLOUT case No. 879 [Handelsgericht Bern, Switzerland, 17 January 2002] (see full text of the decision); Landgericht Frankfurt, Germany, 9 December 1992, Unilex. This is one of the 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. But see Foreign Trade Court of Arbitration attached to the Yugoslav Chamber of Commerce, Serbia, 27 November 2002, 27 November 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021127sb.html> (requiring that notice by telephone be confirmed in writing within a reasonable time).

⁴⁴Oberlandesgericht Saarbrücken, Germany, 17 January 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070117g1.html>; Landgericht Bayreuth, Germany, 10 December 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/041210g1.html>; CLOUT case No. 879 [Handelsgericht Bern, Switzerland, 17 January 2002] (see full text of the decision); 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). But see CLOUT case No. 825 [Oberlandesgericht Köln, Germany, 14 August 2006] (see full text of the decision) (holding that testimony by witnesses provided sufficient proof that the buyer had given telephonic notice). See generally Rechtbank van Koophandel Hasselt, Belgium, 4 February 2004 District Court Hasselt (N S.p.A. v. S NV). English case outline available on the Internet at <http://cisgw3.law.pace.edu/cases/040204b1.html>, stating that the buyer has the burden of proving that it gave notice by telephone).

⁴⁵CLOUT case No. 4 [Landgericht Stuttgart, Germany, 31 August 1989] (see full text of the decision); Landgericht Frankfurt, Germany, 13 July 1994, Unilex; CLOUT case No. 4 [Landgericht Stuttgart, Germany, 31 August 1989] (see full text of the decision).

⁴⁶Rechtbank van Koophandel Kortrijk, Belgium, 27 June 1997, Unilex. Compare Foreign Trade Court of Arbitration attached to the Yugoslav Chamber of Commerce, Serbia, 27 November 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021127sb.html> (requiring that notice by telephone be confirmed in writing within a reasonable time).

⁴⁷District Court in Komarno, Slovakia, 24 February 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090224k1.html>.

⁴⁸Landgericht Aachen, Germany, 28 July 1993, Unilex, reversed on other grounds by Oberlandesgericht Köln, Germany, 22 February 1994, Unilex. See also CLOUT case No. 120 [Oberlandesgericht Köln, Germany, 22 February 1994].

⁴⁹Article 39 (1) requires the buyer to give notice “to the seller,” and article 39 (2) states that the buyer must “give the seller notice.” See Landgericht Bielefeld, Germany, 15 August 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030815g1.html>.

⁵⁰CLOUT case No. 220 [Kantonsgericht Nidwalden, Switzerland, 3 December 1997] (see full text of the decision).

⁵¹Landgericht Bielefeld, Germany, 15 August 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030815g1.html>.

⁵²CLOUT 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.

⁵³CLOUT case No. 411 [Landgericht Bochum, Germany, 24 January 1996], also in Unilex. Compare CLOUT case No. 4 [Landgericht Stuttgart, Germany, 31 August 1989] (see full text of the decision) (holding that the buyer had not satisfied the requirements of article 39 because it did not prove, inter alia, that the person to whom the buyer faxed notice had “reception competency in regard to the faxes”).

⁵⁴CLOUT case No. 364 [Landgericht Köln, Germany 30 November 1999]. Another decision avoided determining whether notice sent to the seller’s agent met the requirements of article 39 because the alleged notice was insufficient on other grounds. Amtsgericht Freiburg, Germany, 6 July 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070706g1.html>.

⁵⁵Hoge Raad, the Netherlands, 4 February 2005, Unilex.

⁵⁶Hof van Beroep Antwerpen, Belgium, 14 February 2002 (NV Carta Mundi v. Index Syndicate Ltd.), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020214b1.html>.

⁵⁷See, e.g., CLOUT case No. 608 [Tribunale Rimini, Italy, 26 November 2002] (see full text of the decision).

⁵⁸See, e.g., CLOUT case No. 1057 [Oberster Gerichtshof, Austria, 2 April 2009], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090402a3.html> (contractual provision shortening the usual time for examining the goods and giving notice of lack of conformity); Rechtbank Arnhem, the Netherlands, 11 February 2009, Unilex; Judicial Board of Szeged, Hungary, 5 December 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081205h1.html>; 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).

⁵⁹Judicial Board of Szeged, Hungary, 5 December 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081205h1.html>; Landgericht Coburg, Germany, 12 December 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061212g1.html>; 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 Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7331) (see full text of the decision); CLOUT case No. 94 [Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft—Wien, Austria, 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).

⁶⁰CLOUT 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).

⁶¹Rechtbank Arnhem, the Netherlands, 11 February 2009, Unilex; CLOUT case No. 232 [Oberlandesgericht München, Germany, 11 March 1998] (see full text of the decision); CLOUT case No. 303 [Arbitration Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7331)] (see full text of the decision).

⁶²CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (see full text of the decision). Compare *Rechtbank van Koophandel Mechelen*, Belgium, 18 January 2002 (N.V. G. v. N.V. H.P.), Unilex (because seller's terms, which required notice within 24 hours of delivery of perishable goods (tomatoes), were barely legible and in a language foreign to buyer, they were not deemed part of contract). In CLOUT case No. 222 [U.S. 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).

⁶³CLOUT case No. 237 [Arbitration Institute of the Stockholm Chamber of Commerce, Sweden, 5 June 1998] (see full text of the decision).

⁶⁴Oberlandesgericht Hamburg, Germany, 25 January 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080125g1.html>.

⁶⁵CLOUT case No. 542 [Oberster Gerichtshof, Austria, 17 April 2002] (see full text of the decision).

⁶⁶CLOUT 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.

⁶⁷CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002] (see full text of the decision approving reasoning of lower appeals court).

⁶⁸Rechtbank Arnhem, the Netherlands, 11 February 2009, Unilex.

⁶⁹CLOUT case No. 828 [Gerechtshof 's-Hertogenbosch, the Netherlands, 2 January 2007].

⁷⁰CLOUT 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)); Arbitration Court of the International Chamber of Commerce, 1997 (Arbitral award No. 8611), 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)).

⁷¹See, e.g., CLOUT case No. 1057 [Oberster Gerichtshof, Austria, 2 April 2009], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090402a3.html> (indicating that a seller can waive its right to proper notice under article 39 (1), but that in the case before the court the buyer had failed to allege and prove such a waiver); *Rechtbank van Koophandel Kortrijk*, Belgium, 4 June 2004 (Steinbock-Bjonustan EHF v. N.V. Duma), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040604b1.html>.

⁷²CLOUT 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 rejected 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).

⁷³CLOUT 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.

⁷⁴CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998].

⁷⁵CLOUT case No. 270 [Bundesgerichtshof, Germany, 25 November 1998].

⁷⁶Rechtbank van Koophandel Kortrijk, Belgium, 4 June 2004 (Steinbock-Bjonustan EHF v. N.V. Duma), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040604b1.html>.

⁷⁷Landgericht Aschaffenburg, Germany, 20 April 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060420g1.html>.

⁷⁸CLOUT case No. 94 [Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft–Wien, Austria, 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.

⁷⁹CLOUT case No. 337 [Landgericht Saarbrücken, Germany, 26 March 1996].

⁸⁰CLOUT case No. 343 [Landgericht Darmstadt, Germany, 9 May 2000].

⁸¹Arrondissementsrechtbank Hof's-Hertogenbosch, the Netherlands, 26 February 1992, Unilex.

⁸²Rechtbank Breda, the Netherlands, 16 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090116n1.html>; Judicial Board of Szeged, Hungary, 5 December 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081205h1.html>.

law.pace.edu/cases/081205h1.html; Arrondissementsrechtbank Zutphen, the Netherlands, 27 February 2008 (Frutas Caminito Sociedad Cooperativa Valenciana. v. Groente-En Fruithandel Heemskerk BV), English abstract available on the Internet at <http://cisgw3.law.pace.edu/cases/080227n2.html> (to permit the seller to inspect the goods); CLOUT case No. 724 [Oberlandesgericht Koblenz, Germany, 14 December 2006] (see full text of the decision); Oberster Gerichtshof, Austria, 30 November 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061130a3.html> (to minimize disputes over whether the condition of the goods had changed after delivery); CLOUT case No. 939 [Gerechtshof 's-Hertogenbosch, the Netherlands, 19 September 2006]; U.S. District Court, Northern District of Illinois, United States, 21 May 2004 (Chicago Prime Packers, Inc. v. Northam Food Trading Co.), available on the Internet at <http://cisgw3.law.pace.edu/cases/040521u1.html> (to avoid controversies over the condition of the goods at the time of transfer); Bundesgericht, Switzerland, 28 May 2002, English translation of excerpt available on the Internet at <http://cisgw3.law.pace.edu/cases/020528s1.html> (dicta—transaction governed by domestic law); CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999], also available on the Internet at 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).

⁸³CLOUT case No. 724 [Oberlandesgericht Koblenz, Germany, 14 December 2006]; Oberster Gerichtshof, Austria, 30 November 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061130a3.html> (“to enable the parties to take appropriate measures”); 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).

⁸⁴Landgericht Aschaffenburg, Germany, 20 April 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060420g1.html>; CLOUT case No. 694 [U.S. Bankruptcy Court, District of Oregon, United States, 29 March 2004 (In re Siskiyou Evergreen, Inc.)] (see full text of the decision) (“European cases construing the Convention have required the notice to describe the claimed non-conformity with enough detail to allow the seller to identify and correct the problem without further investigation. A more practical interpretation would hold that the notice must be given in time, and in sufficient detail, to allow the seller to cure the defect in a manner allowing the buyer the benefit of his bargain.”); Bundesgericht, Switzerland, 28 May 2002, English translation of excerpt available on the Internet at <http://cisgw3.law.pace.edu/cases/020528s1.html> (dicta—transaction governed by domestic law); 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).

⁸⁵Landgericht Stuttgart, Germany, 15 October 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/091015g1.html>. See also Judicial Board of Szeged, Hungary, 5 December 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081205h1.html> (to arrange for repair or replacement of the goods at minimal cost); Arrondissementsrechtbank Zutphen, the Netherlands, 27 February 2008 (Frutas Caminito Sociedad Cooperativa Valenciana. v. Groente-En Fruithandel Heemskerk BV), English abstract available on the Internet at <http://cisgw3.law.pace.edu/cases/080227n2.html> (to permit the seller to gather evidence); CLOUT case No. 938 [Kantonsgericht Zug, Switzerland, 30 August 2007] (see full text of the decision) (“to put the seller in a position to understand the asserted lack of conformity and to take the necessary steps to gather any required evidence for possible future legal proceedings about the question of conformity, to initiate either a substitute delivery or a repair of the goods, and finally to take recourse against its own supplier”); Hoge Raad, the Netherlands, 4 February 2005, Unilex (to give the seller “a fair opportunity to remedy the defects and in general gather evidence on the alleged lack of conformity”).

⁸⁶CLOUT case No. 939 [Gerechtshof 's-Hertogenbosch, the Netherlands, 19 September 2006].

⁸⁷CLOUT case No. 409 [Landgericht Kassel, Germany, 15 February 1996], see also Unilex.

⁸⁸Rechtbank Breda, the Netherlands, 16 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090116n1.html>; CLOUT case No. 849 [Audiencia Provincial de Pontevedra, Spain, 19 December 2007] (see full text of the decision) (to minimize questions concerning the time the lack of conformity arose); CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999], also available on the Internet at www.cisg.at/1_22399x.htm.

⁸⁹Rechtbank Zwolle, 5 March 1997, the Netherlands, 1997, Unilex.

⁹⁰CLOUT case No. 486 [Audiencia Provincial de La Coruña, Spain, 21 June 2002].

⁹¹Oberlandesgericht Hamburg, Germany, 25 January 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080125g1.html>; CLOUT case No. 885 [Bundesgericht, Switzerland, 13 November 2003] (see full text of the decision).

⁹²Landgericht München, Germany, 29 November 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051129g1.html>.

⁹³CLOUT case No. 721 [Oberlandesgericht Karlsruhe, Germany, 8 February 2006] (identify the lack of conformity exactly); CLOUT case No. 597 [Oberlandesgericht Celle, Germany, 10 March 2004] (see full text of the decision) (“the buyer must describe the non-conformity as precisely as possible”); 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). But see CLOUT case No. 885 [Bundesgericht, Switzerland, 13 November 2003] (see full text of the decision) (indicating that the German translation of article 39 used by German-speaking courts requires greater precision than the official texts of the CISG).

⁹⁴Oberlandesgericht Linz, Austria, 1 June 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050601a3.html>; Landgericht Saarbrücken, Germany, 2 July 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020702g1.html>.

⁹⁵Hof van Beroep Gent, Belgium, 28 January 2004 (J.B. and G.B. v. BV H.V.), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040128b1.html>.

⁹⁶CLOUT case No. 694 [U.S. Bankruptcy Court, District of Oregon, United States, 29 March 2004 (In re Siskiyou Evergreen, Inc.)] (see full text of the decision).

⁹⁷CLOUT case No. 344 [Landgericht Erfurt, Germany, 29 July 1998] (see full text of the decision). See also Oberlandesgericht Koblenz, Germany, 21 November 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071121g1.html> (notice should make seller “aware of the nature and the scale of the lack of conformity”).

⁹⁸Landgericht München, Germany, 29 November 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051129g1.html> (“to enable the seller to react adequately”). Compare Hof van Beroep Gent, Belgium, 28 January 2004 (J.B. and G.B. v. BV H.V.), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040128b1.html> (article 39 notice should be specific enough that it “should at least be possible to conclude that the goods purchased are ridden with certain defects or for some reason or another are not in conformity with the contract, so that the seller, for whom it should be clear that the buyer has complaints regarding the delivery, is able to make a judgment about the consequence it should reserve for the complaint. The notice must enable parties to decide if certain measures (possibly regarding the furnishing of proof) arise”).

⁹⁹Landgericht Stuttgart, Germany, 15 October 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/091015g1.html>; CLOUT case No. 344 [Landgericht Erfurt, Germany, 29 July 1998] (see full text of the decision). See also Oberlandesgericht Hamm, Germany, 2 April 2009, English headnotes available on the Internet at <http://cisgw3.law.pace.edu/cases/090402g1.html> (notice should be specific enough to permit the seller to “form an idea” of the lack of conformity and take “necessary steps”); CLOUT case No. 938 [Kantonsgericht Zug, Switzerland, 30 August 2007] (see full text of the decision) (“to put the seller in a position to understand the asserted lack of conformity and to take the necessary steps to gather any required evidence for possible future legal proceedings about the question of conformity, to initiate either a substitute delivery or a repair of the goods, and finally to take recourse against its own supplier”); CLOUT case No. 934 [Tribunal Cantonal Valais, Switzerland, 27 April 2007] (see full text of the decision) (notice should be precise enough to permit the seller to react by examining the goods and to cure the lack of conformity); 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 choose among the several responses available to it, such as curing the lack of conformity, replacing the non-conforming 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).

¹⁰⁰Hof van Beroep Antwerpen, Belgium, 14 February 2002 (NV Carta Mundi v. Index Syndicate Ltd.), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020214b1.html>.

¹⁰¹CLOUT case No. 229 [Bundesgerichtshof, Germany, 4 December 1996] (see full text of the decision). For similar statements, see CLOUT case No. 724 [Oberlandesgericht Koblenz, Germany, 14 December 2006] (see full text of the decision) (sufficient information about the goods’ non-compliance with the contractually-agreed qualities so that the seller can take all necessary steps to make up for the defect); Landgericht Bamberg, Germany, 23 October 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061023g1.html>; 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).

¹⁰²Ibid.

¹⁰³Landgericht Saarbrücken, Germany, 2 July 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020702g1.html>.

¹⁰⁴See also CLOUT case No. 319 [Bundesgerichtshof, Germany, 3 November 1999].

¹⁰⁵CLOUT case No. 938 [Kantonsgericht Zug, Switzerland, 30 August 2007] (see full text of the decision).

¹⁰⁶Oberlandesgericht Saarbrücken, Germany, 17 January 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070117g1.html>.

¹⁰⁷CLOUT case No. 319 [Bundesgerichtshof Germany, 3 November 1999]; Arbitration Court of the International Chamber of Commerce, 1997 (Arbitral award No. 8611), Unilex; CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997]; Landgericht München, Germany, 20 March 1995, Unilex.

¹⁰⁸Landgericht Marburg, Germany, 12 December 1995, Unilex.

¹⁰⁹CLOUT 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 www.cisg.at/1_22399x.htm.

¹¹⁰Landgericht Coburg, Germany, 12 December 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061212g1.html>; Oberlandesgericht Linz, Austria, 1 June 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050601a3.html> (buyer should specify which goods were missing from deliveries). See also Landgericht Köln, Germany, 5 December 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061205g1.html>, where the buyer’s complaint that the seller had delivered huge excess quantities of the goods valued at €90,000 was held to be insufficiently specific.

¹¹¹CLOUT 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].

¹¹²CLOUT case No. 879 [Handelsgericht Bern, Switzerland, 17 January 2002] (see full text of the decision).

¹¹³CLOUT case No. 938 [Kantonsgericht Zug, Switzerland, 30 August 2007] (see full text of the decision); Landgericht Bamberg, Germany, 23 October 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061023g1.html> (indicating that the requirements regarding the content of the notice should not be “exaggerated”); Oberster Gerichtshof, Austria, 8 November 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051108a3.html> (same); Bundesgericht, Switzerland, 28 May 2002, English translation of excerpt available on the Internet at <http://cisgw3.law.pace.edu/cases/020528s1.html> (dicta—transaction governed by domestic law) (“The notice requirement is not supposed to burden the buyer with the risk of the defect. Therefore, the demands for a sufficient specification of the defect may not be set too high”); CLOUT case No. 538 [Oberlandesgericht Innsbruck, Austria, 26 April 2002] (“the requirements of the notice should not be too burdensome for the buyer”); 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].

¹¹⁴Landgericht Bamberg, Germany, 23 October 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061023g1.html>. See also CLOUT case No. 885 [Bundesgericht, Switzerland, 13 November 2003] (see full text of the decision) (“in the age of technology, the seller can be expected to ask questions if he desires more precise instructions from the buyer”).

¹¹⁵CLOUT case No. 938 [Kantonsgericht Zug, Switzerland, 30 August 2007] (see full text of the decision); Obergericht Zug, Switzerland, 19 December 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061219s1.html>; 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).

¹¹⁶CLOUT case No. 938 [Kantonsgericht Zug, Switzerland, 30 August 2007] (see full text of the decision).

¹¹⁷CLOUT case No. 938 [Kantonsgericht Zug, Switzerland, 30 August 2007] (see full text of the decision); CLOUT case No. 724 [Oberlandesgericht Koblenz, Germany, 14 December 2006] (see full text of the decision); CLOUT case No. 905 [Kantonsgericht Wallis, Switzerland, 21 February 2005] (see full text of the decision); CLOUT case No. 885 [Bundesgericht, Switzerland, 13 November 2003] (see full text of the decision); CLOUT case No. 319 [Bundesgerichtshof, Germany, 3 November 1999]. See also CLOUT case No. 833 [Hoge Raad, the Netherlands, 20 February 1998] (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, available 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).

¹¹⁸CLOUT case No. 867 [Tribunale di Forlì, Italy, 11 December 2008], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081211i3.html>.

¹¹⁹Oberlandesgericht Koblenz, Germany, 21 November 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071121g1.html>.

¹²⁰CLOUT case No. 724 [Oberlandesgericht Koblenz, Germany, 14 December 2006] (see full text of the decision).

¹²¹Landgericht München, Germany, 29 November 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051129g1.html>.

¹²²CLOUT case No. 905 [Kantonsgericht Wallis, Switzerland, 21 February 2005] (see full text of the decision).

¹²³Oberlandesgericht Schleswig, Germany, 22 August 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020822g2.html>.

¹²⁴Hof van Beroep Antwerpen, Belgium, 14 February 2002 (NV Carta Mundi v. Index Syndicate Ltd.), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020214b1.html>.

¹²⁵CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999], also in Unilex.

¹²⁶CLOUT case No. 319 [Bundesgerichtshof, Germany, 3 November 1999] (see full text of the decision).

¹²⁷CLOUT case No. 833 [Hoge Raad, the Netherlands, 20 February 1998].

¹²⁸CLOUT case No. 593 [Oberlandesgericht Karlsruhe, Germany, 6 March 2003].

¹²⁹Landgericht Bamberg, Germany, 23 October 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061023g1.html>.

¹³⁰For 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]; Arbitration Court of the International Chamber of Commerce, 1997 (Arbitral award No. 8611); 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).

¹³¹Oberster Gerichtshof, Austria, 8 May 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080508a3.html>.

¹³²Oberlandesgericht Hamburg, Germany, 25 January 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080125g1.html>.

¹³³CLOUT case No. 938 [Kantonsgericht Zug, Switzerland, 30 August 2007] (see full text of the decision) (dicta). See also Landgericht Coburg, Germany, 12 December 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061212g1.html> (“A mere reference to inferior or poor quality is not sufficient”).

¹³⁴Oberlandesgericht Saarbrücken, Germany, 17 January 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070117g1.html>.

¹³⁵CLOUT case No. 721 [Oberlandesgericht Karlsruhe, Germany, 8 February 2006].

¹³⁶Oberlandesgericht Linz, Austria, 1 June 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050601a3.html>.

¹³⁷Oberlandesgericht Düsseldorf, Germany, 23 January 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040123g1.html>.

¹³⁸CLOUT case No. 885 [Bundesgericht, Switzerland, 13 November 2003] (see full text of the decision).

¹³⁹Foreign Trade Court of Arbitration attached to the Yugoslav Chamber of Commerce, Serbia, 27 November 2002, 27 November 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021127sb.html> (requiring that notice by telephone be confirmed in writing within a reasonable time).

¹⁴⁰Landgericht Saarbrücken, Germany, 2 July 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020702g1.html>.

¹⁴¹Hof van Beroep Antwerpen, Belgium, 14 February 2002 (NV Carta Mundi v. Index Syndicate Ltd.), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020214b1.html>.

- ¹⁴²CLOUT case No. 364 [Landgericht Köln, Germany, 30 November 1999].
- ¹⁴³CLOUT case No. 290 [Oberlandesgericht Saarbrücken, Germany, 3 June 1998].
- ¹⁴⁴Rechtbank van Koophandel Kortrijk, Belgium, 16 December 1996, Unilex.
- ¹⁴⁵CLOUT case No. 220 [Kantonsgericht Nidwalden, Switzerland, 3 December 1997].
- ¹⁴⁶CLOUT case No. 3 [Landgericht München, Germany, 3 July 1989].
- ¹⁴⁷CLOUT case No. 98 [Rechtbank Roermond, the Netherlands, 19 December 1991].
- ¹⁴⁸CLOUT case No. 339 [Landgericht Regensburg, Germany, 24 September 1998].
- ¹⁴⁹Landgericht Marburg, Germany, 12 December 1995, Unilex.
- ¹⁵⁰CLOUT case No. 411 [Landgericht Bochum, Germany, 24 January 1996], also in Unilex.
- ¹⁵¹Landgericht Hannover, Germany, 1 December 1993, Unilex.
- ¹⁵²Landgericht München, Germany, 20 March 1995, Unilex.
- ¹⁵³CLOUT case No. 229 [Bundesgerichtshof, Germany, 4 December 1996].
- ¹⁵⁴CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000].
- ¹⁵⁵CLOUT case No. 273 [Oberlandesgericht München, Germany, 9 July 1997] (see full text of the decision).
- ¹⁵⁶CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997].
- ¹⁵⁷Hof van Beroep Ghent, Belgium, 14 November 2008 (Volmari Werner v. Isocob NV), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081114b1.html>.
- ¹⁵⁸CLOUT Case No. 833 [Hoge Raad, the Netherlands, 20 February 1998].
- ¹⁵⁹CLOUT case No. 131 [Landgericht München, Germany, 8 February 1995].
- ¹⁶⁰Oberlandesgericht Saarbrücken, Germany, 17 January 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070117g1.html>.
- ¹⁶¹CLOUT case No. 721 [Oberlandesgericht Karlsruhe, Germany, 8 February 2006].
- ¹⁶²CLOUT case No. 608 [Tribunale Rimini, Italy, 26 November 2002] (see full text of the decision).
- ¹⁶³CLOUT case No. 310 [Oberlandesgericht Düsseldorf, Germany, 12 March 1993] (see full text of the decision).
- ¹⁶⁴Tribunale Civile di Cuneo, Italy, 31 January 1996, Unilex.
- ¹⁶⁵United States District Court, Southern District of Ohio, United States, 26 March 2009 (Miami Valley Paper, LLC v. Lebbing Engineering & Consulting GmbH), available on the Internet at <http://cisgw3.law.pace.edu/cases/090326u1.html>; Rechtbank Breda, the Netherlands, 16 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090116n1.html>; Tribunale di Forlì, Italy, 16 February 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090216i3.html>; CLOUT case No. 867 [Tribunale di Forlì, Italy, 11 December 2008], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081211i3.html>; CLOUT case No. 938 [Kantonsgericht Zug, Switzerland, 30 August 2007] (see full text of the decision); CLOUT case No. 934 [Tribunal Cantonal Valais, Switzerland, 27 April 2007] (see full text of the decision); CLOUT case No. 723 [Oberlandesgericht Koblenz, Germany, 19 October 2006] (see full text of the decision); Tribunale Civile di Cuneo, Italy, 31 January 1996, Unilex; Landgericht Hamburg, Germany, 6 September 2004, English translation available on the Internet at (<http://cisgw3.law.pace.edu/cases/040906g1.html>); CLOUT case No. 892 [Kantonsgericht Schaffhausen, Switzerland, 27 January 2004] (see full text of the decision); Landgericht Tübingen, Germany, 18 June 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030618g1.html>; Single-Member Court of First Instance of Thessalonika, Greece, 2003 (docket No. 14953/2003), English editorial remarks available on the Internet at <http://cisgw3.law.pace.edu/cases/030001gr.html>; CLOUT case No. 608 [Tribunale Rimini, Italy, 26 November 2002] (see full text of the decision); 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].
- ¹⁶⁶Rechtbank van Koophandel Hasselt, Belgium, 20 September 2005 (J.M. Smithuis Pre Pain v. Bakkershuis), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050920b1.html> (“The reasonable time of article 39 (1) is a short term”); Landgericht Tübingen, Germany, 18 June 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030618g1.html> (“a common assumption that [the reasonable time for notice] should be short . . . a strict standard”); CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999], also available on the Internet at 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). But see Appellationshof Bern, Switzerland, 11 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040211s1.html>, reasoning upheld in CLOUT case No. 894 [Bundesgericht, Switzerland, 7 July 2004] (see full text of the decision) (“the CISG in general attempts to avoid too strict time limits”); CLOUT case No. 538 [Oberlandesgericht Innsbruck, Austria, 26 April 2002] (“the requirements of the notice should not be too burdensome for the buyer”).
- ¹⁶⁷Oberlandesgericht Saarbrücken, Germany, 17 January 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070117g1.html>. See also Appellationshof Bern, Switzerland, 11 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040211s1.html>, reasoning upheld in CLOUT case No. 894 [Bundesgericht, Switzerland, 7 July 2004] (see full text of the decision) (“it is not justified for the buyer to suffer from mistakes made by the seller by way of a reversal of the burden of proof caused by strict time limits for examination and notification”).
- ¹⁶⁸CLOUT case No. 694 [U.S. Bankruptcy Court, District of Oregon, United States, 29 March 2004 (In re Siskiyou Evergreen, Inc.)] (see full text of the decision).

¹⁶⁹Landgericht Hamburg, Germany, 6 September 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040906g1.html>.

¹⁷⁰CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002] (see full text of the decision).

¹⁷¹CLOUT 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).

¹⁷²Amtsgericht Freiburg, Germany, 6 July 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070706g1.html>; CLOUT case No. 748 [Oberster Gerichtshof, Austria, 24 May 2005]; Appellationshof Bern, Switzerland, 11 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040211s1.html>, reasoning upheld in CLOUT case No. 894 [Bundesgericht, Switzerland, 7 July 2004] (see full text of the decision); CLOUT case No. 892 [Kantonsgericht Schaffhausen, Switzerland, 27 January 2004] (see full text of the decision). See also Oberlandesgericht München, Germany, 17 November 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061117g1.html> (under article 27 CISG, the seller bore the risk of transmission of notice, and was obliged to inform the buyer of the seller's change of address; thus the timeliness of the buyer's notice was determined as of the time it was dispatched, and the fact that the seller never received the notice at its new location did not prevent the notice from being effective).

¹⁷³For 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., Oberlandesgericht Saarbrücken, Germany, 17 January 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070117g1.html>; CLOUT case No. 775 [Landgericht Frankfurt, Germany, 11 April 2005] (see full text of the decision); 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].

¹⁷⁴Oberlandesgericht Saarbrücken, Germany, 17 January 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070117g1.html> (also holding that the buyer had a reasonable excuse for failure to give timely article 39 (1) because buyer was not informed of the lack of conformity by its expert until a later time).

¹⁷⁵U.S. Court of Appeals for the Fifth Circuit, United States, 11 June 2003 (BP Oil International v. Empresa Estatal Petroleos de Ecuador), available on the Internet at <http://cisgw3.law.pace.edu/cases/030611u1.html>.

¹⁷⁶Hoviokous / hovrätt Turku, Finland, 24 May 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050524f5.html>.

¹⁷⁷CLOUT case No. 941 [Gerechtshof Arnhem, the Netherlands, 18 July 2006]; Hof van Beroep Antwerpen, Belgium, 14 April 2004 (ING Insurance v. BVBA HVA Koeling and Fagard Winand; HVA Koeling BVBA v. Fagard Winand and Besseling Agri-Technic BV), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040414b1.html>.

¹⁷⁸Landgericht Berlin, Germany, 13 September 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060913g1.html>.

¹⁷⁹See Landgericht Bamberg, Germany, 23 October 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061023g1.html>; Landgericht Berlin, Germany, 16 September 1992, Unilex.

¹⁸⁰An 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. 909 [Kantonsgericht Appenzell-Ausserrhoden, Switzerland, 9 March 2006] (see full text of the decision) (buyer's statements indicated he was present at delivery, when the damage to the goods occurred); 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).

¹⁸¹CLOUT case No. 867 [Tribunale di Forlì, Italy, 11 December 2008], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081211i3.html>.

¹⁸²Oberlandesgericht Koblenz, Germany, 21 November 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071121g1.html>; Regional Court Zilina, Slovakia, 25 October 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071025k1.html>; Cour d'appel Versailles, France, 13 October 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051013f1.html>; Hoviokous / hovrätt Turku, Finland, 24 May 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050524f5.html>; Hoge Raad, the Netherlands, 4 February 2005, Unilex; Hof van Beroep Antwerpen, Belgium, 14 February 2002 (NV Carta Mundi v. Index Syndicate Ltd.), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020214b1.html>.

¹⁸³CLOUT case No. 210 [Audiencia Provincial Barcelona, Spain, 20 June 1997].

¹⁸⁴CLOUT case No. 833 [Hoge Raad, the Netherlands, 20 February 1998].

¹⁸⁵CLOUT case No. 590 [Landgericht Saarbrücken, Germany, 1 June 2004] (see full text of the decision).

¹⁸⁶Appellationshof Bern, Switzerland, 11 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040211s1.html>, reasoning upheld in CLOUT case No. 894 [Bundesgericht, Switzerland, 7 July 2004] (see full text of the decision).

¹⁸⁷CLOUT case No. 879 [Handelsgericht Bern, Switzerland, 17 January 2002] (see full text of the decision).

¹⁸⁸See the Digest for article 38, paragraph 2.

¹⁸⁹CLOUT case No. 1057 [Oberster Gerichtshof, Austria, 2 April 2009], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090402a3.html>; Tribunale di Forlì, Italy, 16 February 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090216i3.html>; CLOUT case No. 867 [Tribunale di Forlì, Italy, 11 December 2008], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081211i3.html>; Handelsgericht Aargau, Switzerland, 26 November 2008,

English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081126s1.html>; CLOUT case No. 802 [Tribunal Supremo, Spain, 17 January 2008] (see full text of the decision); CLOUT case No. 828 [Gerechtshof 's-Hertogenbosch, the Netherlands, 2 January 2007]; Landgericht Aschaffenburg, Germany, 20 April 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060420g1.html>; CLOUT case No. 944 [Gerechtshof-Hertogenbosch, the Netherlands, 11 October 2005] (see full text of the decision); CLOUT case No. 775 [Landgericht Frankfurt, Germany, 11 April 2005] (see full text of the decision); Landgericht Hamburg, Germany, 6 September 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040906g1.html>; Rechtbank van Koophandel Kortrijk, Belgium, 4 June 2004 (Steinbock-Bjonustan EHF v. N.V. Duma), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040604b1.html>; Hof van Beroep Gent, Belgium, 16 June 2004 (Mermark Fleischhandelsgesellschaft mbH v. Cvba Lokerse Vleesveiling), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040616b1.html>; CLOUT case No. 590 [Landgericht Saarbrücken, Germany, 1 June 2004] (see full text of the decision); U.S. District Court, Northern District of Illinois, United States, 21 May 2004 (Chicago Prime Packers, Inc. v. Northam Food Trading Co.), available on the Internet at <http://cisgw3.law.pace.edu/cases/040521u1.html>; Appellationshof Bern, Switzerland, 11 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040211s1.html>, reasoning upheld in CLOUT case No. 894 [Bundesgericht, Switzerland, 7 July 2004] (see full text of the decision); CLOUT case No. 892 [Kantonsgericht Schaffhausen, Switzerland, 27 January 2004] (see full text of the decision); Oberlandesgericht Düsseldorf, Germany, 23 January 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040123g1.html>; Rechtbank van Koophandel Hasselt, Belgium, 6 January 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040106b1.html>; CLOUT case No. 885 [Bundesgericht, Switzerland, 13 November 2003] (see full text of the decision); Hof van Beroep Gent, Belgium, 8 October 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/031008b1.html>; Landgericht Bielefeld, Germany, 15 August 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030815g1.html>; Rechtbank van Koophandel Veurne, Belgium, 19 March 2003 (CVBA L. v. E.G. BV), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030319b1.html>; Handelsgericht St. Gallen, Switzerland, 11 February 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030211s1.html>; CLOUT case No. 608 [Tribunale Rimini, Italy, 26 November 2002] (see full text of the decision); Oberlandesgericht München, Germany, 13 November 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021113g1.html>; CLOUT case No. 484 [Audiencia Provincial de la Pontevedra, Spain, 3 October 2002]; Rechtbank van Koophandel Hasselt, Belgium, 6 March 2002 (Roelants Eurosprint v. Beltronic Engineering International), UNILEX; Landgericht Saarbrücken, Germany, 2 July 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020702g1.html>; CLOUT case No. 997 [Sø og Handelsretten, Denmark, 31 January 2002]; CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994]; CLOUT case No. 262 [Kanton St. Gallen, Gerichtskommission Oberrheinthal, Switzerland, 30 June 1995]; Pretura di Torino, Italy, 30 January 1997, Unilex, English translation available on the Internet at www.cisg.law.pace.edu/cisgw/wais/db/cases/2/970130i3.html; Arbitration Court of the International Chamber of Commerce, June 1996 (Arbitral award No. 8247), *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]; Arrondissementsrechtbank 's-Hertogenbosch, the Netherlands, 15 December 1997, Unilex; CLOUT case No. 4 [Landgericht Stuttgart, Germany, 31 August 1989]. Compare *Hoviokus / hovrätt Turku*, Finland, 24 May 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050524f5.html> (because the article 38 examination conducted by the buyer, which was proper and in accordance with trade usage and practices established between the parties, did not reveal the lack of conformity, the buyer's reasonable time for giving article 39 (1) notice did not begin until the buyer learned of the lack of conformity through complaints from its customers); Hof van Beroep Antwerpen, Belgium, 14 February 2002 (NV Carta Mundi v. Index Syndicate Ltd.), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020214b1.html> (the buyer was justified in not examining the goods (thus delaying discovery of the lack of conformity) until the seller had made enough deliveries of glass game pieces to permit the assembly of full-game packages; the buyer's reasonable time for giving article 39 (1) notice did not begin to run until that point).

¹⁹⁰See the Digest for article 38.

¹⁹¹E.g., CLOUT case No. 1057 [Oberster Gerichtshof, Austria, 2 April 2009], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090402a3.html>; Tribunale di Forlì, Italy, 16 February 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090216i3.html>; Handelsgericht Aargau, Switzerland, 26 November 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081126s1.html>; CLOUT case No. 849 [Audiencia Provincial de Pontevedra, Spain, 19 December 2007] (see full text of the decision); Obergericht Zug, Switzerland, 19 December 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061219s1.html>; Landgericht Hamburg, Germany, 6 September 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040906g1.html>; Rechtbank van Koophandel Kortrijk, Belgium, 4 June 2004 (Steinbock-Bjonustan EHF v. N.V. Duma), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040604b1.html>; Appellationshof Bern, Switzerland, 11 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040211s1.html>, reasoning upheld in CLOUT case No. 894 [Bundesgericht, Switzerland, 7 July 2004] (see full text of the decision); Rechtbank van Koophandel Hasselt, Belgium, 6 January 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040106b1.html>; Hof van Beroep Gent, Belgium, 8 October 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/031008b1.html>; Handelsgericht St. Gallen, Switzerland, 11 February 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030211s1.html>; CLOUT case No. 608 [Tribunale Rimini, Italy, 26 November 2002] (see full text of the decision); CLOUT case No. 484 [Audiencia Provincial de la Pontevedra, Spain, 3 October 2002]; Rechtbank van Koophandel Hasselt, Belgium, 6 March 2002 (Roelants Eurosprint v. Beltronic Engineering International), UNILEX; 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.

¹⁹²E.g., Hof van Beroep Ghent, Belgium, 16 April 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070416b1.html>; 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).

¹⁹³Tribunale di Forlì, Italy, 16 February 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090216i3.html>. Compare CLOUT case No. 1040 [Audiencia Provincial de Cuenca, Spain, 31 January 2005], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050131s4.html>, holding that, even though the buyer had been informed of the results of a

veterinarian's examination soon after livestock was delivered, the buyer's delay in giving article 39 notice that the livestock was in poor condition was "reasonable for the [Buyer] to be convinced of the actual sanitary condition of the animals."

¹⁹⁴For the description of a latent defect, see CLOUT case No. 590 [Landgericht Saarbrücken, Germany, 1 June 2004] (see full text of the decision) (also stating that the buyer bears the burden of proving that a lack of conformity was hidden or latent). See also Landgericht Saarbrücken, Germany, 2 July 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020702g1.html> (defect that was "immediately discernible by way of a simple test" that the buyer should have carried out was not a latent defect and did not extend the time for notice); Landgericht München, Germany, 27 February 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020227g1.html> (buyer's reasonable time for giving article 39 (1) notice did not begin to run until it actually became aware of defects because it was under no duty to discover non-conformity—lack of basic electrical safety features—during its article 38 examination upon delivery).

¹⁹⁵Regional Court Zilina, Slovakia, 25 October 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071025k1.html>; Hoviokeus / hovrätt Turku, Finland, 24 May 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050524f5.html>; Hoge Raad, the Netherlands, 4 February 2005, Unilex; Cour d'appel de Poitiers, France, 26 October 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/041026f1.html>; CLOUT case No. 773 [Bundesgerichtshof, Germany, 30 June 2004] (see full text of the decision); CLOUT case No. 590 [Landgericht Saarbrücken, Germany, 1 June 2004] (see full text of the decision); Landgericht München, Germany, 27 February 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020227g1.html> (buyer's reasonable time for giving article 39 (1) notice did not begin to run until it actually became aware of defects because it was under no duty to discover non-conformity—lack of basic electrical safety features—during its article 38 examination upon delivery); CLOUT case No. 879 [Handelsgericht Bern, Switzerland, 17 January 2002] (see full text of the decision); 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 article 38 at paragraph 15.

¹⁹⁶CLOUT case No. 319 [Bundesgerichtshof, Germany, 3 November 1999].

¹⁹⁷CLOUT case No. 944 [Gerechthof –Hertogenbosch, the Netherlands, 11 October 2005] (see full text of the decision); Cour d'appel de Poitiers, France, 26 October 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/041026f1.html>; CLOUT case No. 590 [Landgericht Saarbrücken, Germany, 1 June 2004] (see full text of the decision) (reasonable time to give notice of a latent non-conformity commences "when a prudent buyer would take steps to examine the goods closer as well as take legal steps due to the existence of suspicious circumstances"); CLOUT case No. 879 [Handelsgericht Bern, Switzerland, 17 January 2002] (see full text of the decision); 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.

¹⁹⁸CLOUT case No. 225, France, 1998; CLOUT case No. 833 [Hoge Raad, the Netherlands, 20 February 1998]; Tribunale di Busto Arsizio, Italy, 13 December 2001, available in *Rivista di Diritto Internazionale Privato e Processuale*, 2003, 150–155, also available on Unilex.

¹⁹⁹See the discussion in paragraph 19 *supra*.

²⁰⁰For a survey of some of the presumptive notice periods that have been suggested, see Appellationshof Bern, Switzerland, 11 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040211s1.html>, reasoning upheld in CLOUT case No. 894 [Bundesgericht, Switzerland, 7 July 2004] (see full text of the decision).

²⁰¹E.g., Oberlandesgericht Hamburg, Germany, 25 January 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080125g1.html>; Landgericht Hamburg, Germany, 6 September 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040906g1.html>; Oberlandesgericht Schleswig, Germany, 22 August 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020822g2.html>; Obergericht Luzern, Switzerland, 29 July 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020729s1.html>; 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 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 Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 5 December 1995] (see full text of the decision).

²⁰²Obergericht Luzern, Switzerland, 29 July 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020729s1.html>.

²⁰³CLOUT case No. 167 [Oberlandesgericht München, Germany, 8 February 1995] (see full text of the decision).

²⁰⁴CLOUT case No. 1057 [Oberster Gerichtshof, Austria, 2 April 2009], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090402a3.html>; Oberlandesgericht Linz, Austria, 1 June 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050601a3.html>; CLOUT case No. 892 [Kantonsgericht Schaffhausen, Switzerland, 27 January 2004] (see full text of the decision); CLOUT case No. 538 [Oberlandesgericht Innsbruck, Austria, 26 April 2002]; CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999], also in Unilex.

²⁰⁵Oberlandesgericht Hamburg, Germany, 25 January 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080125g1.html>; CLOUT case No. 593 [Oberlandesgericht Karlsruhe, Germany, 6 March 2003].

²⁰⁶Landgericht Bamberg, Germany, 23 October 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061023g1.html>; Cour de Justice [Appellate Court] de Genève, Switzerland, 20 January 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060120s1.html>; Landgericht Saarbrücken, Germany, 2 July 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020702g1.html>; 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).

²⁰⁷Obergericht Zug, Switzerland, 19 December 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061219s1.html>.

²⁰⁸CLOUT case No. 941 [Gerechtshof Arnhem, the Netherlands, 18 July 2006]; Landgericht Tübingen, Germany, 18 June 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030618g1.html>; Landgericht Landshut, Germany, 5 April 1993 Unilex database (presumptive time period for defects that are not hidden).

²⁰⁹CLOUT case No. 909 [Kantonsgericht Appenzell-Ausserrhoden, Switzerland, 9 March 2006] (see full text of the decision).

²¹⁰CLOUT case No. 892 [Kantonsgericht Schaffhausen, Switzerland, 27 January 2004] (see full text of the decision); 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.

²¹¹CLOUT 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).

²¹²Oberlandesgericht München, Germany, 13 November 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021113g1.html>.

²¹³District Court in Nitra, Slovakia, 3 October 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061003k1.html>; 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).

²¹⁴CLOUT case No. 885 [Bundesgericht, Switzerland, 13 November 2003] (see full text of the decision).

²¹⁵Landgericht Stuttgart, Germany, 15 October 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/091015g1.html>; Handelsgericht Aargau, Switzerland, 26 November 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081126s1.html>; CLOUT case No. 938 [Kantonsgericht Zug, Switzerland, 30 August 2007] (see full text of the decision); Obergericht Zug, Switzerland, 19 December 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061219s1.html>; CLOUT case No. 723 [Oberlandesgericht Koblenz, Germany, 19 October 2006] (see full text of the decision); Rechtbank van Koophandel Hasselt, Belgium, 20 September 2005 (J.M. Smithuis Pre Pain v. Bakkershuis), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050920b1.html>; Landgericht Hamburg, Germany, 6 September 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040906g1.html>; Landgericht Kiel, Germany, 27 July 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040727g1.html>; Rechtbank van Koophandel Kortrijk, Belgium, 4 June 2004 (Steinbock-Bjonustan EHF v. N.V. Duma), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040604b1.html>; Oberlandesgericht München, Germany, 13 November 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021113g1.html>; Kantonsgericht Schaffhausen, Switzerland, 25 February 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020225s1.html>; 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 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).

²¹⁶CLOUT case No. 825 [Oberlandesgericht Köln, Germany, 14 August 2006] (see full text of the decision) (notice with respect to perishable goods due within 24 hours); Single-Member Court of First Instance of Thessalonika, Greece, 2003 (docket No. 14953/2003), English editorial remarks available on the Internet at <http://cisgw3.law.pace.edu/cases/030001gr.html> (“for consumables the reasonable period corresponds to a few days or sometimes even a few hours”); Oberlandesgericht Schleswig, Germany, 22 August 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020822g2.html> (notice of lack of conformity of live sheep generally due in three to four days after delivery); 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 three 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.

²¹⁷See paragraph 19 *supra*.

²¹⁸Arrondissementsrechtbank Zutphen, the Netherlands, 27 February 2008 (Frutas Caminito Sociedad Cooperativa Valenciana. v. Groente-En Fruithandel Heemskerk BV), English abstract available on the Internet at <http://cisgw3.law.pace.edu/cases/080227n2.html>; CLOUT case No. 849 [Audiencia Provincial de Pontevedra, Spain, 19 December 2007] (see full text of the decision); CLOUT case No. 934 [Tribunal Cantonal Valais, Switzerland, 27 April 2007] (see full text of the decision) (“the extent of the non-conformity”); U.S. District Court, Northern District of Illinois, United States, 21 May 2004 (Chicago Prime Packers, Inc. v. Northam Food Trading Co.), available on the Internet at <http://cisgw3.law.pace.edu/cases/040521u1.html>; Hof van Beroep Gent, Belgium, 12 May 2003 (S. GmbH v. A. bvba), English editorial remarks available on the Internet at <http://cisgw3.law.pace.edu/cases/030512b1.html>; 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. See also CLOUT case No. 776 [Juzgado Primero Civil de Primera Instancia de Lerma de Villada, Mexico, 3 October

2006] (equating the rule of article 39 (1) with a provision of Mexican domestic sales law that required a buyer to give written notice to the seller within five days after delivery if a lack of conformity was apparent, but which extended the notice period to 30 days if the lack of conformity was not apparent). 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.

²¹⁹CLOUT case No. 934 [Tribunal Cantonal Valais, Switzerland, 27 April 2007] (see full text of the decision); Single-Member Court of First Instance of Thessalonika, Greece, 2003 (docket No. 14953/2003), English editorial remarks available on the Internet at <http://cisgw3.law.pace.edu/cases/030001gr.html>; CLOUT case No. 608 [Tribunale Rimini, Italy, 26 November 2002] (see full text of the decision) (“the nature of the goods and . . . their use”); 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 www.cisg.law.pace.edu/cisg/wais/db/cases2/970130i3.html; CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000].

²²⁰Rechtbank Arnhem, the Netherlands, 11 February 2009, Unilex; Rechtbank Breda, the Netherlands, 16 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090116n1.html>; Arrondissementsrechtbank Zutphen, the Netherlands, 27 February 2008 (Frutas Caminito Sociedad Cooperativa Valenciana. v. Groente-En Fruithandel Heemskerk BV), English abstract available on the Internet at <http://cisgw3.law.pace.edu/cases/080227n2.html>; CLOUT case No. 849 [Audiencia Provincial de Pontevedra, Spain, 19 December 2007] (see full text of the decision) (perishable goods intended for human consumption); Hof van Beroep Ghent, Belgium, 16 April 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070416b1.html> (frozen meat for human consumption); CLOUT case No. 828 [Gerechtshof 's-Hertogenbosch, the Netherlands, 2 January 2007] (live trees); CLOUT case No. 723 [Oberlandesgericht Koblenz, Germany, 19 October 2006] (see full text of the decision); CLOUT case No. 825 [Oberlandesgericht Köln, Germany, 14 August 2006] (see full text of the decision); Rechtbank van Koophandel Veurne, Belgium, 19 March 2003 (CVBA L. v. E.G. BV), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030319b1.html> (fresh vegetables); Single-Member Court of First Instance of Thessalonika, Greece, 2003 (docket No. 14953/2003), English editorial remarks available on the Internet at <http://cisgw3.law.pace.edu/cases/030001gr.html> (“consumables”); CLOUT case No. 608 [Tribunale Rimini, Italy, 26 November 2002] (see full text of the decision); 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 article 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).

²²¹CLOUT case No. 723 [Oberlandesgericht Koblenz, Germany, 19 October 2006] (see full text of the decision); Hof van Beroep Gent, Belgium, 12 May 2003 (S. GmbH v. A. bvba), English editorial remarks available on the Internet at <http://cisgw3.law.pace.edu/cases/030512b1.html>; CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999], also in Unilex; Amtsgericht Augsburg, Germany, 29 January 1996, Unilex. Compare CLOUT case No. 694 [U.S. Bankruptcy Court, District of Oregon, United States, 29 March 2004 (In re Siskiyou Evergreen, Inc.)] (see full text of the decision) (where the goods (Christmas trees) were seasonal, and earlier notice would not have permitted the seller to effectively cure the lack of conformity, notice was deemed timely, since facilitating cure is the purpose of the article 39 notice requirement).

²²²District Court in Komarno, Slovakia 24 February 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090224k1.html> (because the goods—new potatoes—were not subject to rapid deterioration, the buyer had a longer time in which to give notice); Obergericht Zug, Switzerland, 19 December 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061219s1.html>; Landgericht München, Germany, 27 February 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020227g1.html> (video screen apparatus); 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).

²²³Obergericht Luzern, Switzerland, 29 July 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020729s1.html>.

²²⁴United States District Court, Southern District of Ohio, United States, 26 March 2009 (Miami Valley Paper, LLC v. Lebbing Engineering & Consulting GmbH), available on the Internet at <http://cisgw3.law.pace.edu/cases/090326u1.html>.

²²⁵CLOUT case No. 941 [Gerechtshof Arnhem, the Netherlands, 18 July 2006]; Arrondissementsrechtbank '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 article 38, which in turn meant that buyer’s notice was given beyond a reasonable time from when it should have discovered the defects).

²²⁶Rechtbank Breda, the Netherlands, 16 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090116n1.html>; Arrondissementsrechtbank Zutphen, the Netherlands, 27 February 2008 (Frutas Caminito Sociedad Cooperativa Valenciana. v. Groente-En Fruithandel Heemskerk BV), English abstract available on the Internet at <http://cisgw3.law.pace.edu/cases/080227n2.html> (buyer arranged for inappropriate transportation that hastened the deterioration of perishable goods); Landgericht Hamburg, Germany, 6 September 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040906g1.html>; CLOUT case No. 284 [Oberlandesgericht Köln, Germany, 21 August 1997]. Compare Oberster Gerichtshof, Austria, 30 November 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061130a3.html> (a purpose of article 39 is to minimize disputes over whether the goods had changed condition after delivery).

²²⁷Judicial Board of Szeged, Hungary, 5 December 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081205h1.html>.

²²⁸Single-Member Court of First Instance of Thessalonika, Greece, 2003 (docket No. 14953/2003), English editorial remarks available on the Internet at <http://cisgw3.law.pace.edu/cases/030001gr.html>.

²²⁹CLOUT case No. 938 [Kantonsgericht Zug, Switzerland, 30 August 2007] (see full text of the decision); Single-Member Court of First Instance of Thessalonika, Greece, 2003 (docket No. 14953/2003), English editorial remarks available on the Internet at <http://cisgw3.law.pace.edu/cases/030001gr.html>.

²³⁰CLOUT case No. 938 [Kantonsgericht Zug, Switzerland, 30 August 2007] (see full text of the decision); CLOUT case No. 934 [Tribunal Cantonal Valais, Switzerland, 27 April 2007] (see full text of the decision); Rechtbank van Koophandel Kortrijk, Belgium, 16 December 1996, Unilex; Rechtbank Zwolle, the Netherlands, 5 March 1997, Unilex. See also CLOUT case No. 939 [Gerechtshof 's-Hertogenbosch, the Netherlands, 19 September 2006] (court rejected the seller's argument that the season in which the goods (live trees from a tree nursery) had been delivered should influence the reasonable time because "nothing indicated that the tree nurseries made any such distinction").

²³¹CLOUT case No. 938 [Kantonsgericht Zug, Switzerland, 30 August 2007] (see full text of the decision); CLOUT case No. 939 [Gerechtshof 's-Hertogenbosch, the Netherlands, 19 September 2006] (applying the five-to-six day notice period established in past transactions between the parties); CLOUT case No. 164 [Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 5 December 1995] (see full text of the decision).

²³²Landgericht Köln, Germany, 11 November 1993, Unilex.

²³³United States District Court, Southern District of Ohio, United States, 26 March 2009 (Miami Valley Paper, LLC v. Lebbing Engineering & Consulting GmbH), available on the Internet at <http://cisgw3.law.pace.edu/cases/090326u1.html>; CLOUT case No. 941 [Gerechtshof Arnhem, the Netherlands, 18 July 2006]; Gerechtshof Arnhem, the Netherlands, 17 June 1997, Unilex; CLOUT case No. 232 [Oberlandesgericht München, Germany, 11 March 1998] (see full text of the decision).

²³⁴CLOUT case No. 486 [Audiencia Provincial de La Coruña, Spain, 21 June 2002].

²³⁵CLOUT case No. 634 [Landgericht Berlin, Germany 21 March 2003].

²³⁶CLOUT case No. 992 [Retting i København, Denmark, 19 October 2007].

²³⁷China International Economic and Trade Arbitration Commission, People's Republic of China, 12 March 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040312c1.html>; 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.

²³⁸Federal Court of Australia, Australia, 13 August 2010 (*Cortem SpA v. Controlmatic Pty Ltd.*), available on the Internet at www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2010/852.html; China International Economic & Trade Arbitration Commission, People's Republic of China, 21 October 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051021c1.html>. Compare CLOUT case No. 798 [Audiencia Provincial Girona, Spain, 6 November 2006], where the court held that notice given when the buyer began negotiations with the seller to resolve the dispute over the conformity of delivered goods was sufficient to satisfy the notice requirement of article 39 (2).

²³⁹CLOUT case No. 596 [Oberlandesgericht Zweibrücken, Germany, 2 February 2004] (see full text of the decision).

²⁴⁰Landgericht Düsseldorf, Germany, 23 June 1994, Unilex.

²⁴¹Hof van Beroep Gent, Belgium, 28 January 2004 (J.B. and G.B. v. BV H.V.), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040128b1.html>.

²⁴²Federal Court of Australia, Australia, 13 August 2010 (*Cortem SpA v. Controlmatic Pty Ltd.*), available on the Internet at www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2010/852.html.

²⁴³CLOUT case No. 799 [Audiencia Provincial de Pontevedra, Spain, 8 February 2007]; CLOUT case No. 262 [Kanton St. Gallen, Gerichtskommission Oberrheintal, Switzerland 30 June 1995]; CLOUT case No. 263 [Bezirksgericht Unterrheintal, Switzerland, 16 September 1998].

²⁴⁴Tribunal commercial de Bruxelles, Belgium, 5 October 1994, Unilex.

²⁴⁵CLOUT case No. 256 [Tribunal Cantonal du Valais, Switzerland, 29 June 1998].

²⁴⁶CLOUT case No. 538 [Oberlandesgericht Innsbruck, Austria, 26 April 2002].

²⁴⁷Rechtbank Breda, the Netherlands, 16 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090116n1.html> (perishable goods); Oberlandesgericht Köln, Germany, 19 May 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080519g1.html> (pesticides); CLOUT case No. 608 [Tribunale Rimini, Italy, 26 November 2002] (see full text of the decision).

²⁴⁸Rechtbank van Koophandel Hasselt, Belgium, 6 March 2002 (Roelants Eurosprint v. Beltronic Engineering International), Unilex.

²⁴⁹Obergericht Zug, Switzerland, 19 December 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061219s1.html> (four months after the seller completed installation of the goods); 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].

²⁵⁰CLOUT case No. 192 [Obergericht des Kantons Luzern, Switzerland, 8 January 1997]; Landgericht Berlin, Germany, 16 September 1992, Unilex.

²⁵¹Hof van Beroep Gent, Belgium, 12 May 2003 (S. GmbH v. A. bvba), English editorial remarks available on the Internet at <http://cisgw3.law.pace.edu/cases/030512b1.html>; Handelsgericht St. Gallen, Switzerland, 11 February 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030211s1.html> (where buyer should have discovered the defects within a few days after delivery); 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].

²⁵²Hof von Beroep Gent, Belgium, 2 December 2002 (B.V.B.A. A.S. v. GmbH P.C.), English Case Outline available on the Internet at <http://cisgw3.law.pace.edu/cases/021202b1.html>.

²⁵³ Oberlandesgericht München, Germany, 13 November 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021113g1.html>; CLOUT case No. 292 [Oberlandesgericht Saarbrücken, Germany, 13 January 1993].

²⁵⁴ Oberlandesgericht Saarbrücken, Germany, 17 January 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070117g1.html> (also holding that the buyer had a reasonable excuse for failure to give timely article 39 (1) because buyer was not informed of the lack of conformity by its expert until a later time).

²⁵⁵ Judicial Board of Szeged, Hungary, 5 December 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081205h1.html>; Rechtbank van Koophandel Hasselt, Belgium, 6 March 2002 (Roelants Europrint v. Beltronic Engineering International), UNILEX; Rechtbank van Koophandel Kortrijk, Belgium, 16 December 1996, Unilex; CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994].

²⁵⁶ CLOUT case No. 423 [Oberster Gerichtshof, Austria, 27 August 1999], also in Unilex.

²⁵⁷ Landgericht München, Germany, 20 February 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020220g1.html>.

²⁵⁸ CLOUT case No. 634 [Landgericht Berlin, Germany 21 March 2003].

²⁵⁹ Amtsgericht Kehl, Germany, 6 October 1995, Unilex.

²⁶⁰ Obergericht Luzern, Switzerland, 29 July 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020729s1.html>.

²⁶¹ Landgericht Köln, Germany, 5 December 2006, English translation available on the Internet at (<http://cisgw3.law.pace.edu/cases/061205g1.html>).

²⁶² CLOUT case No. 828 [Gerechtshof 's-Hertogenbosch, the Netherlands, 2 January 2007], see also Unilex (perishable goods—live trees; stating that notice given anytime more than six days after delivery would have been untimely); Landgericht Mönchengladbach, Germany, 22 May 1992, Unilex.

²⁶³ CLOUT case No. 359 [Oberlandesgericht Koblenz, Germany, 18 November 1999]; CLOUT case No. 310 [Oberlandesgericht Düsseldorf, Germany, 12 March 1993].

²⁶⁴ CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997].

²⁶⁵ Tribunale Civile di Cuneo, Italy, 31 January 1996, Unilex.

²⁶⁶ 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].

²⁶⁷ Amtsgericht Riedlingen, Germany, 21 October 1994, Unilex; Landgericht Berlin, Germany, 16 September, 1992, Unilex.

²⁶⁸ Landgericht Landshut, Germany, 5 April 1995, Unilex.

²⁶⁹ CLOUT case No. 4 [Landgericht Stuttgart, Germany, 31 August 1989].

²⁷⁰ Foreign Trade Court of Arbitration attached to the Yugoslav Chamber of Commerce, Serbia, 27 November 2002, 27 November 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021127sb.html> (requiring that notice by telephone be confirmed in writing within a reasonable time).

²⁷¹ Rechtbank van Koophandel Veurne, Belgium, 19 March 2003 (CVBA L. v. E.G. BV), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030319b1.html>.

²⁷² Hof van Beroep Ghent, Belgium, 16 April 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070416b1.html>.

²⁷³ CLOUT case No. 284 [Oberlandesgericht Köln, Germany, 21 August 1997] (see full text of the decision).

²⁷⁴ Arrondissementsrechtbank Zutphen, the Netherlands, 27 February 2008 (Frutas Caminito Sociedad Cooperativa Valenciana. v. Groente-En Fruithandel Heemskerk BV), English abstract available on the Internet at <http://cisgw3.law.pace.edu/cases/080227n2.html> (perishable goods (fruit) with easily discoverable defects).

²⁷⁵ Arrondissementsrechtbank Zutphen, the Netherlands, 27 February 2008 (Frutas Caminito Sociedad Cooperativa Valenciana. v. Groente-En Fruithandel Heemskerk BV), English abstract available on the Internet at <http://cisgw3.law.pace.edu/cases/080227n2.html> (buyer arranged improper mode of transportation that would hasten the deterioration of perishable goods); Oberlandesgericht Schleswig, Germany, 22 August 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020822g2.html> (sheep warranted to be ready for slaughter, subject to rapid change in relevant condition).

²⁷⁶ CLOUT case No. 290 [Oberlandesgericht Saarbrücken, Germany, 3 June 1998].

²⁷⁷ Supreme Court, Israel 17 March 2009 (*Pamesa Cerámica v. Yisrael Mendelson Ltd.*), available on the Internet at <http://cisgw3.law.pace.edu/cases/090317i5.html>.

²⁷⁸ Tribunale di Forlì, Italy, 16 February 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090216i3.html>.

²⁷⁹ Hof van Beroep Antwerpen, Belgium, 14 April 2004 (ING Insurance v. BVBA HVA Koeling and Fagard Winand; HVA Koeling BVBA v. Fagard Winand and Besseling Agri-Technic BV), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040414b1.html>.

²⁸⁰ Cour d'appel de Poitiers, France, 26 October 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/041026f1.html>.

²⁸¹ CLOUT case No. 597 [Oberlandesgericht Celle, Germany, 10 March 2004] (see full text of the decision); Landgericht Saarbrücken, Germany, 2 July 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020702g1.html>; CLOUT case No. 997 [Sø og Handelsretten, Denmark, 31 January 2002] (frozen mackerel); Pretura di Torino, Italy 30 January 1997, Unilex, also available on the Internet at www.cisg.law.pace.edu/cisg/wais/db/cases/2/970130i3.html.

²⁸²Landgericht Aschaffenburg, Germany, 20 April 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060420g1.html>; Tribunal Cantonal Valais, Switzerland, 30 April 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030430s1.html>.

²⁸³CLOUT case No. 1057 [Oberster Gerichtshof, Austria, 2 April 2009], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090402a3.html>; Oberlandesgericht Linz, Austria, 1 June 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050601a3.html>; Hof van Beroep Gent, Belgium, 8 October 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/031008b1.html>.

²⁸⁴CLOUT case No. 833 [Hoge Raad, the Netherlands, 20 February 1998].

²⁸⁵Landgericht Stuttgart, Germany, 15 October 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/091015g1.html>; Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, 21 February 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050221sb.html>.

²⁸⁶Oberlandesgericht Saarbrücken, Germany, 17 January 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070117g1.html>; Landgericht Hamburg, Germany, 6 September 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040906g1.html>; CLOUT case No. 773 [Bundesgerichtshof, Germany, 30 June 2004] (see full text of the decision); Landgericht Berlin, Germany, 16 September, 1992, Unilex.

²⁸⁷Hof van Beroep Ghent, Belgium, 16 June 2004 (Mermark Fleischhandelsgesellschaft mbH v. Cvba Lokerse Vleesveiling), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040616b1.html>.

²⁸⁸CLOUT case No. 941 [Gerechthof Arnhem, the Netherlands, 18 July 2006].

²⁸⁹Rechtbank van Koophandel Kortrijk, Belgium, 4 June 2004 (Steinbock-Bjonustan EHF v. N.V. Duma), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040604b1.html>.

²⁹⁰Oberlandesgericht Hamm, Germany, 2 April 2009, English headnotes available on the Internet at <http://cisgw3.law.pace.edu/cases/090402g1.html>; Rechtbank van Koophandel Hasselt, Belgium, 6 January 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040106b1.html>; CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995] (see full text of the decision).

²⁹¹CLOUT case No. 164 [Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 5 December 1995] (see full text of the decision).

²⁹²Landgericht Bamberg, Germany, 23 October 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061023g1.html>; 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).

²⁹³CLOUT case No. 849 [Audiencia Provincial de Pontevedra, Spain, 19 December 2007] (see full text of the decision).

²⁹⁴Arbitration Court of the International Chamber of Commerce, 1996 (Arbitral award No. 8247), Unilex.

²⁹⁵CLOUT 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).

²⁹⁶CLOUT case No. 775 [Landgericht Frankfurt, Germany, 11 April 2005] (see full text of the decision); Arrondissementsrechtbank 's-Hertogenbosch, the Netherlands, 15 December 1997, Unilex.

²⁹⁷District Court in Nitra, Slovakia, 3 October 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061003k1.html>; CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997].

²⁹⁸CLOUT case No. 909 [Kantonsgericht Appenzell-Ausserrhoden, Switzerland, 9 March 2006] (see full text of the decision); U.S. District Court, Northern District of Illinois, United States, 21 May 2004 (Chicago Prime Packers, Inc. v. Northam Food Trading Co.), available on the Internet at <http://cisgw3.law.pace.edu/cases/040521u1.html> (frozen pork ribs for human consumption).

²⁹⁹Landgericht Tübingen, Germany, 18 June 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030618g1.html>.

³⁰⁰CLOUT 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 [Audiencia 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.

³⁰¹CLOUT case No. 1038 [Audiencia Provincial de Valencia, Spain, 8 April 2008].

³⁰²Hof van Beroep Ghent, Belgium, 14 November 2008 (Volmari Werner v. Isocab NV), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081114b1.html>.

³⁰³Oberlandesgericht Koblenz, Germany, 21 November 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071121g1.html>.

³⁰⁴CLOUT case No. 590 [Landgericht Saarbrücken, Germany, 1 June 2004] (see full text of the decision).

³⁰⁵Cour d'appel Versailles, France, 13 October 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051013f1.html>.

³⁰⁶Hoviokeus / hovrätt Turku, Finland, 24 May 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050524f5.html>.

³⁰⁷CLOUT case No. 905 [Kantonsgericht Wallis, Switzerland, 21 February 2005] (see full text of the decision).

³⁰⁸CLOUT case No. 229 [Bundesgerichtshof, Germany, 4 December 1996] (see full text of the decision).

³⁰⁹CLOUT case No. 825 [Oberlandesgericht Köln, Germany, 14 August 2006] (see full text of the decision).

³¹⁰District Court in Komarno, Slovakia 24 February 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090224k1.html>; CLOUT case No. 46 [Landgericht Aachen, Germany, 3 April 1990] (see full text of the decision).

³¹¹Rechtbank van Koophandel Mechelen, Belgium, 18 January 2002, Unilex.

³¹²Landgericht Bielefeld, Germany, 18 January 1991, Unilex.

³¹³Landgericht Coburg, Germany, 12 December 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061212g1.html>.

³¹⁴CLOUT case No. 723 [Oberlandesgericht Koblenz, Germany, 19 October 2006] (see full text of the decision) (tee shirts); Hovioikeus/hovrätt Helsinki, Finland, 31 May 2004 (Crudex Chemicals Oy v. Landmark Chemicals S.A.), English editorial analysis available on the Internet at <http://cisgw3.law.pace.edu/cases/040531f5.html>.

³¹⁵CLOUT case No. 867 [Tribunale di Forlì, Italy, 11 December 2008], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081211i3.html>; Appellationshof Bern, Switzerland, 11 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040211s1.html>, reasoning upheld in CLOUT case No. 894 [Bundesgericht, Switzerland, 7 July 2004] (see full text of the decision); Helsinki Court of First Instance, Finland, 11 June 1995, and Helsinki Court of Appeals, Finland, 30 June 1998, available on the Internet at www.utu.fi/oik/tdk/xcisg/tap5.html#engl.

³¹⁶CLOUT case No. 120 [Oberlandesgericht Köln, Germany, 22 February 1994], also in Unilex (noting that buyer examined goods at the beginning of July and gave notice on or before 8 July, which the court held was timely, particularly in light of fact that 4 and 5 July were weekend days).

³¹⁷CLOUT case No. 45 [Arbitration Court of the International Chamber of Commerce, 1989 (Arbitral award No. 5713)] (see full text of the decision).

³¹⁸CLOUT case No. 593 [Oberlandesgericht Karlsruhe, Germany, 6 March 2003].

³¹⁹CLOUT 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, available 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).

³²⁰Landgericht Frankfurt, Germany, 9 December 1992, Unilex.

³²¹CLOUT case No. 315 [Cour de Cassation, France, 26 May 1999] (see full text of the decision).

³²²CLOUT case No. 1040 [Audiencia Provincial de Cuenca, Spain, 31 January 2005], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050131s4.html>.

³²³CLOUT case No. 892 [Kantonsgericht Schaffhausen, Switzerland, 27 January 2004] (see full text of the decision).

³²⁴Oberlandesgericht Düsseldorf, Germany, 23 January 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040123g1.html>; CLOUT case No. 319 [Bundesgerichtshof, Germany, 3 November 1999].

³²⁵CLOUT case No. 885 [Bundesgericht, Switzerland, 13 November 2003] (see full text of the decision); 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.

³²⁶Handelsgericht Aargau, Switzerland, 26 November 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081126s1.html>; CLOUT case No. 885 [Bundesgericht, Switzerland, 13 November 2003] (see full text of the decision).

³²⁷U.S. District Court, Southern District of New York, United States, 23 August 2006 (*TeeVee Tunes v. Gerhard Schubert GmbH*), available on the Internet at <http://cisgw3.law.pace.edu/cases/060823u1.html>.

³²⁸Regional Court Zilina, Slovakia, 25 October 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071025k1.html> (decision indicates that buyer received customer complaints in August and September, and notified seller of the lack of conformity in October).

³²⁹Landgericht München, Germany, 27 February 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020227g1.html>.

³³⁰CLOUT case No. 484 [Audiencia Provincial de Pontevedra, Spain, 3 October 2002].

³³¹Single-Member Court of First Instance of Thessalonika, Greece, 2003 (docket No. 14953/2003), English editorial remarks available on the Internet at <http://cisgw3.law.pace.edu/cases/030001gr.html>.

³³²China International Economic & Trade Arbitration Commission, People's Republic of China, 3 June 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030603c1.html>.

³³³CLOUT case No. 694 [U.S. Bankruptcy Court, District of Oregon, United States, 29 March 2004 (*In re Siskiyou Evergreen, Inc.*)] (see full text of the decision).

³³⁴The 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."

³³⁵CLOUT case No. 799 [Audiencia Provincial de Pontevedra, Spain, 8 February 2007].

³³⁶See, e.g., Cour d'appel de Rouen, France, 19 December 2006 (*Société Agrico v. Société SIAC*), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061219f1.html>, affirmed by CLOUT case No. 1028 [Cour de Cassation, France, 16 September 2008] (holding that the requirements of article 40 were not satisfied on the facts of the case). See generally the Digest for article 40.

³³⁷See Federal Court of Australia, Australia, 13 August 2010 (*Cortem SpA v. Controlmatic Pty. Ltd.*), available on the Internet at www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2010/852.html; CLOUT case No. 1026 [Cour de Cassation, France, 8 April 2009]

(*Société Bati-Seul v. Société Ceramiche Marca Corona*), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090408f1.html>; Supreme Court, Israel 17 March 2009 (*Pamesa Cerámica v. Yisrael Mendelson Ltd.*), available on the Internet at <http://cisgw3.law.pace.edu/cases/090317i5.html>; CLOUT case No. 1058 [Oberster Gerichtshof, Austria, 19 December 2007], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071219a3.html> (holding that there is no “gap” in article 39 (2) regarding the treatment of latent defects); Cour d’appel de Rouen, France, 19 December 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061219f1.html>; Oberlandesgericht Stuttgart, Germany, 20 December 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/041220g1.html>; Landgericht Marburg, Germany, 12 December 1995, Unilex (invoking article 39 (2) to deny the buyer any remedy for a claimed lack of conformity).

³³⁸CLOUT case No. 934 [Tribunal Cantonal Valais, Switzerland, 27 April 2007] (see full text of the decision).

³³⁹CLOUT case No. 1058 [See Oberster Gerichtshof, Austria, 19 December 2007], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071219a3.html>.

³⁴⁰CLOUT case No. 934 [Tribunal Cantonal Valais, Switzerland, 27 April 2007] (see full text of the decision); 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).

³⁴¹CLOUT case No. 798 [Audiencia Provincial Girona, Spain, 6 November 2006].

³⁴²Bundesgericht, Switzerland, 18 May 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090518s1.html>. An earlier decision had chosen to extend the domestic limitations period to two years in such cases. CLOUT case No. 249 [Cour de Justice, Genève, Switzerland, 10 October 1997].

³⁴³Single-Member Court of First Instance Larissa, Greece, 2005 (docket No. 165/2005), English editorial analysis available on the Internet at <http://cisgw3.law.pace.edu/cases/050165gr.html>; CLOUT case No. 879 [Handelsgericht Bern, Switzerland, 17 January 2002], see full text of the decision.

³⁴⁴Bundesgericht, Switzerland, 18 May 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090518s1.html>; CLOUT case NO. 1027 [Cour de cassation, France, 3 February 2009]; U.S. District Court, Eastern District of Kentucky, United States, 18 March 2008 (*Sky Cast, Inc. v. Global Direct Distributions, LLC*), available on the Internet at <http://cisgw3.law.pace.edu/cases/080318u1.html>; Hof van Beroep Ghent, Belgium, 17 May 2004 (*Noma B.V.B.A. v. Misa Sud Refrigerazione S.p.A.*), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040517b1.html>; CLOUT case No. 879 [Handelsgericht Bern, Switzerland, 17 January 2002], see full text of the decision; CLOUT case No. 202 [Cour d’appel, Grenoble, France, 13 September 1995] (see full text of the decision); CLOUT case No. 302 [Arbitration Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7660)]; CLOUT case No. 300 [Arbitration Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7565)].

³⁴⁵For a decision indicating that parties may agree to derogate from article 39 (2), see CLOUT case No. 1058 [Oberster Gerichtshof, Austria, 19 December 2007], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071219a3.html>.

³⁴⁶CLOUT case No. 302 [Arbitration Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7660)].

³⁴⁷CLOUT case No. 300 [Arbitration Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7565)].

³⁴⁸CLOUT case No. 237 [Arbitration Institute of the Stockholm Chamber of Commerce, Sweden, 5 June 1998] (see full text of the decision).

³⁴⁹CLOUT case No. 300 [Arbitration Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7565)].

³⁵⁰Juzgado de Primera Instancia La Laguna, Spain, 23 October 2007, Unilex.

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." and which the seller "did not disclose to the buyer."

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

3. Another decision that discusses article 40 CISG at length—even though the applicable law was the 1964 Hague Sales Convention (Uniform Law for International Sales, or ULIS)—identifies two rationales for the provision: 1) that the provision focuses on instances of *bad faith* by the seller in concealing defects of which he was aware or could not have been unaware; 2) that article 40 CISG focuses on situations where the seller *does not need* notice of the lack of conformity because it is already aware (or it could not have been unaware) of the lack of conformity, and thus that the seller can foresee that the buyer will make a claim even without notice.³ This decision also suggests that article 40 is based on a principle of "estoppel"; and that it constitutes an exception to the rules of articles 38

and 39 CISG which should be interpreted narrowly and limited to "exceptional cases".⁴ The decision also suggests that a buyer's bad faith in failing to give the seller notice of a lack of conformity until it files a claim should be considered and balanced against the seller's bad faith in not disclosing a lack of conformity, and that in close or ambiguous cases such a consideration may argue against application of article 40.⁵

4. 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.⁶

SCOPE AND EFFECT OF ARTICLE 40

5. In a number of decisions, article 40 has been successfully invoked to prevent a seller from relying on a buyer's non-compliance with article 38 and/or article 39;⁷ in other cases, a buyer's invocation of article 40 has failed.⁸ 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.⁹ 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.¹⁰ 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 provision 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.¹¹

REQUIREMENT THAT THE SELLER KNEW OR COULD NOT HAVE BEEN UNAWARE OF FACTS RELATED TO A LACK OF CONFORMITY: IN GENERAL

6. 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.”¹² 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.”¹³ 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”.¹⁴ 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”.¹⁵ 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.¹⁶

7. Another decision containing extensive discussion of article 40 CISG (even though the applicable law in the case was the 1964 Hague Sales Convention (Uniform Law for International Sales, or “ULIS”)) suggests that the provision applies when the seller’s awareness of a defect, or its lack of knowledge of a defect of which it could not have been unaware, amounts to bad faith; that “general awareness of a seller that some of his products are not of the best quality” does not satisfy the “could not have been unaware” standard; and that to satisfy the “could not have been unaware standard,” a seller’s non-awareness of a lack of conformity must have arisen from “at least negligence that constitutes a breach of the customary care in trade,” and possibly from “gross negligence,” “more than gross negligence” (“almost fraud”), or even “de facto awareness.”¹⁷ Other decisions have indicated that the requirements of article 40 are satisfied if the seller’s ignorance of a lack of conformity is due to gross negligence.¹⁸ Some decisions assert that article 40 requires that the seller knew (or could not have been unaware) not only of the facts giving rise to the 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:
BURDEN OF PROOF

8. 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.²⁰ 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.²¹ 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.”²² Another decision declared that the burden of proof as to whether the seller knew or could not have been unaware of a lack of conformity—a burden that normally rested on the buyer because article 40 constituted an exception to a rule, and the buyer was invoking the exception—could be shifted to the seller based either on the nature of the lack of conformity (i.e., if the goods deviated obviously from the requirements of the contract and the non-conformity resulted from facts within the seller’s domain), or on the principle of “proof proximity” (“Beweisnähe”), in order to avoid unreasonable difficulties of proof where the seller had clearly superior access to the evidence as compared to the buyer.²³ Applying these principles, the court found that, because the type of non-conformity at issue (irradiated paprika powder where the contract required non-irradiated goods) was difficult to detect, the nature of the lack of conformity did not justify shifting the burden to the seller; but that the proof-proximity principle required the seller to prove that its non-awareness of the lack of conformity was not due to its gross negligence, provided the buyer had shown that the irradiation took place at the facilities of the seller or the seller’s supplier.²⁴

REQUIREMENT THAT THE SELLER KNEW OR
COULD NOT HAVE BEEN UNAWARE OF FACTS
RELATED TO A LACK OF CONFORMITY:
APPLICATION (EVIDENCE)

9. 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.²⁵ 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.²⁶ 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.²⁷ On this point another decision stated that, where a buyer seeks to satisfy the article 40 standard through evidence that the seller's products had been shown or alleged to be defective in other transactions, "the buyer must *at least* prove that in the past the seller discovered defects *of the kind being alleged* . . . , in the same type of products, in such a way that it should have given rise to a real concern"; and that "[w]hen we are speaking of a manufacturer who manufactures large quantities of products, it is possible that the awareness should be confined to a certain production line or consignment."²⁸ The same decision indicates that, to invoke article 40, the buyer must show that the seller should have foreseen that the buyer would make a claim for lack of conformity.²⁹

10. It has been held that a seller "could not have been unaware" that wine it sold had been diluted with water, because the non-conformity resulted from an intentional act,³⁰ and that sellers who shipped goods other than those ordered by their buyers necessarily knew of the lack of conformity.³¹ It has also been suggested that gross negligence on the part of the seller would be presumed if the goods deviated obviously from the requirements of the contract and the non-conformity resulted from facts within the seller's domain.³² Where the seller knew that the buyer had purchased doors and door jams in order to deliver them in combinations sets to its customers, it was held that the seller necessarily was aware of the lack of conformity when it delivered 176 door jams but only 22 doors.³³ It was also held that the requirements of article 40 were satisfied where a contract's technical specifications for the goods specified an "average" maximum level for a particular indicator, and the certificate of quality issued for the goods that were actually delivered by the seller substantially exceeded that level.³⁴ And it has been held that, where the seller did not provide a quality certificate and did not sufficiently test that an amphibious vehicle could be used in water, it had been shown that the seller knew or could not have been unaware that the vehicle was not usable in water, and the requirements of article 40 were satisfied.³⁵ 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.³⁶ And where the contract required non-irradiated paprika powder but the seller delivered irradiated powder, the court held that, based on the "proof proximity" principle, if the buyer proved that the irradiation occurred at the facilities of the seller or the seller's supplier, it was the seller's burden to prove that its non-awareness of the lack of conformity was not due to gross negligence.³⁷

11. 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.³⁸ 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.³⁹ Other decisions assert that the buyer's resale of the goods to its own customers suggests that the defects complained of were not obvious, and that the buyer had therefore failed to show that the seller could not have been unaware of the lack of conformity.⁴⁰ 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.⁴¹ 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.⁴² Similarly, it has been held that the presence of feathers in turkey meat did not, as such, prove that the seller was aware of this lack of conformity, or was unaware only due to severe negligence, and thus proof of this lack of conformity did not establish the requirements for applying article 40.⁴³

12. Proof that potatoes had been grown on land infected in the past by a potato disease was found insufficient to establish that the seller knew or could not have been unaware that the potatoes were infected with the disease, particularly in light of the fact that the grower had not been banned from producing potatoes on the land and the potatoes delivered by the seller had been inspected and certified as disease-free at the time of delivery.⁴⁴ Testimony that the seller knew that its products had been shown to have various defects in other transactions, it has been asserted, was insufficient to show that the seller knew or could not have been unaware of the lack of conformity claimed by the buyer, because that testimony did *not* establish that "in the past the seller discovered defects *of the kind being alleged* . . . , in the same type of products, in such a way that it should have given rise to a real concern": and proof of "a *general awareness* of 'problems' that were discovered in the past . . . does not satisfy the requirements of article 40."⁴⁵ Furthermore, an allegation that the seller had failed to warn the buyer of a change in product specifications that would require a change in installation procedures, it was held, did not constitute an allegation under article 40 that the seller knew or could not have been unaware of a lack of conformity.⁴⁶ And where a buyer argued that the seller should have informed the buyer that greenhouse panels installed in a "non-vertical fashion" would not function properly, a court held that article 40 was inapplicable because "it was not shown that [Seller] knew that [Buyer] would apply the plates in a non-vertical fashion."⁴⁷

**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**

13. 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. Several decisions have indicated that this determination should be made as of the time of delivery.⁴⁸

SELLER'S DISCLOSURE OF LACK OF CONFORMITY

14. 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,⁴⁹ 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".⁵⁰ 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 . . .".⁵¹ 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.⁵² On the other hand, where a seller delivered stainless steel plates in dimensions that it knew differed from those specified in the contract, but the dimensions of the delivered plates were disclosed on the seller's invoice that accompanied the delivery, article 40 was held not to prevent the seller from relying on the buyer's failure to give timely notice.⁵³ 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.⁵⁴ 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.⁵⁵ It has also been held that "disclosure must occur, at the latest, by the time the seller hands the goods over to the buyer—disclosure after that point does not result in non-application of article 40,"⁵⁶ and disclosure at the time the goods were delivered has been held adequate in other decisions.⁵⁷ Another decision, however, indicates that disclosure must have occurred at the time the contract was concluded.⁵⁸ One decision indicates that the seller bears the burden of proving adequate disclosure.⁵⁹

DEROGATION AND WAIVER

15. 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 39⁶⁰—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."⁶¹ 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.⁶²

ARTICLE 40 AS EMBODYING GENERAL PRINCIPLES UNDERLYING THE CISG

16. 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 . . .".⁶³ Several decisions have identified article 40 as embodying a general principle of the Convention applicable to resolve unsettled issues under the CISG.⁶⁴ 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."⁶⁵ 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)⁶⁶ for misrepresenting the age and mileage of a car even if the buyer could not have been unaware of the lack of conformity.⁶⁷

Notes

¹CLOUT case No. 237 [Arbitration Institute of the Stockholm Chamber of Commerce, Sweden, 5 June 1998] (see full text of the decision).

²Ibid.

³Supreme Court, Israel, 17 March 2009 (Pamesa Cerámica v. Yisrael Mendelson Ltd), English text available on the Internet at <http://cisgw3.law.pace.edu/cases/090317i5.html>. Compare Hof van Beroep Ghent, Belgium, 16 April 2007 (Dat-Schaub International a/s v. Kipco-Damaco N.V.), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070416b1.html> ("Article 40 aims at either the bad faith of the seller, or severe negligence on his part"); Oberster Gerichtshof, Austria, 30 November 2006, English

translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061130a3.html> (“It would be unjust and unnecessary formalism in such cases to oblige the buyer to inform the seller about any non-conformities when the latter has already been aware or could not have been unaware of them. . . . [article 40] seeks not to protect a seller acting in bad faith”); Oberlandesgericht Düsseldorf, Germany, 23 January 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040123g1.html> (indicating that article 40 focuses on the seller’s bad faith, which means “not only deceit but also unawareness of the non-conformity of the goods which is due to gross negligence,” along with the “essential element” of “non-disclosure of the lack of conformity”); Oberlandesgericht Schleswig, Germany, 22 August 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020822g2.html> (“article 40 CISG applies, if the respective seller acted in bad faith”); Hof van Beroep Antwerpen, Belgium, 27 June 2001, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/010627b1.html> (“Article 40 CISG . . . is an application of the good faith principle”).

⁴CLOUT case No. 237 [Arbitration Institute of the Stockholm Chamber of Commerce, Sweden, 5 June 1998] (see full text of the decision).

⁵Ibid.

⁶CLOUT 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 article 40 prevented seller from relying on articles 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 aware that some items were missing from delivery boxes, and seller could use late notice as a defence as to this non-conformity).

⁷In the following cases, the tribunal found that article 40 precluded the seller from relying on articles 38 and/or 39: Shanghai First Intermediate People’s Court, People’s Republic of China, 25 December 2008 (Shanghai Anlili International Trading Co. Ltd. v. J & P Golden Wings Corp.), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081225c1.html>; China International Economic and Trade Arbitration Commission [CIETAC], People’s Republic of China, December 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061200c1.html>; Oberster Gerichtshof, Austria, 30 November 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061130a3.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 19 October 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061019r1.html>; Higher Court in Ljubljana, Slovenia, 14 December 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051214sv.html>; CLOUT case No. 838 [Cour de Cassation, France, 4 October 2005] (Société ISF v. Société Riv. SARL); CLOUT case No. 747 [Oberster Gerichtshof, Austria, 23 May 2005]; High People’s Court of Shandong Province, People’s Republic of China, 10 September 2004 (WS China Import GmbH v. Longkou Guanyuan Food Co.), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040910c1.html>; CLOUT case No. 694 [U.S. Bankruptcy Court, District of Oregon, United States, 29 March 2004 (In re Siskiyou Evergreen, Inc.)]; CLOUT case No. 596 [Oberlandesgericht Zweibrücken, Germany, 2 February 2004]; Hof van Beroep Gent, Belgium, 28 January 2004 (J.B. and G.B. v. BV H.V.), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040128b1.html>; CLOUT case No. 477 [Oberster Gerichtshof, Austria, 27 February 2003]; CLOUT case No. 45 [Arbitration Court of the International Chamber of Commerce, 1989 (Arbitral award No. 5713)]; CLOUT case No. 237 [Arbitration Institute of the Stockholm Chamber of Commerce, Sweden, 5 June 1998]; CLOUT case No. 170 [Landgericht Trier, Germany, 12 October 1995]; Landgericht Landshut, Germany, 5 April 1995, Unilex. In the following case, 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].

⁸In the following cases, the tribunal found that the requirements to apply article 40 had not been established: CLOUT case No. 1028 [Cour de cassation, France, 16 September 2008 (Société Industrielle et Agricole du Pays de Caux (SIAC) v. Agrico Cooperatieve Handelsvereniging Voor Akkerbouwgewassen BA)], affirming Cour d’appel de Rouen, France, 19 December 2006 (Société Agrico v. Société SIAC), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061219f1.html>; Oberlandesgericht Stuttgart, Germany, 31 March 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080331g1.html>; CLOUT case No. 1058 [Oberster Gerichtshof, Austria, 19 December 2007], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071219a3.html>; Hof van Beroep Ghent, Belgium, 16 April 2007 (Dat-Schaub International a/s v. Kipco-Damacco N.V.), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070416b1.html>; Cour d’appel de Paris, France, 25 February 2005 (S.A. DIG... v. Société S...), Unilex, reversed on other grounds, CLOUT case No. 836 [Cour de cassation, France, 13 February 2007]; Hof van Beroep Ghent, Belgium, 4 October 2004 (Deforche NV v. Prins Gebroeders Bouwstoffenhandel BV), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/041004b1.html>; Oberlandesgericht Düsseldorf, Germany, 23 January 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040123g1.html>; CLOUT case No. 608 [Tribunale Rimini, Italy, 26 November 2002 (Al Palazzo S.r.l v. Bernardaud di Limoges S.A.) (see full text of the decision)]; Oberlandesgericht Rostock, Germany, 25 September 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020925g1.html>; 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); Bulgarska turgosko-promishlena palata, Bulgaria, 24 April 1996 (Arbitral award No. 56/1995), Unilex; CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997]; CLOUT case No. 270 [Bundesgerichtshof, Germany, 25 November 1998]. See also Supreme Court, Israel, 17 March 2009 (Pamesa Cerámica v. Yisrael Mendelson Ltd), English text available on the Internet at <http://cisgw3.law.pace.edu/cases/090317i5.html> (holding that the buyer had failed to prove the requirements for applying article 40 of the 1964 Hague Sales Convention (Uniform Law for International Sales, or “ULIS”), which the court construed by reference to the similar provisions of article 40 CISG).

⁹Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 19 October 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061019r1.html>; CLOUT case No. 237 [Arbitration Institute of the Stockholm Chamber of Commerce, Sweden, 5 June 1998].

¹⁰CLOUT case No. 237 [Arbitration Institute of the Stockholm Chamber of Commerce, Sweden, 5 June 1998].

¹¹CLOUT case No. 168 [Oberlandesgericht Köln, Germany 21 March 1996].

¹²CLOUT case No. 237 [Arbitration Institute of the Stockholm Chamber of Commerce, Sweden, 5 June 1998] (see full text of the decision).

¹³For 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). See also CLOUT case No. 773 [Bundesgerichtshof, Germany, 30 June 2004] (see full text of the decision) (stating that gross negligence on the part of the seller would be presumed if the goods deviated obviously from the requirements of the contract and the non-conformity resulted from facts within the seller's domain).

¹⁴CLOUT case No. 237 [Arbitration Institute of the Stockholm Chamber of Commerce, Sweden, 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 to discover a lack of conformity).

¹⁵CLOUT case No. 237 [Arbitration Institute of the Stockholm Chamber of Commerce, Sweden, 5 June 1998] (see full text of the decision). 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).

¹⁶CLOUT case No. 237 [Arbitration Institute of the Stockholm Chamber of Commerce, Sweden, 5 June 1998] (dissenting opinion) (see full text of the decision).

¹⁷Supreme Court, Israel, 17 March 2009 (Pamesa Cerámica v. Yisrael Mendelson Ltd), English text available on the Internet at <http://cisgw3.law.pace.edu/cases/090317i5.html>. Compare Oberlandesgericht Stuttgart, Germany, 31 March 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080331g1.html> (stating that, because the buyer failed to allege even gross negligence, it was unnecessary to decide whether article 40 requires gross negligence or fraud on the part of the seller); Hof van Beroep Ghent, Belgium, 16 April 2007 (Dat-Schaub International a/s v. Kipco-Damaco N.V.), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070416b1.html> ("Article 40 aims at either the bad faith of the seller, or severe negligence on his part"); Hof van Beroep Ghent, Belgium, 4 October 2004 (Deforche NV v. Prins Gebroeders Bouwstoffenhandel BV), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/041004b1.html> (dismissing buyer's article 40 argument because "this is not a case of fraud").

¹⁸CLOUT case No. 773 [Bundesgerichtshof, Germany, 30 June 2004] (see full text of the decision); CLOUT case No. 597 [Oberlandesgericht Celle, Germany, 10 March 2004] ("at least gross negligence"); Oberlandesgericht Düsseldorf, Germany, 23 January 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040123g1.html>; CLOUT case No. 232 [Oberlandesgericht München, Germany, 11 March 1998] (see full text of the decision).

¹⁹Oberlandesgericht Schleswig, Germany, 22 August 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020822g2.html> (holding that, where the sales contract was not clear in requiring the delivery of sheep that were ready for slaughter, "the exemption under article 40 CISG is not applicable, since this provision would require that the parties had agreed on the delivery of sheep, mature to be slaughtered immediately and that the [Seller] had positive knowledge of this fact" (emphasis added); CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997]; CLOUT case No. 270 [Bundesgerichtshof Germany 25 November 1998]. See also Supreme Court, Israel, 17 March 2009 (Pamesa Cerámica v. Yisrael Mendelson Ltd.), English text available on the Internet at <http://cisgw3.law.pace.edu/cases/090317i5.html> (stating that, to invoke article 40, the buyer must show that the seller should have foreseen that the buyer would make a claim for lack of conformity) (dicta—the transaction at issue was governed by the 1964 Hague Sales Convention (Uniform Law for International Sales, or "ULIS")); Cour d'appel de Paris, France, 25 February 2005 (S.A. DIG... v. Société S...), Unilex, reversed on other grounds, CLOUT case No. 836 [Cour de cassation, France, 13 February 2007] (asserting that the buyer must prove that the seller had "precise knowledge of the buyer's intended use of the goods"). Cf. CLOUT case No. 596 [Oberlandesgericht Zweibrücken, Germany, 2 February 2004] (see full text of the decision) (the seller was aware that some of the milling machinery it delivered was of Russian origin, which the court determined was a breach of the parties' contract, but the seller argued that article 40 did not apply because the seller "acted on the assumption that it was allowed to deliver Russian mills"; the court found article 40 applicable, emphasizing that the buyer clearly intended to purchase mills of German origin, and "[i]f [Seller] felt entitled to deliver Russian mills anyhow, it defied concerns that it could not and should not have ignored").

²⁰Oberlandesgericht Stuttgart, Germany, 31 March 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080331g1.html>; Hof van Beroep Ghent, Belgium, 16 April 2007 (Dat-Schaub International a/s v. Kipco-Damaco N.V.), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070416b1.html>; Cour d'appel de Paris, France, 25 February 2005 (S.A. DIG... v. Société S...), Unilex, reversed on other grounds, CLOUT case No. 836 [Cour de cassation, France, 13 February 2007]; Hof van Beroep Ghent, Belgium, 24 March 2004 (NV Segers-Van Ingelgem v. NV Axima et al.), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040324b1.html>; CLOUT case No. 608 [Tribunale Rimini, Italy, 26 November 2002 (Al Palazzo S.r.l v. Bernardaud di Limoges S.A.) (see full text of the decision)]; CLOUT case No. 98 [Rechtbank Roermond, the Netherlands, 19 December 1991]; CLOUT case No. 237 [Arbitration Institute of the Stockholm Chamber of Commerce, Sweden, 5 June 1998] (see full text of the decision). See also CLOUT case No. 773 [Bundesgerichtshof, Germany, 30 June 2004] (see full text of the decision), stating that the buyer generally bears the burden of proving that the seller knew or could not have been unaware of the lack of conformity based on the "rule-exception" burden of proof principle, which the court identified as a general principle underlying the Convention, applicable pursuant to article 7 (2) CISG; as discussed further in paragraph 5 *supra*, however, the court also stated that, on the facts of the case, the burden could be placed on the seller to prove that its lack of awareness of the non-conformity was not due to gross negligence. Other decisions have implied, without expressly so stating, 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. 597 [Oberlandesgericht Celle, Germany, 10 March 2004] (article 40 did not apply because buyer "neither argued nor substantiated" the requirements of article 40); Landgericht München, Germany, 20 February 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020220g1.html>; CLOUT case No. 879 [Handelsgericht Bern, Switzerland, 17 January 2002] (see full text of the decision); ICC Arbitration Case No. 11333, International Chamber of Commerce, 2002, English text available on the Internet at (<http://cisgw3.law.pace.edu/cases/021333i1.html>); 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).

²¹CLOUT case No. 237 [Arbitration Institute of the Stockholm Chamber of Commerce, Sweden, 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).

²²CLOUT case No. 237 [Arbitration Institute of the Stockholm Chamber of Commerce, Sweden, 5 June 1998] (see full text of the decision).

²³CLOUT case No. 773 [Bundesgerichtshof, Germany, 30 June 2004] (see full text of the decision).

²⁴Ibid.

²⁵Landgericht Landshut, Germany, 5 April 1995, Unilex.

²⁶CLOUT case No. 237 [Arbitration Institute of the Stockholm Chamber of Commerce, Sweden, 5 June 1998] (see full text of the decision). Compare Oberster Gerichtshof, Austria, 30 November 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061130a3.html> (where, in a sale of industrial equipment, the seller substituted a control feature it had developed for the one required by the contract, the seller was “undoubtedly aware” of the lack of conformity).

²⁷CLOUT case No. 237 [Arbitration Institute of the Stockholm Chamber of Commerce, Sweden, 5 June 1998] (see full text of the decision). See also Arbitration Court of the International Chamber of Commerce, 2002 (Arbitral award No. 11333), English text available on the Internet at <http://cisgw3.law.pace.edu/cases/021333i1.html> (“By way of example, the seller who knows, from complaints received from other customers in the context of previous sales of similar goods, that the goods lack conformity cannot rely on the fact that the buyer did not give notice within the time limit of article 39 CISG”); Hof van Beroep Antwerpen, Belgium, 27 June 2001, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/010627b1.html> (“it also emerges from . . . the earlier damages cases which gave rise to a settlement [involving a significant payment] that the [seller] knew or at least could not have been unaware of the defects”).

²⁸Supreme Court, Israel, 17 March 2009 (Pamesa Cerámica v. Yisrael Mendelson Ltd), English text available on the Internet at <http://cisgw3.law.pace.edu/cases/090317i5.html> (dicta—the transaction at issue was governed by the 1964 Hague Sales Convention (Uniform Law for International Sales, or “ULIS”).

²⁹Ibid. See also Cour d’appel de Paris, France, 25 February 2005 (S.A. DIG... v. Société S...), Unilex, reversed on other grounds, CLOUT case No. 836 [Cour de cassation, France, 13 February 2007] (asserting that the buyer must prove that the seller had “precise knowledge of the buyer’s intended use of the goods”).

³⁰CLOUT case No. 170 [Landgericht Trier, Germany, 12 October 1995] (see full text of the decision). Compare CLOUT case No. 838 [Cour de Cassation, France, 4 October 2005] (Société ISF v. Société Riv. SARL), where the court held that, because defects in steel used for engine parts were attributable to the mixture of materials used during the casting of the steel, the seller (as the manufacturer of the goods) could not have been ignorant of the lack of conformity; and that this was confirmed by the fact the seller had not provided the buyer with a certificate of the analysis of the composition of the metal as required by the contract, thus suggesting that the seller deliberately concealed the non-conformity from the buyer.

³¹Shanghai First Intermediate People’s Court, People’s Republic of China, 25 December 2008 (Shanghai Anlili International Trading Co. Ltd. v. J & P Golden Wings Corp.), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081225c1.html>; High People’s Court of Shandong Province, People’s Republic of China, 10 September 2004 (WS China Import GmbH v. Longkou Guanyuan Food Co.), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040910c1.html> (inspection indicated that the seller changed and mixed other goods with the goods required by the contract, which constituted sufficient proof that the seller knew or could not have been unaware of the lack of conformity); CLOUT case No. 694 [U.S. Bankruptcy Court, District of Oregon, United States, 29 March 2004 (In re Siskiyou Evergreen, Inc.)] (where the contract required #1 grade Christmas trees but the seller delivered inferior #3 grade trees, the court held that the seller could not have been unaware of the non-conformity because the delivered trees were either purchased by the seller from third-party suppliers under contracts expressly calling for inferior #3 grade trees, or were harvested from the seller’s own land by its own employees); Oberlandesgericht Düsseldorf, Germany, 23 January 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040123g1.html> (seller was presumed to know that it delivered stainless steel plates in dimensions different from those specified in the contract; article 40 was held inapplicable, however, because the seller adequately disclosed the lack of conformity); CLOUT case No. 477 [Oberster Gerichtshof, Austria, 27 February 2003] (seller was presumed to be aware that it delivered fish from an earlier year’s catch than that required by the contract); 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).

³²CLOUT case No. 773 [Bundesgerichtshof, Germany, 30 June 2004] (see full text of the decision).

³³Higher Court in Ljubljana, Slovenia, 14 December 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051214sv.html>.

³⁴Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 19 October 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061019r1.html>.

³⁵China International Economic and Trade Arbitration Commission, People’s Republic of China, December 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061200c1.html>.

³⁶CLOUT case No. 98 [Rechtbank Roermond, the Netherlands, 19 December 1991]. Compare U.S. Court of Appeals for the Fifth Circuit, United States, 11 June 2003 (BP Oil International v. Empresa Estatal Petroleos de Ecuador), English text available on the Internet at <http://cisgw3.law.pace.edu/cases/030611u1.html> (remanding the case back to the trial court to permit the development of evidence as to whether the seller knew or could not have been unaware that it had delivered gasoline with excessive gum content). 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 Court of the International Chamber of Commerce, 1989 (Arbitral award No. 5713)].

³⁷CLOUT case No. 773 [Bundesgerichtshof, Germany, 30 June 2004] (see full text of the decision).

³⁸Oberlandesgericht Stuttgart, Germany, 31 March 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080331g1.html>; CLOUT case No.597 [Oberlandesgericht Celle, Germany, 10 March 2004]; Hof van Beroep Gent, Belgium, 28 January 2004 (J.B. and G.B. v. BV H.V.), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040128b1.html>; Landgericht Landshut, Germany, 5 April 1995, Unilex.

³⁹CLOUT case No. 285 [Oberlandesgericht Koblenz, Germany, 11 September 1998] (see full text of the decision).

⁴⁰Supreme Court, Israel, 17 March 2009 (Pamesa Cerámica v. Yisrael Mendelson Ltd), English text available on the Internet at <http://cisgw3.law.pace.edu/cases/090317i5.html> (dicta—the transaction at issue was governed by the 1964 Hague Sales Convention (Uniform Law for International Sales, or “ULIS”)); CLOUT case No. 232 [Oberlandesgericht München, Germany, 11 March 1998].

⁴¹CLOUT 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 paragraph 4 *supra*, an arbitration tribunal has indicated is insufficient to satisfy the requirements of article 40; see CLOUT case No. 237 [Arbitration Institute of the Stockholm Chamber of Commerce, Sweden, 5 June 1998] (see full text of the decision).

⁴²CLOUT case No. 474 [Tribunal of International Court of Commercial Arbitration of the Chamber of Commerce and Industry, Russian Federation, Russian Federation, 24 January 2000 (Arbitral award No. 54/1999)], also in Unilex.

⁴³Hof van Beroep Ghent, Belgium, 16 April 2007 (Dat-Schaub International a/s v. Kipco-Damaco N.V.), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070416b1.html>.

⁴⁴CLOUT case No. 1028 [Cour de cassation, France, 16 September 2008 (Société Industrielle et Agricole du Pays de Caux (SIAC) v. Agrico Cooperatieve Handelsvereniging Voor Akkerbouwgewassen BA)], affirming Cour de d’appel de Rouen, France, 19 December 2006 (Société Agrico v. Société SIAC), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061219f1.html>.

⁴⁵Supreme Court, Israel, 17 March 2009 (Pamesa Cerámica v. Yisrael Mendelson Ltd), English text available on the Internet at <http://cisgw3.law.pace.edu/cases/090317i5.html> (dicta—the transaction at issue was governed by the 1964 Hague Sales Convention (Uniform Law for International Sales, or “ULIS”)).

⁴⁶CLOUT case No. 1058 [Oberster Gerichtshof, Austria, 19 December 2007], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071219a3.html>.

⁴⁷Hof van Beroep Ghent, Belgium, 4 October 2004 (Deforche NV v. Prins Gebroeders Bouwstoffenhandel BV), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/041004b1.html>.

⁴⁸China International Economic and Trade Arbitration Commission, People’s Republic of China, December 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061200c1.html>; Landgericht Landshut, Germany, 5 April 1995, Unilex. But see Shanghai First Intermediate People’s Court, People’s Republic of China, 25 December 2008 (Shanghai Anlil International Trading Co. Ltd. v. J & P Golden Wings Corp.), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081225c1.html>, where the court apparently suggests that knowledge of a non-conformity which the seller acquired during negotiations conducted after the goods had been delivered could trigger article 40; Oberlandesgericht Stuttgart, Germany, 31 March 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080331g1.html>, where the court appears to indicate that the seller must be aware (or could not have been unaware) of the lack of conformity at the time of the conclusion of the contract.

⁴⁹Oberlandesgericht Düsseldorf, Germany, 23 January 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040123g1.html>; Oberlandesgericht Rostock, Germany, 25 September 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020925g1.html>; CLOUT case No. 285 [Oberlandesgericht Koblenz, Germany, 11 September 1998] (recognizing a seller’s duty to warn of known non-conformities under article 40, but finding no such duty in the case because the goods were in fact conforming); CLOUT case No. 237 [Arbitration Institute of the Stockholm Chamber of Commerce, Sweden, 5 June 1998] (see full text of the decision); Bulgarian Chamber of Commerce and Industry Arbitration, Bulgaria, 24 April 1996 (Arbitral award No. 56/1995), Unilex. See also Landgericht Landshut, Germany, 5 April 1995, Unilex, which indicates that the seller bears the burden of proving adequate disclosure.

⁵⁰CLOUT case No. 237 [Arbitration Institute of the Stockholm Chamber of Commerce, Sweden, 5 June 1998] (see full text of the decision).

⁵¹Ibid. (see full text of the decision).

⁵²CLOUT case No. 596 [Oberlandesgericht Zweibrücken, Germany, 2 February 2004] (see full text of the decision).

⁵³Oberlandesgericht Düsseldorf, Germany, 23 January 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040123g1.html>. Compare Oberlandesgericht Rostock, Germany, 25 September 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020925g1.html> (seller sufficiently disclosed the lack of conformity in documents that accompanied the delivery of the goods).

⁵⁴Bulgarian Chamber of Commerce and Industry Arbitration, Bulgaria, 24 April 1996 (Arbitral award No. 56/1995), Unilex.

⁵⁵Landgericht Landshut, Germany, 5 April 1995, Unilex.

⁵⁶Oberster Gerichtshof, Austria, 30 November 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061130a3.html>.

⁵⁷Oberlandesgericht Düsseldorf, Germany, 23 January 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040123g1.html>; Oberlandesgericht Rostock, Germany, 25 September 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020925g1.html>.

⁵⁸Cour d'appel de Paris, France, 25 February 2005 (S.A. DIG... v. Société S...), Unilex, reversed on other grounds, CLOUT case No. 836 [Cour de cassation, France, 13 February 2007].

⁵⁹Landgericht Landshut, Germany, 5 April 1995, Unilex.

⁶⁰CLOUT case No. 237 [Arbitration Institute of the Stockholm Chamber of Commerce, Sweden, 5 June 1998] (see full text of the decision).

⁶¹Ibid. (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.

⁶²CLOUT 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 cover 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).

⁶³In 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”.

⁶⁴Cf. Supreme Court, Israel, 17 March 2009 (Pamesa Cerámica v. Yisrael Mendelson Ltd), English text available on the Internet at <http://cisgw3.law.pace.edu/cases/090317i5.html> (dicta—the transaction at issue was governed by the 1964 Hague Sales Convention (Uniform Law for International Sales, or “ULIS”)), in which (without mentioning article 7 (2) or identifying the following as “general principles” underlying the Convention) the court asserts that article 40 embodies a principle of estoppel, and encompasses a comparison of the good and bad faith behavior of the seller and the buyer.

⁶⁵CLOUT case No. 237 [Arbitration Institute of the Stockholm Chamber of Commerce, Sweden, 5 June 1998] (see full text of the decision).

⁶⁶Article 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”.

⁶⁷CLOUT 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.¹ 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 . . ." This obligation has been considered in situations in which the buyer was deprived of possession of the goods.² The protection in article 41 against "any . . . claim of a third party" has been interpreted, "[a]ccording to its meaning and purpose . . . to protect the buyer from the very outset from having to deal with any third party claims concerning the purchased item, the justification of which he cannot immediately check, although [w]hether this also applies to claims pulled out of thin air is disputed."³ An exception to the article 41 obligation arises, however, if the buyer "agreed to take the goods subject to that right or claim". In addition, it has been stated that, under article 6, the parties may agree more generally to derogate from the obligations of article 41.⁴ 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, and on derogation from the provision. In one decision, 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.⁵ 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.⁶ Where the delivered goods (an automobile) were seized from the buyer as stolen goods, the court indicated that article 41 would have been violated had the parties not agreed to exclude the obligations in article 41 and had the statute of limitations applicable to the article 41 claim not expired before the claim was filed; the court found, however, that the delivery of stolen goods also violated article 30 CISG (which provides that the seller must "transfer the property in the goods, as required by the contract"), and that the article 30 obligation was neither excluded by the parties' agreement nor barred by the applicable statute of limitations.⁷ In another decision, the court held that the seller of an automobile that was confiscated from the buyer as a stolen vehicle had violated its obligation under both article 41 and 30; a contractual disclaimer of liability, the court held, had not become part of the parties' contract, and even if it had, would not have eliminated the seller's obligation under article 30 to transfer ownership of the goods.⁸ Where the goods were seized from the buyer because of violations of import regulations, on the other hand, the court found that neither article 41 nor article 30 CISG had not been violated because the buyer was aware of the situation concerning the import regulations when it purchased the goods, and thus the buyer had agreed to "take the goods subject to that right or claim."⁹ Where the buyer, at the time the contract was concluded, was not made aware of violations of import regulations that led to the confiscations of the goods, however, the seller was held to have violated article 41.¹⁰ Another buyer from whom goods (an automobile) had been confiscated lost its rights under article 41 because it failed to give timely notice of the third party's right or claim as required by article 43 CISG.¹¹

Notes

¹See Landgericht Freiburg, Germany, 22 August 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020822g1.html> (holding that domestic law governed the question of whether the seller had transferred title to the seller pursuant to a contract governed by the CISG).

²Oberlandesgericht Dresden, Germany, 21 March 2007 and 18 January 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070321g1.html>; CLOUT case No. 822 [Bundesgerichtshof, Germany, 11 January 2006]; Landgericht Freiburg, Germany, 22 August 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020822g1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 21 January 1998, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/980121r1.html>; Federal Arbitration Court for the Western Siberia Circuit, Russian Federation, 6 August 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020806r1.html>.

³CLOUT case No. 822 [Bundesgerichtshof, Germany, 11 January 2006] (see full text of the decision).

⁴Oberlandesgericht Dresden, Germany, 21 March 2007 and 18 January 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070321g1.html>; Landgericht Freiburg, Germany, 22 August 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020822g1.html>.

⁵CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (see full text of the decision).

⁶Arbitration Court of the International Chamber of Commerce, 1995 (Arbitral award No. 8204), Unilex.

⁷Oberlandesgericht Dresden, Germany, 21 March 2007 and 18 January 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070321g1.html>.

⁸Landgericht Freiburg, Germany, 22 August 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020822g1.html>.

⁹Federal Arbitration Court for the Western Siberia Circuit, Russian Federation, 6 August 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020806r1.html>.

¹⁰Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 21 January 1998, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/980121r1.html>.

¹¹CLOUT case No. 822 [Bundesgerichtshof, Germany, 11 January 2006].

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 industrial property or other intellectual property rights or claims of third parties. A seller is in breach if it delivers goods in violation of article 42; it has been held that the buyer bears the burden of proving such a breach.¹ It has also been held that the industrial property rights referred to in article 42 encompass "patents of any kind," including "processing patents"; and that there is a breach of article 42 if the third party's industrial or intellectual property rights in fact exists, or "if any industrial property right is being unrightfully claimed" because "[i]t is part of the seller's sphere of risk to deal with the third party in such cases."² The seller's obligation to deliver goods free of third party rights or claims based on intellectual property, however, 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";³ it has been held that the buyer bears the burden of proving this element of article 42 (1).⁴ 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. As one decision stated, "[t]he seller merely has to guarantee a corresponding conformity in certain countries, but not on a worldwide level It is primarily liable for any conflict with property rights under the law of the State in which it is being resold or in which it is supposed to be used, provided that the parties took this State into consideration at the time of the conclusion of the sales contract."⁵ 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"⁶ 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. The relatively few decisions that have applied article 42 have tended to focus on the question whether the buyer, at the time of the conclusion of the contract, knew or could not have been unaware of the third party's industrial or other intellectual property rights or claims. One 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.⁷ Similarly, a court found that a buyer, as a professional in the field, could not have been unaware that shoelaces used on the footwear 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 the buyer could not recover from the seller the payments buyer had made to compensate the holder of the trademark.⁸ It was also held that professional buyers who, at the time the contract was concluded, were clearly aware of the creators of a particular line of furniture, and who regularly consulted

with professional interior decorators, “could not have been unaware that the furniture bought from the [Seller] was counterfeit,” and thus the buyer could not assert a claim against the seller under article 42.⁹ And in a decision involving an action by a seller to collect the unpaid price for plastic faceplates for mobile phones, the buyer complained, *inter alia*, that the goods delivered by the seller

violated the trademark rights of a third party, and that as a result “huge quantities” of the goods had been confiscated; the court rejected the buyer’s complaint on the basis that the buyer had failed to give the seller notice specifying the third party’s right or claim within a reasonable time after the buyer became aware or ought to have become aware of such right or claim, as required by article 43 (1).¹⁰

Notes

¹CLOUT case No. 753 [Oberster Gerichtshof, Austria, 12 September 2006], although the court noted that in “exceptional circumstances, considerations of equity can lead to a shifting of the burden of proof” (see the full text of the decision). The court appears to have derived this burden of proof rule from the Convention itself rather than from non-CISG domestic law. See also Hof Arnhem, the Netherlands, 21 May 1996, Unilex; Rechtbank Zwolle, the Netherlands, 1 March 1995 (final decision) and 16 March 1994 (interim decision), Unilex.

²CLOUT case No. 753 [Oberster Gerichtshof, Austria, 12 September 2006] (see full text of the decision).

³The 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).

⁴Hof Arnhem, the Netherlands, 21 May 1996, Unilex; Rechtbank Zwolle, the Netherlands, 1 March 1995 (final decision) and 16 March 1994 (interim decision), Unilex.

⁵CLOUT case No. 753 [Oberster Gerichtshof, Austria, 12 September 2006] (see full text of the decision). According to this decision, the buyer bears the burden of proving that the third party’s right or claim was based on the law of the state designated by article 42 (1) (a) or (b).

⁶The 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.

⁷Supreme Court of Israel, 22 August 1993, Unilex.

⁸CLOUT case No. 479 [Cour de Cassation, France 19 March 2002] (see full text of the decision). Compare CLOUT case No. 491 [Cour d’appel de Colmar, France, 23 November 2002] (holding that the buyer, who acted in its “professional capacity” in entering into the contract for sale, could not have been unaware that the blouses it purchased violated a third party’s intellectual property rights); Cour d’appel Rouen, France, 17 February 2000, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/000217f1.html> (buyer, who provided instructions regarding the shoes that seller manufactured on its behalf, could not have been unaware that the shoe ribbons on the goods it received violated the intellectual property rights of a third party).

⁹Tribunal de grande instance de Versailles, France, 23 November 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/041123f1.html>.

¹⁰Landgericht Köln, Germany, 5 December 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061205g1.html>.

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 has breached articles 41 or 42.¹ 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. A small number of cases have applied article 43. In one, the buyer gave oral notice, during a personal visit to the seller, that the goods (an automobile) had been confiscated by authorities seven days earlier as stolen property; the court indicated that this constituted notice of a third party's right or claim to the goods (which would be a breach of the seller's obligations under article 41 CISG), that the notice was given within a reasonable time after the buyer became aware or ought to have become aware of the right or claim, and thus that the notice satisfied article 43—although the court also suggested that the parties had excluded article 41 by agreement, and that the buyer's article 41 claim was barred by the applicable statute of limitations.²

3. In another decision, the seller and its parent company were engaged in an ongoing dispute with the licensor of patent rights relating to CDs manufactured by the parent and sold to the buyer by the seller; the buyer may have become aware as early as 18 October 2000 that the licensor had attempted to terminate its license contract with the parent, but the buyer did not become aware that the seller was withholding license payments to the licensor until around the beginning of December 2000. In a fax to the seller dated 3 December 2000 the buyer complained that it feared the licensor would seek to collect license fees directly from the buyer's customers. The seller brought an action to collect payments on the price of the goods that the buyer had withheld, and the buyer defended by claiming the seller had breached article 42 CISG. The court of first instance held that the buyer's notice to seller concerning the third party's intellectual property claim was timely under article 43 (1) because the buyer had no obligation

to investigate, even in the face of "suspicious circumstances," whether the license contract with the licensor remained valid; therefore the buyer need not have become aware of the third party's intellectual property right or claim earlier than it in fact did; in addition, the court of first instance held that, under article 43 (2), the seller could not rely on any alleged failure by buyer to give notice as required by article 43 (1) because the seller was aware of the third party's right or claim.³ The intermediate appeals court affirmed the lower court's decision concerning article 43 notice on the basis of article 43 (2);⁴ the final appeals court reversed the decision of the court of first instance on other grounds, without commenting on the article 43 notice issue.⁵ Another decision addressing article 43 (2) declared that the provision applied (and thus would excuse a buyer's failure to give proper notice under article 43 (1)) only if there was "positive knowledge by [Seller] of the right or the claims of third parties at the time when the claim would have had to have been presented to him."⁶

4. A court has also held that the buyer's notice indicating the goods had been confiscated as stolen, given two months after the goods were seized, was untimely under article 43 (1): the court emphasized that the buyer should easily have recognized, without the need to secure legal advice, that such seizure was a significant event suggesting that the goods the seller delivered had been stolen; the court also found that the buyer had failed to substantiate its claim to have engaged in a complex and protracted legal evaluation of the seizure.⁷ In addition, the court found that the buyer had failed to give the seller proper article 43 (1) notice that the insurer of the party from whom the goods were allegedly stolen had demanded that the buyer turn over the goods: even if information concerning such demand contained in the buyer's legal complaint against the seller could satisfy article 43 (1), the court held, the notice was too late because the complaint was filed almost seven months after the buyer received the insurance company's demand.⁸ In the course of this decision, the court made a number of general observations concerning article 43 notice. The court indicated that the "reasonable time" for giving notice under article 43 (1) was to be determined by the circumstances of each particular case, and that a "rigid" interpretation of the buyer's period for giving notice would therefore be improper; that the buyer was entitled to "a certain period of time within which it could get an approximate picture of the legal situation," and the

length of that period would be influenced by the type of legal defect involved.⁹ Concerning the contents and purpose of the notice required by article 43 (1), the court stated that it was not sufficient to inform the seller generally that the goods were alleged to have been stolen because “[t]he notice of a third party claim is supposed to allow the seller to make contact with the third party and to defend the claim against the buyer. The notice must therefore set forth the

name of the third party and inform the seller of the steps taken by the third party.”¹⁰

5. 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.

Notes

¹See Oberlandesgericht Dresden, Germany, 21 March 2007 and 18 January 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070321g1.html> (holding that the buyer’s duty to notify under article 43 (1) applied only to the buyer’s claim that the goods seller delivered were subject to a right or claim of a third party in violation of article 41 CISG, and not to the buyer’s claim that the seller failed to transfer the property in the goods as required by article 30 CISG).

²Oberlandesgericht Dresden, Germany, 21 March 2007 and 18 January 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070321g1.html>.

³See CLOUT case No. 753 [Oberster Gerichtshof, Austria, 12 September 2006] (see full text of the decision) (containing a report of the decision of the court of first instance).

⁴See CLOUT case No. 753 [Oberster Gerichtshof, Austria, 12 September 2006] (see full text of the decision) (containing a report of the decision of the intermediate appeals court).

⁵See CLOUT case No. 753 [Oberster Gerichtshof, Austria, 12 September 2006] (see full text of the decision). For another decision dealing with the application of article 43 to a buyer’s claim under article 42 CISG, see Landgericht Köln, Germany, 5 December 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061205g1.html> (dealing with a claim under article 42 CISG).

⁶Oberlandesgericht Hamm, Germany, 15 July 2004, decision described and affirmed (without specific comment on article 43 (2)) in CLOUT case No. 822 [Bundesgerichtshof, Germany, 11 January 2006] (see full text of the decision).

⁷CLOUT case No. 822 [Bundesgerichtshof, Germany, 11 January 2006] (see full text of the decision). For another decision holding that the buyer had lost its claim for failure to give timely article 43 (1) notice, see Landgericht Köln, Germany, 5 December 2006, English translation available on the Internet at (<http://cisgw3.law.pace.edu/cases/061205g1.html>) (dealing with a claim under article 42 CISG).

⁸CLOUT case No. 822 [Bundesgerichtshof, Germany, 11 January 2006] (see full text of the decision).

⁹Ibid.

¹⁰Ibid.

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.⁴ 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.⁵ On appeal, however, this decision was reversed on other grounds,⁶ 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.⁷ 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.⁸

“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 of article 44—which, it has been asserted, “does not relate to fault as a technical legal term”⁹—must take an even more particularized¹⁰ and “subjective”¹¹ approach to the buyer’s circumstances. Specifically, it has been stated that “the buyer’s conduct is excused if, under the circumstances of the individual case, he equitably deserves a certain understanding and a certain consideration.”¹² 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.”¹³ 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.¹⁴ 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.¹⁵ The following criteria have also been identified as relevant in determining the application of article 44: whether the consequence of the failure to make proper notice “has such slight repercussions that a buyer is customarily forgiven for it and therefore does not justify the substantial consequences of a complete

exclusion of warranties,”¹⁶ as well as the result of a “balancing of interests according to the criteria of fairness,”¹⁷ It has also been asserted that, because it creates an exception to the notice rules in article 39 (1) and article 43 (1), article 44 should be interpreted narrowly.¹⁸

“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).¹⁹ 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.²⁰

“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.²¹ 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.²² 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 44.²³ 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.²⁴ 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.²⁵ 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.²⁶ Where a buyer had examined goods at their point of origin, furthermore, the fact that article 38 (2) might have permitted the buyer to defer examination until the goods arrived at their destination did not provide a reasonable excuse for the buyer’s failure to notify the seller until more than a reasonable time after the buyer discovered the lack of conformity.²⁷ A buyer also failed to prove a reasonable excuse for late notice based on the fact that the lack of conformity involved a “complicated set of circumstances with reference to three different legal systems” as well as “language complications”; the court held that the buyer failed to prove that these factors justified the extra time it took buyer to give notice.²⁸ Another buyer was unsuccessful in arguing that it had a reasonable excuse for failing to give timely notice that barley could not be resold as organic barley: the buyer asserted that it had to wait until national regulatory authorities declared that the goods did not qualify as organic before giving notice; the court, however, held that the failure of the seller to include a required certificate of organic origin with the delivery of the barley—the reason the goods did not qualify as organic—by itself made the delivery non-conforming, and there was no reason the buyer should have waited to give notice of this lack of conformity.²⁹ 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.³⁰

6. In several 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.³¹ 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 44.³² 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.³³ And where the buyer notified the seller immediately after in fact discovering seller’s responsibility for a lack of conformity (although this was more than a reasonable time after the court found the buyer ought to have discovered the lack of conformity), and the seller suffered no apparent prejudice from delay in notice, article 44 excuse was held appropriate.³⁴

Notes

¹Most cases that have applied article 44 have involved situations in which a buyer failed to give proper notice of lack of conformity as required by article 39 (1). For a case considering the application of article 44 where the buyer had failed to give proper notice as required by article 43 (1), see CLOUT case No. 822 [Bundesgerichtshof, Germany, 11 January 2006]. 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.

²Arbitration Court of the International Chamber of Commerce, June 1999 (Arbitral award No. 9187), Unilex.

³CLOUT case No. 474 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 24 January 2000 (Arbitral award No. 54/1999)], also in Unilex.

⁴Oberlandesgericht Linz, Austria, 24 September 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070924a3.html>.

⁵CLOUT 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).

⁶CLOUT 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.

⁷Arbitration Court of the International Chamber of Commerce, June 1999 (Arbitral award No. 9187), Unilex; CLOUT case No. 474 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 24 January 2000 (Arbitral award No. 54/1999)], also in Unilex.

⁸Ibid.

⁹Oberlandesgericht Saarbrücken, Germany, 17 January 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070117g1.html>.

¹⁰CLOUT case No. 822 [Bundesgerichtshof, Germany, 11 January 2006] (see full text of the decision) ("the circumstances of the individual case"). See also Oberlandesgericht Saarbrücken, Germany, 17 January 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070117g1.html> ("the circumstances of the individual case"); CLOUT case No. 596 [Oberlandesgericht Zweibrücken, Germany, 2 February 2004] (see full text of the decision) ("the circumstances of the particular case").

¹¹See CLOUT case No. 822 [Bundesgerichtshof, Germany, 11 January 2006] (see full text of the decision) ("regard to the personal circumstances of the buyer"). See also Oberlandesgericht Saarbrücken, Germany, 17 January 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070117g1.html> ("due consideration of personal circumstances affecting the buyer").

¹²CLOUT case No. 822 [Bundesgerichtshof, Germany, 11 January 2006] (see full text of the decision). Compare Oberlandesgericht Saarbrücken, Germany, 17 January 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070117g1.html> ("[a] reasonable excuse is present if the conduct of the buyer deserves some fair understanding and forbearance due to the circumstances of the individual case"); CLOUT case No. 596 [Oberlandesgericht Zweibrücken, Germany, 2 February 2004] (see full text of the decision) (article 44 applies if "in the circumstances of the particular case" the buyer deserves "a degree of understanding and leniency").

¹³CLOUT 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").

¹⁴CLOUT case No. 167 [Oberlandesgericht München, Germany, 8 February 1995] (see full text of the decision).

¹⁵CLOUT case No. 192 [Obergericht des Kantons Luzern, Switzerland, 8 January 1997] (see full text of the decision).

¹⁶CLOUT case No. 822 [Bundesgerichtshof, Germany, 11 January 2006] (see full text of the decision). Compare Oberlandesgericht Saarbrücken, Germany, 17 January 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070117g1.html> ("if the failure to make the required notification is so insignificant . . . that it can be waived in the course of usual and fair business dealing, and should therefore not be subject to the severe consequences of a full exclusion of liability").

¹⁷Oberlandesgericht Saarbrücken, Germany, 17 January 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070117g1.html>. Among the factors to be considered in the article 44 balancing test, according to this decision, are "the severity of the failure to comply with the duty, the consequences of a full exclusion of liability, the detriment inflicted on the seller due to the failure to notify, and the buyer's efforts in complying with the requirements relating to the notification."

¹⁸CLOUT case No. 822 [Bundesgerichtshof, Germany, 11 January 2006] (see full text of the decision); Oberlandesgericht Saarbrücken, Germany, 17 January 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070117g1.html>; CLOUT case No. 542 [Oberster Gerichtshof, Austria, 17 April 2002].

¹⁹CLOUT case No. 608 [Tribunale Rimini, Italy, 26 November 2002] (Al Palazzo S.r.l v. Bernardaud di Limoges S.A.), (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. 292 [Oberlandesgericht Saarbrücken, Germany, 13 January 1993] (see full text of the decision).

²⁰CLOUT case No. 775 [Landgericht Frankfurt, Germany, 11 April 2005] (see full text of the decision); CLOUT case No. 280 [Oberlandesgericht Jena, Germany, 26 May 1998] (see full text of the decision); CLOUT case No. 303 [Arbitration Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7331)] (see full text of the decision); CLOUT case No. 378 [Tribunale di Vigevano,

Italy, 12 July 2000] (see full text of the decision); Arbitration Court of the International Chamber of Commerce, 1997 (Arbitral award No. 8611), Unilex.

²¹In the following cases, the court found that the buyer did not have a reasonable excuse for its failure to satisfy the notice requirement of article 39 (1): CLOUT case No. 802 [Tribunal Supremo, Spain, 17 January 2008] (see full text of case); CLOUT case No. 822 [Bundesgerichtshof, Germany, 11 January 2006] (see full text of the decision); CLOUT case No. 597 [Oberlandesgericht Celle, Germany, 10 March 2004]; Oberlandesgericht München, Germany, 13 November 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021113g1.html>; CLOUT case No. 596 [Oberlandesgericht Zweibrücken, Germany, 2 February 2004]; CLOUT case No. 542 [Oberster Gerichtshof, Austria, 17 April 2002]; 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 Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7331)]; 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); Court of Arbitration of the International Chamber of Commerce, 1997 (Arbitral award No. 8611), 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 Unter- rheintal, Switzerland, 16 September 1998] (see full text of the decision); CLOUT case No. 997 [Sø og Handelsretten, Denmark, 31 January 2002], English translation 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 Court of Arbitration of the International Chamber of Commerce, June 1999 (Arbitral award No. 9187), Unilex; CLOUT case No. 474 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 24 January 2000 (Arbitral award No. 54/1999)], 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].

²²CLOUT case No. 285 [Oberlandesgericht Koblenz, Germany, 11 September 1998].

²³CLOUT case No. 997 [Sø og Handelsretten, Denmark, 31 January 2002], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020131d1.html>.

²⁴CLOUT case No. 167 [Oberlandesgericht München, Germany, 8 February 1995] (see full text of the decision).

²⁵Arrondissementsrechtsbank 's-Hertogenbosch, the Netherlands, 15 December 1997, Unilex.

²⁶CLOUT case No. 596 [Oberlandesgericht Zweibrücken, Germany, 2 February 2004].

²⁷CLOUT case No. 802 [Tribunal Supremo, Spain, 17 January 2008] (see full text of case).

²⁸CLOUT case No. 822 [Bundesgerichtshof, Germany, 11 January 2006] (see full text of the decision).

²⁹Oberlandesgericht München, Germany, 13 November 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021113g1.html>. The possibility that the seller would supply the certificate of organic origin after the delivery, the court also held, did not give the buyer a reasonable excuse for its late notice, because a belated certificate was not permitted by the contract nor by applicable regulations.

³⁰CLOUT case No. 597 [Oberlandesgericht Celle, Germany, 10 March 2004].

³¹Oberlandesgericht Saarbrücken, Germany, 17 January 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070117g1.html>; Arbitration Court of the International Chamber of Commerce, June 1999 (Arbitral award No. 9187), Unilex; CLOUT case No. 474 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 24 January 2000 (Arbitral award No. 54/1999)], 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].

³²Arbitration Court of the International Chamber of Commerce, June 1999 (Arbitral award No. 9187), Unilex.

³³CLOUT case No. 474 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 24 January 2000 (Arbitral award No. 54/1999)], also in Unilex.

³⁴Oberlandesgericht Saarbrücken, Germany, 17 January 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070117g1.html>.

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 mirror 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

¹A 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).

²Indeed, 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. However, under article 47 the buyer itself is entitled to fix an additional period of time for performance.

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 pre-empts 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.⁴ Even if an additional duty not specifically addressed in the Convention—for instance, the duty to extend a bank guaranty in favour of the buyer⁵—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.⁶

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.⁷

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.⁸ 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.⁹ 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 71.¹⁰ 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.¹¹

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.¹² Only under the conditions described in article 79 or in a case falling within article 80 is the seller exempted from liability for damages.¹³

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.¹⁴

9. The decisions that have applied article 45 (1) (b) evidence no difficulty with the application of this provision as such.¹⁵ 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, generally without being discussed in detail.¹⁶

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.¹⁷ The amount of damages, however, depends on the other remedy to which the buyer has resorted.¹⁸

Notes

¹See *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”).

²See, e.g., CLOUT case No. 85 [U.S. District Court, Northern District of New York, United States, 9 September 1994], affirmed in part and reversed in part by CLOUT case No. 138 [U.S. Court of Appeals for the Second Circuit, United States, 6 December 1995]; CLOUT case No. 140 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 16 March 1995 (Arbitral award No. 155/1994)]; Cairo Regional Centre for Commercial Arbitration (CRCICA), Egypt, 3 October 1995, Unilex; CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 21 March, 21 June 1996] (see full text of the decision); Court of Arbitration of the International Chamber of Commerce, France, 1996 (Arbitral award No. 8247), *ICC International Court of Arbitration Bulletin*, 2000, 53; CLOUT case No. 236 [Bundesgerichtshof, Germany, 23 July 1997]; CLOUT case No. 248 [Bundesgericht, Switzerland, 28 October 1998] (see full text of the decision); CLOUT case No. 1022 [Expanded Tribunal of the Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, 23 January 2008]. See also the Digest for article 74, paragraph 10.

³U.S. District Court, Southern District of New York, United States, 10 May 2002 (Geneva Pharmaceuticals Tech. Corp. v. Barr Labs. Inc.), available on the Internet at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/020510u1.html>; U.S. District Court, Eastern District of Kentucky, United States, 18 March 2008 (Sky Cast, Inc. v. Global Direct Distribution, LLC), available on the Internet at <http://cisgw3.law.pace.edu/cases/080318u1.html>;

⁴See, e.g., CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999]; CLOUT case No. 724 [Oberlandesgericht Koblenz, Germany, 14 December 2006] (delivery of insufficiently packaged goods); CLOUT case No. 850 [Audiencia Provincial de Madrid, sección 14ª, Spain, 20 February 2007] (goods with excess humidity).

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.¹⁹ 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, etc.—which has been breached.²⁰ 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.²¹ 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 Convention on the Limitation Period in the International Sale of Goods.²²

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.²³ According to article 79, the burden is on the seller to prove any exempting circumstances.²⁴

⁵See Cairo Regional Centre for Commercial Arbitration (CRCICA), Egypt, 3 October 1995, Unilex.

⁶See, e.g., CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999].

⁷CLOUT case No. 1058 [Oberster Gerichtshof, Austria, 19 December 2007], available in *Internationales Handelsrecht* 2008, 106.

⁸See, e.g., CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999]. A parallel provision, article 61 (1) (b), entitles the seller to claim damages for any breach of contract by the buyer.

⁹See 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).

¹⁰Court of Arbitration of the International Chamber of Commerce, January 1997 (Arbitral award No. 8786), *ICC International Court of Arbitration Bulletin*, 2000, 70.

¹¹See, e.g., Court of Arbitration of the International Chamber of Commerce, France, June 1996 (Arbitral award No. 8247), *ICC International Court of Arbitration Bulletin* 2000, 53; CLOUT case No. 364 [Landgericht Köln, Germany, 30 November 1999]; CLOUT case No. 775 [Landgericht Frankfurt a.M., Germany, 11 April 2005]; CLOUT case No. 721 [Oberlandesgericht Karlsruhe, Germany, 8 February 2006]; CLOUT case No. 723 [Oberlandesgericht Koblenz, Germany, 19 October 2006]; CLOUT case No. 825 [Oberlandesgericht Köln, Germany, 14 August 2006]. 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.

¹²See *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 and, for instance CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999].

¹³For an example in which the article 79 exemption was found not inapplicable, see CLOUT case No. 140 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 16 March 1995 (Arbitral award No. 155/1994)].

¹⁴See *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 article 74, paragraph 10.

¹⁵See, e.g., the decisions cited in note 2 *supra*; see also, as a further example, Bundesgericht, Switzerland, 17 December 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/091217s1.html>.

¹⁶See 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); Court of Arbitration of the International Chamber of Commerce, France, June 1996 (Arbitral 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 [Schiedsgericht der Hamburger freundschaftlichen Arbitrage, Germany, 29 December 1998]; CLOUT case No. 348 [Oberlandesgericht Hamburg, Germany, 26 November 1999]; Oberlandesgericht München, Germany, 5 March 2008, available in *Internationales Handelsrecht* 2008, 253.

¹⁷See, for example, CLOUT case No. 345 [Landgericht Heilbronn, Germany, 15 September 1997]; China International Economic and Trade Arbitration Commission, People's Republic of China, 24 July 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070724c1.html>. See also the Digest for article 46, paragraph 9.

¹⁸See the Digests for articles 74-76.

¹⁹Granting such grace periods is possible, e.g., under article 1184 paragraph 3 and article 1244 of the French Code civil and in legal systems which have been influenced by the French civil code.

²⁰Bundesgerichtshof, Germany, 11 December 1996; CLOUT case No. 268 [Bundesgerichtshof, Germany, 11 December 1996]; Gerechthof 's-Hertogenbosch, the 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].

²¹See Bundesgericht, Switzerland, 18 May 2009, *Internationales Handelsrecht* 2010, 27. See also the Digest for article 4, paragraph 14.

²²CLOUT case No. 346 [Landgericht Mainz, Germany, 26 November 1998]; Bundesgericht, Switzerland, 18 May 2009, available at *Internationales Handelsrecht* 2010, 27.

²³See, e.g., Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 27 May 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050527r1.html>; CLOUT case No. 721 [Oberlandesgericht Karlsruhe, Germany, 8 February 2006]; CLOUT case No. 723 [Oberlandesgericht Koblenz, Germany, 19 October 2006].

²⁴See the Digest for article 79, paragraph 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 often been invoked in reported decisions. In practice, aggrieved parties have generally preferred to pursue other remedies—in particular the right to claim damages. The parties can contract out the remedy of specific performance.³

GENERAL REQUIREMENTS

5. The right to require performance of an obligation presupposes that the obligation exists and has thus far not been

fulfilled. With the exceptions stated in articles 40 and 44, the buyer must also comply with the notice requirement in articles 38 and 39.⁴

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.⁵ 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.⁶ 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.⁷

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 50.⁸ The buyer can, however, combine a request for performance and a claim for any remaining damage—e.g., damage caused by delayed performance.⁹ 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 law¹⁰ or, so far as it applies, by the 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,¹¹ but it does not limit the time for such notice. One tribunal held that this gap should be filled by redress to the UNIDROIT Principles (article 7.2.2), which require the request to be made within reasonable time.¹²

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.¹³

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.¹⁴

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.¹⁵ 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.¹⁶ If non-conforming goods cannot be used or resold with reasonable effort, however, there is a fundamental breach.¹⁷ The same is true where the goods suffer from a

serious defect, even though 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),¹⁸ or where the goods have major defects and the buyer requires the goods for its manufacturing processes.¹⁹ 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.²⁰ However, it was held not to be a fundamental breach that delivered tractor-trailers exceeded the agreed height of 4 m by 10 cm.²¹

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.²² 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.²³ This is in line with seller’s right to cure as provided for in article 48 of the Convention. A tribunal also referred to the proportionality of the costs and efforts a replacement would entail.²⁴

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;²⁵ 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.

17. Where the seller offered replacement of defective goods free of charge, and the buyer rejected this offer (and used the goods in a non-suitable way), a court has reduced the buyer’s damages claim.²⁶

REPAIR (ARTICLE 46 (3))

18. 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.”²⁷

19. 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.²⁸

20. Repair is effectively provided if after repair the goods can be used as agreed.²⁹ If the repaired goods subsequently become defective the buyer must give notice of

the defects.³⁰ It has been held that the time limits of article 39 apply to this notice,³¹ but a request to repair the new defects can be given within a reasonable time thereafter.³² 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.³³

21. After due notice of a lack of conformity, according to article 45 (1) (b), the buyer can claim damages (see also article 48 (1), second sentence), and is not obliged to request repair, although a court has held that the buyer is entitled to damages only after having given the seller a chance to remedy any non-conformity.³⁴

Notes

¹See the Digest for article 28.

²See CLOUT case No. 428 [Oberster Gerichtshof, 7 September 2000], also available on the Internet at www.cisg.at/8_2200v.htm.

³Arbitration Court of the International Chamber of Commerce, 2004 (Arbitral award No. 12173), *Yearbook of Commercial Arbitration* XXXIV (2009) 111 ff.

⁴See, e.g., CLOUT case No. 346 [Landgericht Mainz, Germany, 26 November 1998]; Cour d'appel de Poitiers, France, 28 October 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/981126g1.html>.

⁵See CLOUT case No. 594 [Oberlandesgericht Karlsruhe, Germany, 19 December 2002] (buyer's refusal to further perform and its request for repayment of prepaid price regarded as sufficient). 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.

⁶See the following cases (where, however, the buyers had resorted to other remedies—namely damages or (as far as possible) avoidance): Arbitration Court of the International Chamber of Commerce, January 1997 (Arbitral award No. 8786), *ICC International Court of Arbitration Bulletin* 2000, 70 (late delivery); Cairo Regional Centre for Commercial Arbitration (CRCICA), 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).

⁷This was also the result in U.S. District Court, Southern District of New York, United States, 20 August 2008 (Hilaturas Miel, S.L. v. Republic of Iraq, 573 F.Supp.2d 781), available on the Internet at <http://cisgw3.law.pace.edu/cases/080820u1.html> (because of the hostilities in the Iraq war the seller could no longer perform the contract).

⁸See *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 paragraph 7.

⁹*Ibid.* at paragraph 4.

¹⁰See, for example, CLOUT case No. 346 [Landgericht Mainz, Germany, 26 November 1998].

¹¹See *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 paragraphs 4-5.

¹²International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 30 January 2007, Unilex.

¹³See, e.g., Cour d'appel de Poitiers, France, 26 October 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080820u1.html>; China International Economic and Trade Arbitration Commission, People's Republic of China, 24 July 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070724c1.html>. See also Supreme Court, Poland, 11 May 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070511p1.html>.

¹⁴See the Digest for article 35.

¹⁵CLOUT case No. 171 [Bundesgerichtshof, Germany, 3 April 1996]; CLOUT case No. 248 [Bundesgericht, Switzerland, 28 October 1998].

¹⁶CLOUT case No. 248 [Bundesgericht, Switzerland, 28 October 1998].

¹⁷CLOUT 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 cracks in leather); Landgericht Landshut, Germany, 5 April 1995, Unilex (T-shirts which shrunk by two sizes after first washing).

¹⁸CLOUT case No. 107 [Oberlandesgericht Innsbruck, Austria, 1 July 1994].

¹⁹See CLOUT case No. 138 [U.S. Court of Appeals for the Second Circuit, United States, 6 December 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 unfit for the anticipated use by the buyer's customer) (see full text of the decision).

²⁰CLOUT 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).

²¹Hof Gent, Belgium, 30 June 2004, English translations available on the Internet at <http://cisgw3.law.pace.edu/cases/040630b1.html>.

²²CLOUT case No. 196 [Handelsgericht des Kantons Zürich, Switzerland, 26 April 1995].

²³CLOUT case No. 152 [Cour d'appel, Grenoble, France, 26 April 1995]; CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997].

²⁴China International Economic and Trade Arbitration Commission, People's Republic of China, 11 November 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021111c1.html>.

²⁵See the Digest for article 39, paragraphs 19-26.

²⁶CLOUT case No. 553 [Audiencia Provincial de Barcelona, Spain, 28 April 2004] (reduction by 50 per cent).

²⁷See CLOUT case No. 225 [Cour d'appel, Versailles, France, 29 January 1998]. See also paragraph 15 *supra*.

²⁸CLOUT case No. 125 [Oberlandesgericht Hamm, Germany, 9 June 1995] (see full text of the decision).

²⁹CLOUT case No. 152 [Cour d'appel, Grenoble, France, 26 April 1995].

³⁰Landgericht Oldenburg, Germany, 9 November 1994, Unilex.

³¹*Ibid.*

³²CLOUT case No. 225 [Cour d'appel, Versailles, France, 29 January 1998] (see full text of the decision).

³³*Ibid.*

³⁴Landgericht Köln, Germany, 25 March 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030325g1.html>.

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 (or *Nachfrist* according to its similarity to an institution in German law)¹—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 in its strict sense.² Where the seller has delivered non-conforming goods, the fixing of an additional period for performance is neither necessary nor helpful to acquire a right to avoid the contract. In such cases, this right solely depends on whether the breach is fundamental.³

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.⁴ 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.⁵ Only if the seller informs the buyer that it will not perform during the additional period is the buyer 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 additional 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).⁶ 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.⁷ 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.⁸

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.⁹ In a Danish-German car sale an additional period of three to four weeks for delivery was found to be reasonable.¹⁰ With respect to the reasonable time, all relevant circumstances of the case have to be taken into account (including the conduct of the parties, negotiations and practices between them, and usages (article 8 (3))).¹¹ If the buyer fixes an unreasonably short period for delivery courts have substituted a reasonable period.¹² 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 of time has expired before dispatching its notice of avoidance.¹³

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.¹⁴ A clear expression that the buyer is granting a final deadline is necessary (e.g. "final delivery date: 30 September 2002").¹⁵ 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.¹⁶ 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.¹⁷ The same result was reached in a case where the buyer

accepted several requests from the seller to extend the time for delivery.¹⁸ 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.¹⁹

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.²⁰

8. Whether an extension of time is the mere fixing of an additional time for performance (leaving the original delivery date, etc., intact), or is a modification of the original contract, is a matter of interpretation.²¹ In the latter case, the lapse of the modified time for delivery is not necessarily the basis for avoidance of the contract.

EFFECT OF FIXING AN ADDITIONAL PERIOD OF TIME (ARTICLE 47 (2))

9. 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 period²² or has made its performance dependant of conditions not stipulated in the contract.²³ 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, under the conditions set by article 49. However, the additional time period does not prevent the parties from modifying their contract by agreement.²⁴

Notes

¹CLOUT case No. 956 [Federal Court of Australia, Australia, 20 May 2009 (Olivaylle Pty Ltd v. Flottweg GmbH & Co KGAA)], available on the Internet at <http://cisgw3.law.pace.edu/cases/090520a2.html>.

²See, e.g., CLOUT case No. 990 [China International Economic and Trade Arbitration Commission, People's Republic of China, 19 December 1997]; Kantonsgericht Zug, Switzerland, 14 December 2009, CISG-online No. 2026. See also the Digest for article 49, paragraph 21.

³Oberlandesgericht Koblenz, Germany, 21 November 2007, CISG-online No. 1733.

⁴See CLOUT case No. 846 [U.S. Court of Appeals for the Third Circuit, United States, 19 July 2007].

⁵See *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.

⁶Oberlandesgericht Hamburg, Germany, 4 July 1997, Unilex.

⁷See article 49 (1) (b); see also CLOUT case No. 846 [U.S. Court of Appeals for the Third Circuit, United States, 19 July 2007].

⁸See, 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].

⁹CLOUT case No. 136 [Oberlandesgericht Celle, Germany, 24 May 1995].

¹⁰CLOUT case No. 362 [Oberlandesgericht Naumburg, Germany, 27 April 1999] (see full text of the decision).

¹¹Hof Arnhem, the Netherlands, 7 October 2008, CISG-online No. 1749 (8-12 weeks offered by buyer regarded as reasonable).

¹²CLOUT 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).

¹³Landgericht Ellwangen, Germany, 21 August 1995, Unilex; CLOUT case No. 362 [Oberlandesgericht Naumburg, Germany, 27 April 1999] (see full text of the decision).

¹⁴See Kantonsgericht des Kantons Zug, Switzerland, 14 December 2009, CISG-online No. 2026. 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), 39, paragraphs 6-7.

¹⁵*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, paragraph 7.

¹⁶CLOUT case No. 275 [Oberlandesgericht Düsseldorf, Germany, 24 April 1997].

¹⁷CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997] (see full text of the decision).

¹⁸CLOUT case No. 225 [Cour d'appel, Versailles, France, 29 January 1998].

¹⁹CLOUT case No. 246 [Audiencia Provincial de Barcelona, Spain, 3 November 1997].

²⁰See the decisions cited in the preceding paragraph.

²¹CLOUT case No. 846 [U.S. Court of Appeals for the Third Circuit, United States, 19 July 2007].

²²See CLOUT case No. 293 [Schiedsgericht der Hamburger freundschaftlichen Arbitrage, Germany, 29 December 1998].

²³Ibid.

²⁴CLOUT case No. 846 [U.S. Court of Appeals for the Third Circuit, United States, 19 July 2007].

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 cure² and by article 49 (2) (b) (iii), which evidences that the buyer need not accept the seller’s offer to cure. Moreover, 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 breach³ (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 One court held that even in case of a serious breach the buyer is not entitled to declare the contract avoided as long as the seller has offered remediation and as long as remediation is possible.⁵ It should be noted, however, that a breach is rarely fundamental when the failure of performance could easily be remedied.⁶ 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.⁷ The contract, however, may stipulate that avoidance is only available after the seller had the opportunity to remedy the defect.⁸

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.⁹

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.¹⁰

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.¹¹ In the assessment of damages, furthermore, a court has taken into account the fact that the seller did not take the initiative to remedy defective goods; under article 74, the court concluded, the seller should have foreseen all necessary costs connected with the replacement of the defective goods.¹²

6. Where the parties have agreed on a penalty for delayed performance, it has been held that cure under article 48 does not relieve the seller from paying a penalty beginning from the first day of delay.¹³

RIGHT TO CLAIM DAMAGES

7. 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.¹⁴

REQUEST TO REMEDY A FAILURE OF PERFORMANCE (ARTICLE 48 (2)-(4))

8. 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),¹⁵ 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.

9. 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).¹⁶

10. 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.¹⁷

11. One tribunal has relied on article 48 (2) where the seller had offered to retake the goods and repay the price after the buyer had given notice of defects; since the buyer had not responded to the offer, but had instead resold the allegedly non-conforming goods, the court regarded this as a waiver of the buyer’s rights.¹⁸

Notes

¹See, 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 Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7531)].

²See CLOUT case No. 304 [Arbitration Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7531)] (see full text of the decision).

³See *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.”

⁴See, e.g., CLOUT case No. 339 [Landgericht Regensburg, Germany, 24 September 1998].

⁵CLOUT case No. 882 [Handelsgericht des Kantons Aargau, Switzerland, 5 November 2002].

⁶See for example Arbitration Court of the International Chamber of Commerce, France, January 1995 (Arbitral award No. 7754), *ICC International Court of Arbitration Bulletin* 2000, 46. See also CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997].

⁷See *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, paragraph 6 (“in some cases”).

⁸See CLOUT case No. 956 [Federal Court of Australia, Australia, 20 May 2009 (Olivaylle Pty. Ltd. v. Flottweg GmbH & Co KGAA), available on the Internet at <http://cisgw3.law.pace.edu/cases/090520a2.html> (discussing article 48 CISG as an interpretative aid).

⁹Arbitration Court of the International Chamber of Commerce, France, January 1995 (Arbitral award No. 7754), *ICC International Court of Arbitration Bulletin* 2000, 46. But see CLOUT case No. 882 [Handelsgericht des Kantons Aargau, Switzerland, 5 November 2002] (the court differentiated between urgent and non-urgent repair).

¹⁰CLOUT case No. 125 [Oberlandesgericht Hamm, Germany, 9 June 1995] (costs for replacing defective windows).

¹¹CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997].

¹²CLOUT case No. 994 [Vestre Landsret, Denmark, 21 December 2004].

¹³Audiencia Provincial de Madrid, Spain, 18 October 2007, CISG-online No. 2082.

¹⁴CLOUT 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).

¹⁵See also Amtsgericht Nordhorn, Germany, 14 June 1994, Unilex.

¹⁶See *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, paragraph 14.

¹⁷Ibid., paragraph 16.

¹⁸CLOUT case No. 806 [China International Economic and Trade Arbitration Commission, People's Republic of China, 29 December 1999].

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 is one of the most important CISG provisions. It specifies the conditions under which the buyer is entitled to declare the contract avoided and can, by unilateral act, terminate the contractual relationship. 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 contract as defined in article 25 (article 49 (1) (a)); or 2) where the goods have not been delivered, if the seller fails to deliver them 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). The buyer may also lose its right of avoidance if a return of the goods in their original condition is no longer possible (see article 82 and the exceptions stated there).²

3. In many circumstances, avoidance, along with the rights that accompany it (see the next paragraph), is only one of the remedies available to the buyer; other potential remedies include the right to request performance (article 46),

to reduce the price (article 50), or to claim damages as appropriate where the contract is not avoided. If different remedies are available to the buyer, the buyer is free to choose among them.³

4. Rightful avoidance of the contract plays a role not only as a remedy in itself, but also with respect to other provisions. It is a prerequisite for the assessment of damages under articles 75 and 76,⁴ as well as for the right to request restitution of performance that has already been rendered under the contract (article 81 (2)).

AVOIDANCE IN GENERAL

5. The buyer must declare the contract avoided. There is no automatic termination of contract.⁵ The declaration must be by means of a notice (article 26). No specific form is prescribed for that notice,⁶ although form requirements may be relevant if the reservation under articles 12 and 96 applies. A notification by facsimile has been held to suffice;⁷ it is not necessary to institute legal proceedings to make the declaration.⁸ The notice must clearly express that the buyer now treats the contract as at an end.⁹ A mere announcement of future termination, a statement urging delivery, or merely returning the goods without comment does not suffice.¹⁰ A communication that asked the seller to cease deliveries until certain price issues were solved was also held insufficient.¹¹ Commencing a law suit claiming avoidance of contract has been treated as notice of avoidance.¹² The same has been found if the buyer refuses the goods or requests the repayment of the price¹³ or cancels the order.¹⁴

6. In a case where the seller seriously and finally refused performance of the contract and it was clear that the buyer did not insist on performance, a court has regarded the buyer's express declaration of avoidance as dispensable.¹⁵

7. Because the declaration of avoidance must be unequivocal it has been held that it cannot be made under a condition.¹⁶ However, a binding declaration of future avoidance should the seller fail to perform within an additional period of time was held perfectly valid.¹⁷

8. 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.¹⁸

9. A tribunal held that the buyer can revoke its declaration of avoidance (which normally brings the contract to an end) if the seller has unjustifiably refused the avoidance.¹⁹ In a similar vein, another court held that even after a declaration of avoidance the contract still existed where the buyer later accepted the goods and resold them.²⁰

AVOIDANCE FOR FUNDAMENTAL BREACH (ARTICLE 49 (1) (a))

10. 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.

11. 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. It is, however, no breach where the seller rightfully withholds delivery because the buyer did not make the agreed prepayment²¹ or itself declared the contract avoided without being entitled thereto.²² The seller's non-performance of an agreed-upon duty beyond the core duty of delivering conforming goods (see article 30) can also suffice—for instance, the violation of duties under an exclusive sales contract.²³ 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.²⁴ 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)).²⁵ 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.²⁶ There are, however, exceptions where it has been stated that the standards or provisions of the buyer's country are impliedly applicable—namely, where the same standards or provisions exist in the seller's country as well, where the buyer informed the seller about such standards or provisions relying on the seller's expert knowledge (see also article 35 (2) (b)), or the seller had knowledge of those standards or provisions due to special circumstances.²⁷

12. 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.²⁸

SPECIFIC INSTANCES OF FUNDAMENTAL BREACH

13. Guidelines have developed in case law that may help, to some extent, in determining whether or not a breach of contract qualifies as fundamental.²⁹ 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.³⁰ 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.³¹ On the other hand, the serious, definitive and unjustified refusal of the seller to fulfil its contractual obligations amounts to a fundamental breach.³² 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.³³

14. As a rule, late performance does not by itself constitute a fundamental breach of contract.³⁴ Only when the time for performance is of essential importance—either because that is so stipulated between the parties³⁵ or because timely performance is critical in the circumstances (e.g., seasonal goods)³⁶—will delay amount to a fundamental breach. In a case where the parties had agreed on the "fastest possible" delivery, a delay after the buyer had already prepaid a certain sum has been regarded as a fundamental breach.³⁷

15. 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.³⁸ 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).³⁹ 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.

16. 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 goods⁴⁰ or resell them, even if the resale requires a rebate.⁴¹ 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.⁴² 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.⁴³ It has been held that a buyer who normally does not deal with goods of inferior quality is not obliged to accept them, but may avoid the contract.⁴⁴ 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).⁴⁵ 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.⁴⁶ 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.⁴⁷ The rules governing the delivery of non-conforming goods apply equally if the seller delivers the wrong goods (i.e., an *aliud*).⁴⁸

17. 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.⁴⁹ If the seller offers and effects speedy repair or replacement without inconvenience to the buyer, several decisions have denied a fundamental breach.⁵⁰ 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 breach cannot be denied merely because the buyer did not first request the seller to cure the defective performance.⁵¹

18. Where goods for human consumption are defective so that they are dangerous when consumed, the courts regularly allow avoidance even if the goods could easily be replaced or if the seller immediately tenders conforming goods.⁵² It was also held to constitute a fundamental breach where the seller delivered genetically modified soya contrary to a contractual guaranty.⁵³

19. 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.⁵⁴ 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.⁵⁵

20. 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.⁵⁶ 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,⁵⁷ or the unjustified denial of a valid contract after having taken possession of the goods⁵⁸—can amount to a fundamental breach of contract. Avoidance has also been permitted when resale restrictions were violated in a substantial fashion.⁵⁹ A tribunal found a fundamental breach in the seller's unilateral change of the means of transport (sea transport instead of agreed air transport, which delayed delivery of medical equipment by 12 days) and delayed delivery of documents (which impaired customs clearance).⁶⁰

AVOIDANCE FOR NON-DELIVERY DURING ADDITIONAL PERIOD OF TIME (ARTICLE 49 (1) (b))

21. 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).⁶¹ The buyer can also avoid the contract if the seller declares that it will not deliver within the additional period so fixed. In the latter case, a court held, the buyer can avoid the contract immediately after the seller's final refusal to perform even if the additional period (*Nachfrist*) has not yet lapsed.⁶² It was likewise held that avoidance is available where the seller makes delivery dependant on a further consideration to which it is not entitled.⁶³ If the seller categorically denies its obligation to perform, the buyer is entitled to avoidance without any further *Nachfrist*.⁶⁴

22. Where a delay in delivery does not constitute a fundamental breach (see paragraphs 14-15 above), the buyer must fix a (reasonable) additional period of time in order to have the right to avoid. Only after the additional time has lapsed can the buyer avoid the contract.⁶⁵ No fixing of an additional period of time, however, is necessary where the time for delivery is of the essence of the contract.⁶⁶

PERIOD OF TIME FOR DECLARATION OF
AVOIDANCE WHEN GOODS HAVE
BEEN DELIVERED (ARTICLE 49 (2))

23. 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.⁶⁷ 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.⁶⁸ To be aware, it was held, means that the buyer knows the fact of the breach and its scope, so that the buyer can assess whether or not the breach is fundamental.⁶⁹ 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);⁷⁰ an avoidance declaration made eight weeks after the buyer became aware of the breach has been held too late;⁷¹ 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.⁷² On the other

hand, a month, five weeks, and one to two months has been regarded as a reasonable period of time to declare the contract avoided under article 49 (2) (b).⁷³ A declaration of avoidance made after several extensions of time for performance had been granted was found to be timely,⁷⁴ as was a declaration given within 48 hours after late delivery of an installment.⁷⁵ A declaration of avoidance made three weeks after notice of lack of conformity under article 39, furthermore, was considered timely.⁷⁶

24. Even if avoidance is time-barred under article 49 (2), a court has held, the buyer may request price reduction under article 50.⁷⁷ This reduction may be to zero where the goods have no value at all.⁷⁸ In that situation, price reduction could have almost the same effect as avoidance, except that it does not oblige the buyer to return the goods.⁷⁹

BURDEN OF PROOF

25. 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 it was entitled to expect under the contract.⁸⁰ Furthermore, the buyer must prove that it declared avoidance and dispatched the required notice.⁸¹

OTHER PROCEDURAL ASPECTS

26. Under U.S. procedural law, a dispute between the parties over the fundamentality of a breach has prevented the court from rendering a summary judgment.⁸²

Notes

¹See, 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; Oberlandesgericht Hamburg, Germany, 25 January 2008, *Internationales Handelsrecht* 2008, 98. See also Cámara Nacional de Apelaciones en lo Comercial de Buenos Aires (Sala A), Argentina, 31 May 2007, CISG-online No. 1517 (principle of performance and conservation of the contract).

²See CLOUT case No. 594 [Oberlandesgericht Karlsruhe, Germany, 19 December 2002]. See also the Digest for article 82.

³Oberlandesgericht Koblenz, Germany, 12 December 2006, *Internationales Handelsrecht* 2007, 36.

⁴See, e.g., CLOUT case No. 470 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 22 October 1998].

⁵CLOUT case No. 938 [Kantonsgericht des Kantons Zug, Switzerland, 30 August 2007].

⁶Ibid.

⁷CLOUT case No. 1029 [Cour d'appel de Rennes, France, 27 May 2008].

⁸CLOUT case 1039 [Audiencia Provincial de Navarra, Sección 3, Spain, 27 December 2007].

⁹CLOUT case No. 938 [Kantonsgericht des Kantons Zug, Switzerland, 30 August 2007].

¹⁰CLOUT case No. 6 [Landgericht Frankfurt a.M., Germany, 16 September 1991]; CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997].

¹¹CLOUT case No. 470 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 22 October 1998].

¹²See CLOUT case No. 481 [Cour d'appel Paris, France, 14 June 2001]; CLOUT case No. 535 [Oberster Gerichtshof, Austria, 5 July 2001].

¹³Kantonsgericht des Kantons Zug, Switzerland, 14 December 2009, CISG-online No. 2026; CLOUT case No. 535 [Oberster Gerichtshof, Austria, 5 July 2001].

¹⁴CLOUT case No. 1029 [Cour d'appel de Rennes, France, 27 May 2008].

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

¹⁶CLOUT case No. 892 [Kantonsgericht Schaffhausen, Switzerland, 27 January 2004].

¹⁷Ibid.

¹⁸See, 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 article 44, paragraph 1.

¹⁹CLOUT case No. 999 [Ad hoc Arbitral Tribunal, Denmark, 10 November 2000].

²⁰CLOUT case No. 935 [Handelsgericht des Kantons Zürich, Switzerland, 215 June 2007].

²¹See CLOUT case No. 808 [China International Economic and Trade Arbitration Commission, People's Republic of China, 4 June 1999]; CLOUT case No. 861 [China International Economic and Trade Arbitration Commission, People's Republic of China, 29 September 1997].

²²CLOUT case No. 877 [Bundesgericht, Switzerland, 22 December 2000].

²³See, 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).

²⁴CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995]. See also CLOUT case No. 418 [U.S. 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]; CLOUT case No. 606 [Audiencia Provincial de Granada, Spain, 2 March 2000]; CLOUT case No. 752 [Oberster Gerichtshof, Austria, 25 January 2006].

²⁵See the decisions cited in the preceding footnote.

²⁶CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995].

²⁷See CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995]. See also CLOUT case No. 418 [U.S. District Court, Eastern District of Louisiana, United States, 17 May 1999] (citing CLOUT case No. 123 and applying one of the exceptions formulated there).

²⁸CLOUT case No. 275 [Oberlandesgericht Düsseldorf, Germany, 24 April 1997].

²⁹See also the Digest for article 25.

³⁰CLOUT 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]; CLOUT case No. 808 [China International Economic and Trade Arbitration Commission, People's Republic of China, 4 June 1999] (buyer did not open valid letter of credit before delivery date); CLOUT case No. 796 [Juzgado de Primera Instancia, n° 3 de Badalona, Spain, 25 May 2006]; CLOUT case No. 936 [Bundesgericht, Switzerland, 17 July 2007] (refusal of delivery alleging that buyer lacked creditworthiness, but without sufficient reason).

³¹CLOUT case No. 275 [Oberlandesgericht Düsseldorf, Germany, 24 April, 1997].

³²See 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, Russian Federation, 4 April 1997 (Arbitral award No. 387/1995), Unilex (buyer's final refusal to pay the price).

³³CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997].

³⁴Landgericht 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).

³⁵CLOUT 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); CLOUT case No. 935 [Handelsgericht des Kantons Zug, Switzerland, 25 June 2007], *Internationales Handelsrecht* 2008, 31.

³⁶Corte 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); Arbitration Court of the International Chamber of Commerce, France, January 1997 (Arbitral award No. 8786), *ICC International Court of Arbitration Bulletin* 2000, 70.

³⁷Oberlandesgericht Düsseldorf, Germany, 21 April 2004, *Internationales Handelsrecht* 2005, 24.

³⁸CLOUT case No. 90 [Pretura circondariale di Parma, Italy, 24 November 1989].

³⁹See, e.g., CLOUT case No. 82 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994]. See also paragraph 15 *infra*.

⁴⁰See, e.g., Oberlandesgericht Hamburg, Germany, 25 January 2008, *Internationales Handelsrecht* 2008, 98.

⁴¹CLOUT case No. 171 [Bundesgerichtshof, Germany, 3 April 1996]; CLOUT case No. 248 [Bundesgericht, Switzerland, 28 October 1998].

⁴²CLOUT case No. 248 [Bundesgericht, Switzerland, 28 October 1998].

⁴³CLOUT 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); CLOUT case No. 892 [Kantonsgericht Schaffhausen, Switzerland, 27 January 2004] (a variety of particular defects that, together, made model locomotives unresaleable).

⁴⁴Bundesgericht, Switzerland, 18 May 2009, *Internationales Handelsrecht* 2010, 27.

⁴⁵CLOUT case No. 107 [Oberlandesgericht Innsbruck, Austria, 1 July 1994]; see also Tribunale di Busto Arsizio, Italy, 13 December 2001, available in *Rivista di Diritto Internazionale Privato e Processuale*, 2003, 150–155, also available in Unilex (declaration of avoidance before waiting for result of seller's attempt to cure would be contrary to good faith).

⁴⁶See CLOUT case No. 138 [U.S. Court of Appeals for the Second Circuit, United States, 6 December 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 manufacturing processes of the buyer's customer) See also Tribunale di Busto Arsizio, Italy, 13 December 2001, available in *Rivista di Diritto Internazionale Privato e Processuale*, 2003, 150-155, also available in 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).

⁴⁷CLOUT 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).

⁴⁸CLOUT 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).

⁴⁹CLOUT case No. 196 [Handelsgericht des Kantons Zürich, Switzerland, 26 April 1995]; CLOUT case No. 937 [Tribunal cantonal du Jura, Switzerland, 26 July 2007] (no fundamental breach where easy and cheap repair can remedy the defect).

⁵⁰CLOUT case No. 152 [Cour d'appel, Grenoble, France, 26 April 1995]; CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997].

⁵¹See the Digest for article 48.

⁵²Hof 's-Gravenhage, the Netherlands, 23 April 2003, *Nederlands Jurisprudentie* 2003 No. 713.

⁵³CLOUT case NO. 887 [Appellationsgericht des Kantons Basel-Stadt, Switzerland, 22 August 2003].

⁵⁴CLOUT case No. 171 [Bundesgerichtshof, Germany, 3 April 1996].

⁵⁵Ibid.

⁵⁶Ibid.

⁵⁷CLOUT case No. 308 [Federal Court of Australia, Australia, 28 April 1995].

⁵⁸CLOUT case No. 313 [Cour d'appel, Grenoble, France, 21 October 1999] (seller retained pattern samples) (see full text of the decision).

⁵⁹CLOUT 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].

⁶⁰Tribunal of International Commercial Arbitration of the Ukrainian Chamber of Commerce and Trade, Ukraine, 5 July 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050705u5.html>.

⁶¹See, e.g., CLOUT case No. 892 [Kantonsgericht Schaffhausen, Switzerland, 27 January 2004]. For the requirements for fixing an additional period of time see the Digest for article 47.

⁶²See also Kantonsgericht des Kantons Zug, Switzerland, 14 December 2009, CISG-online No. 2026.

⁶³CLOUT case No. 933 [Bundesgericht, Switzerland, 20 December 2006].

⁶⁴Ibid.

⁶⁵See, e.g., CLOUT case No. 990 [China International Economic and Trade Arbitration Commission (CIETAC), People's Republic of China, 19 December 1997].

⁶⁶CLOUT case No. 935 [Handelsgericht des Kantons Zug, Switzerland, 25 June 2007], *Internationales Handelsrecht* 2008, 31.

⁶⁷But 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 two and a half years even though the goods had not been delivered. The court based its decision on the principle of good faith.

⁶⁸See Bundesgericht, Switzerland, 18 May 2009, *Internationales Handelsrecht* 2010, 27 (if attempts at repair are finally unsuccessful, the period starts when the buyer knew or should have known that fact). One court grappled with the question of when the reasonable time under article 49 (2) began to run where the buyer had received delivery of allegedly non-conforming goods; but 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 non-conformity, 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 [Cour d'appel Paris, France, 14 June 2001].

⁶⁹Bundesgericht, Switzerland, 18 May 2009, *Internationales Handelsrecht* 2010, 27.

⁷⁰CLOUT case No. 124 [Bundesgerichtshof, Germany, 15 February 1995]; see also CLOUT case No. 83 [Oberlandesgericht München, Germany, 2 March 1994] (four months).

⁷¹CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997].

⁷²CLOUT case No. 481 [Cour d'appel Paris, France, 14 June 2001]. See also CLOUT case No. 470 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 22 October 1998] (five or six months; too late); CLOUT case No. 944 [Hof 's-Hertogenbosch, the Netherlands, 11 October 2005].

⁷³CLOUT case No. 905 [Tribunal cantonal du canton de Valais, Switzerland, 21 February 2005] (one month); CLOUT case No. 165 [Oberlandesgericht Oldenburg, Germany, 1 February 1995] (five weeks); Bundesgericht, Switzerland, 18 May 2009, *Internationales Handelsrecht* 2010, 27 (one to two months).

⁷⁴CLOUT case No. 225 [Cour d'appel, Versailles, France, 29 January 1998].

⁷⁵CLOUT case No. 246 [Audiencia Provincial de Barcelona, Spain, 3 November 1997] (delayed).

⁷⁶CLOUT 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 article 49 purposes differs from a "reasonable time" for article 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).

⁷⁷CLOUT case No. 747 [Oberster Gerichtshof, Austria, 23 May 2005].

⁷⁸Supreme Court of Western Australia, Australia, 17 January 2003 (*Ginza Pte. Ltd. v. Vista Corporation Pty. Ltd.*), available on the Internet at <http://cisgw3.law.pace.edu/cases/030117a2.html>; CLOUT case No. 747 [Oberster Gerichtshof, Austria, 23 May 2005]; CLOUT case No. 774 [Bundesgerichtshof, Germany, 2 March 2005]; CLOUT case No. 938 [Kantonsgericht des Kantons Zug, Switzerland, 30 August 2007].

⁷⁹CLOUT case No. 747 [Oberster Gerichtshof, Austria, 23 May 2005].

⁸⁰CLOUT case No. 171 [Bundesgerichtshof, Germany, 3 April 1996] (see full text of the decision).

⁸¹CLOUT case No. 938 [Kantonsgericht des Kantons Zug, Switzerland, 20 August 2007].

⁸²U.S. District Court, Southern District of Ohio, United States, 26 March 2009 (*Miami Valley Paper, LLC v. Lebbing Engineering & Consulting GmbH*), available on the Internet at <http://cisgw3.law.pace.edu/cases/090326u1.html>, also in CISG-online No. 1880.

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.

2. Price reduction is one of the buyer's remedies. It may offer the buyer an alternative to the right to request specific performance, damages or avoidance. To the extent these remedies are alternatives, the buyer is free to choose among them.¹ Price reduction may be requested even if the reasonable period of time to avoid the contract (article 49 (2)) has expired.² Instead of, or together with, price reduction, the buyer is entitled to claim damages for any remaining loss.³

PREREQUISITES FOR PRICE REDUCTION

3. Article 50 applies when goods that have been delivered do not conform to the contract.⁴ Non-conformity is to be understood in the sense of article 35, i.e., defects as to quantity,⁵ quality, description (*aliud*) and packaging. It thus applies if inadequate or unsafe packaging causes the destruction or deterioration of the goods.⁶ In addition, defects in documents relating to the goods can be treated as a case of non-conformity.⁷ The remedy of price reduction is, however, not available if the breach of contract is based upon late delivery⁸ or the violation of any obligation of the seller other than the obligation to deliver conforming goods.

4. 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. Thus even where damages are excluded because of article 79, price reduction may be available. Furthermore, the remedy does not depend on whether the buyer has paid the price.⁹

5. 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).¹⁰ Without due notice the

buyer is not allowed to rely on the lack of conformity and loses all remedies.¹¹ 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).¹²

6. It has been observed that article 50 requires that the buyer express its intention to reduce the price.¹³ The buyer's refusal to pay the price has been regarded as a sufficient expression to claim price reduction, and to reduce the price to zero.¹⁴

7. 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 48.¹⁵

8. 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.¹⁶

CALCULATION OF PRICE REDUCTION

9. 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.¹⁷ Where the insufficient packaging of bottles made them completely useless (because they were cracked or unsterile), their value was not the value at the time before transport, but after the bottles had reached their destination.¹⁸

10. In cases where the delivered goods have no value at all, the price can be reduced to zero.¹⁹ The buyer retains this possibility even if it has lost its right to declare the

contract avoided due to the lapse of time (article 49 (2)).²⁰ Price reduction could then have almost the same effect as (the precluded remedy of) avoidance except that it does not oblige the buyer to return the goods.²¹

11. The parties are free to agree on a specific way to calculate the reduction in value. Where the parties agreed that the buyer would resell non-conforming goods at the best possible price, it was held that the buyer could reduce the original contract price by the difference produced by the resale.²²

12. If disputed by the parties and not otherwise determinable, the respective values can be assessed by expert witnesses.²³

PLACE OF PERFORMANCE

13. The place of performance of the remedy of price reduction is where the goods were delivered.²⁴

REPAYMENT OF PREPAID PRICE

14. It has been held that, if the buyer has already paid the price, article 50 can be the basis for the buyer's recovery claim.²⁵ This is indicated by the wording "whether or not the price has already been paid" in article 50. One court, however, found that the CISG does not cover the case where the buyer has already paid the price but is entitled to request a price reduction and a respective repayment from the seller.²⁶ According to this court, the buyer can recover that money if the applicable national law on unjust enrichment or restitution so provides.²⁷

BURDEN OF PROOF

15. It has been indicated that the buyer bears the burden to prove the reduction in value.²⁸

Notes

¹CLOUT case No. 724 [Oberlandesgericht Koblenz, Germany, 14 December 2006].

²CLOUT case No. 724 [Oberlandesgericht Koblenz, Germany, 14 December 2006]; CLOUT case No. 938 [Kantonsgericht des Kantons Zug, Switzerland, 30 August 2007].

³See CLOUT case No. 935 [Handelsgericht des Kantons Zürich, Switzerland, 25 June 2007]; CLOUT case No. 938 [Kantonsgericht des Kantons Zug, Switzerland, 30 August 2007].

⁴U.S. District Court, 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).

⁵Including the weight of the goods; see U.S. District Court, Southern District Court of New York, 6 April 1994, Unilex.

⁶CLOUT case No. 724 [Oberlandesgericht Koblenz, Germany, 14 December 2006] (seller's insufficient packaging of the goods (bottles) led to cracking and lack of sterility during transport).

⁷Article 48, to which article 50 refers, provides for the cure of non-conforming documents. See the Digest for article 48, paragraph 2.

⁸Landgericht Düsseldorf, Germany, 5 March 1996, Unilex.

⁹See *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, paragraph 5.

¹⁰CLOUT case No. 56 [Canton of Ticino Pretore di Locarno Campagna, Switzerland, 27 April 1992]; CLOUT case No. 432 [Landgericht Stendal, Germany, 12 October 2000]; CLOUT case No. 487 [Tribunal Provincial de Barcelona, sección 4, Spain, 12 September 2001]; CLOUT case No. 721 [Oberlandesgericht Karlsruhe, Germany, 8 February 2006]; CLOUT case No. 724 [Oberlandesgericht Koblenz, Germany, 14 December 2006]. See also CLOUT case No. 958 [Federal Court of Australia, Australia, 24 October 2008] (obiter dicta).

¹¹CLOUT case No. 48 [Oberlandesgericht Düsseldorf, Germany, 8 January 1993]; CLOUT case No. 273 [Oberlandesgericht München, Germany, 9 July 1997]; CLOUT case No. 303 [Arbitration Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7331)]; CLOUT case No. 343 [Landgericht Darmstadt, Germany, 9 May 2000] (see full text of the decision); CLOUT case No. 397 [Audiencia Provincial de Pamplona, sección 3, Spain, 27 March 2000]; CLOUT case No. 800 [Tribunal Supremo, sección 1ª, Spain, 16 May 2007].

¹²In this respect, see, e.g., CLOUT case No. 303 [Arbitration Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7331)]; CLOUT case No. 273 [Oberlandesgericht München, Germany, 9 July 1997].

¹³CLOUT case No. 83 [Oberlandesgericht München, Germany, 2 March 1994].

¹⁴CLOUT case No. 724 [Oberlandesgericht Koblenz, Germany, 14 December 2006].

¹⁵CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997].

¹⁶CLOUT case No. 248 [Bundesgericht, Switzerland, 28 October 1998] (see full text of the decision).

¹⁷CLOUT 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). See also CLOUT case No. 1018 [Hof van Beroep Antwerpen, Belgium, 4 November 1998].

¹⁸CLOUT case No. 724 [Oberlandesgericht Koblenz, Germany, 14 December 2006].

¹⁹Supreme Court of Western Australia, Australia, 17 January 2003 (Ginza Pte. Ltd. v. Vista Corporation Pty. Ltd.), available on the Internet at <http://cisgw3.law.pace.edu/cases/030117a2.html>; CLOUT case No. 724 [Oberlandesgericht Koblenz, Germany, 14 December 2006]; CLOUT case No. 747 [Oberster Gerichtshof, Austria, 23 May 2005]; CLOUT case No. 774 [Bundesgerichtshof, Germany, 2 March 2005]; CLOUT case No. 825 [Oberlandesgericht Köln, Germany, 14 August 2006]; CLOUT case No. 938 [Kantonsgericht des Kantons Zug, Switzerland, 30 August 2007].

²⁰CLOUT case No. 724 [Oberlandesgericht Koblenz, Germany, 14 December 2006]

²¹Ibid.

²²CLOUT case No. 825 [Oberlandesgericht Köln, Germany, 14 August 2006].

²³Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 27 April 2005, CISG-online No. 1500.

²⁴CLOUT case No. 295 [Oberlandesgericht Hamm, Germany, 5 November 1997].

²⁵CLOUT case No. 29 [U.S. Bankruptcy Court, Oregon, United States, 29 March 2004 (In re Siskiyou Evergreen, Inc.)]. See also (although without discussion), International Commercial Tribunal at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 23 March 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050323r1.html>; Commentary of the Secretariat to [then] article 46, paragraph 5.

²⁶CLOUT case No. 894 [Bundesgericht, Switzerland, 7 July 2004].

²⁷Ibid.

²⁸CLOUT case No. 938 [Kantonsgericht des Kantons Zug, Switzerland, 30 August 2007].

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. In such cases, article 51 (1) permits the buyer's remedies to be applied just to that part of a delivery that was not properly performed. Among the buyer's remedies that can be applied to the non-conforming part of a delivery is avoidance of the contract, provided there has been a fundamental breach with respect to the non-conforming portion of the delivery (see paragraph 4 below). Where partial avoidance is employed, the rest of the contract remains unimpaired. Under article 51 (2), the entire contract can be declared avoided only if the partial non-performance amounts to a fundamental breach of the entire contract.¹ Article 51 thus restricts the availability of avoidance to the defective part of the delivery, unless the demanding standard for avoidance of the entire contract is satisfied (see paragraph 7 below); other requirements for avoidance that restrict the availability of the remedy—including the requirement of notice declaring avoidance and an exercise of the remedy within a reasonable time—also apply.

PREREQUISITES

2. Article 51 presupposes that the seller has breached the contract either by delivering fewer goods than contracted for² or by delivering goods that, in part, do not conform with the contract under article 35.³ The application of article 51 requires that the delivered goods consist of separable parts, each of which could be used alone and independently⁴ e.g., some tons of cucumber,⁵ a shipment of tiles,⁶ textiles,⁷ quantities of stainless steel wire,⁸ scaffold fittings,⁹ computer software missing certain modules,¹⁰ many pairs of shoes,¹¹ or even a complete automatic assembly line for batteries for which the contracted spare parts were missing.¹² 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.¹³ It has been held that, as an initial matter, it is the parties' agreement that determines whether separable goods should be treated as a single entity or as multiple units.¹⁴

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 39.¹⁵ This notice

requirement also applies in cases where the seller has delivered only a part of the goods.¹⁶

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 their lack of quality must constitute a fundamental breach—i.e., the non-conforming goods must be of no reasonable use to the buyer.¹⁷ 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.¹⁸ 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 contract 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.¹⁹ It has been held that a delivery that included some defective shoes (approximately 20 per cent of those that the buyer resold) constituted a fundamental breach of the entire contract, because the buyer justifiably feared that a significant percentage of the shoes that remained unsold would also prove to be defective (the defects became apparent only after some months of use); the court also took into account the possibility that further sales of possibly defective shoes would impair the buyer's reputation.²⁰ Similarly, a delivery of 15,000 pressure cookers, part of which were defective in a way that was difficult to detect, was regarded as entirely non-conforming.²¹

5. Article 51 (1) refers only to the remedies provided for in articles 46-50. This does not mean that the remedy of damages, which 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 74.²²

6. If the buyer has rightfully declared avoidance for a part of the delivered goods, the consequences as stated in articles 81-84 apply.²³ The buyer is, however, obliged to pay for the conforming part.²⁴

AVOIDANCE OF THE ENTIRE CONTRACT (ARTICLE 51 (2))

7. As provided in article 51 (2), in case of partial non-delivery 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 justify 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.²⁵ Where the seller had delivered only half of the contracted-for goods, it was held that this might constitute a fundamental breach of the entire contract.²⁶

8. A court has held that the principle expressed in article 51 (2) can be applied to analogous cases where the seller failed to perform duties other than that to deliver conforming goods.²⁷

Notes

¹CLOUT case No. 302 [Arbitration Court of the International Chamber of Commerce, 23 August 1994 (Arbitral award No. 7660) (see full text of the decision)].

²See CLOUT case No. 630 [Arbitration Court of the International Chamber of Commerce, Switzerland, July 1999 (Arbitral award No. 9448)].

³Article 35, however, also covers delivery of a smaller quantity of goods than that contracted for.

⁴CLOUT case No. 302 [Arbitration Court of the International Chamber of Commerce, 23 August 1994 (Arbitral award No. 7660)]; CLOUT case No. 749 [Oberster Gerichtshof, Austria, 21 June 2005]; Arrondissementsrechtbank Zwolle, Netherlands, 29 January 2003, CISG-online No. 928. See also CLOUT case No. 774 [Bundesgerichtshof, Germany, 2 March 2005] (the court accepted that one of several instalments of meat deliveries was not defective while the others were; the court held that the buyer could reduce the price only for the latter).

⁵CLOUT case No. 48 [Oberlandesgericht Düsseldorf, Germany, 8 January 1993].

⁶CLOUT case No. 50 [Landgericht Baden-Baden, Germany, 14 August 1991].

⁷CLOUT case No. 82 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994].

⁸CLOUT case No. 235 [Bundesgerichtshof, Germany, 25 June 1997]; CLOUT case No. 990 [China International Economic and Trade Arbitration Commission, People's Republic of China, 19 December 1997].

⁹CLOUT case No. 304 [Arbitration Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7531)].

¹⁰See CLOUT case No. 749 [Oberster Gerichtshof, Austria, 21 June 2005], where the court remanded the case so that the court of first instance could determine "the impact of the missing module on the usability of the other software components."

¹¹Oberlandesgericht Koblenz, Germany, 21 November 2007, CISG-online No. 1733.

¹²CLOUT case No. 302 [Arbitration Court of the International Chamber of Commerce, 23 August 1994 (Arbitral award No. 7660)].

¹³Ibid.; CLOUT case No. 749 [Oberster Gerichtshof, Austria, 21 June 2005].

¹⁴CLOUT case No. 749 [Oberster Gerichtshof, Austria, 21 June 2005].

¹⁵CLOUT case No. 48 [Oberlandesgericht Düsseldorf, Germany, 8 January 1993]; CLOUT case No. 50 [Landgericht Baden-Baden, Germany, 14 August 1991]; CLOUT No. 432 [Landgericht Stendal, Germany, 12 October 2000].

¹⁶CLOUT case No. 48 [Oberlandesgericht Düsseldorf, Germany, 8 January 1993].

¹⁷See 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). Compare the Digest for article 49, paragraphs 14 and 15.

¹⁸See the Digest for article 49, paragraph 21.

¹⁹CLOUT case No. 275 [Oberlandesgericht Düsseldorf, Germany, 24 April 1997].

²⁰Oberlandesgericht Koblenz, Germany, 21 November 2007, CISG-online No. 1733.

²¹Cour d'appel de Paris, France, 4 June 2004, CISG-online No. 872.

²²CLOUT case No. 82 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994]; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russian Federation, 23 November 1994 (Arbitral award No. 251/1993), Unilex.

²³See Kantonsgericht des Kantons Zug, Switzerland, 14 December 2009, CISG-online No. 2026.

²⁴CLOUT case No. 749 [Oberster Gerichtshof, Austria, 21 June 2005].

²⁵CLOUT case No. 302 [Arbitration Court of the International Chamber of Commerce, 23 August 1994 (Arbitral award No. 7660)].

²⁶Only obiter since the court found that the parties agreed on the termination of the contract: CLOUT case No. 990 [China International Economic and Trade Arbitration Commission, People's Republic of China, 19 December 1997]

²⁷Oberlandesgericht Hamburg, Germany, 25 January 2008, CISG-online No. 1681 (contract to deliver and install furniture and machinery for an ice-café; seller failed to perform the installation duty; buyer not permitted to avoid the entire contract since buyer installed the goods itself and then used them).

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 performance not in accord with the contract. 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 It has been held that early delivery does not give the buyer grounds to avoid the contract or to suspend the buyer’s own obligations.⁴

3. If, however, the buyer takes over goods that are delivered early, the buyer is obliged to pay the contract

price.⁵ 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.⁶

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.⁷ 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 articles 39 or 43 applies.⁸ A notice after several months has been deemed belated.⁹ 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.¹⁰ 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;¹¹ if the buyer cannot avoid and thus must take delivery of the excess, the buyer must pay for it¹² but (provided the notice requirement of article 39 is satisfied) can claim compensation for any damages he suffers from the breach.¹³

Notes

¹See the Digest for article 33, paragraph 6.

²See *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, paragraph 5.

³*Ibid.*, paragraph 4.

⁴China International Economic and Trade Arbitration Commission, People’s Republic of China, 25 May 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050525c1.html>.

⁵CLOUT case No. 141 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 25 April 1995 (Arbitral award No. 200/1994)] (dispatch, in mid-December, of chocolates for Christmas, before buyer transmitted bank guarantee which was supposed to establish the delivery date; buyer held obliged to pay full price).

⁶See *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, paragraph 6.

⁷CLOUT case No. 341 [Ontario Superior Court of Justice, Canada, 31 August 1999].

⁸Oberlandesgericht Rostock, Germany, 25 September 2002, CISG-online No. 672; Landgericht Köln, Germany 5 December 2006, *Internationales Handelsrecht* 2007, 162.

⁹Landgericht Köln, Germany 5 December 2006, *Internationales Handelsrecht* 2007, 162.

¹⁰CLOUT case No. 341 [Ontario Superior Court of Justice, Canada, 31 August 1999] (see full text of the decision).

¹¹See *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, paragraph 9.

¹²Landgericht Köln, Germany 5 December 2006, *Internationales Handelsrecht* 2007, 162.

¹³*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, paragraph 9.

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 opens 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 the matter.¹ The principal obligations of the buyer are to pay the price 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 performance of the contract that departs from the rules of 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)), an obligation to submit specifications regarding the form, measurement or other features of the goods (article 65) or obligations relating to the marketing of the goods, such as a re-export prohibition.³

ILLUSTRATIONS FROM CASE LAW

3. Because it merely sets out the obligations of the buyer—which are treated more fully in subsequent provisions—

article 53 has raised no particular difficulties for tribunals. There have been numerous decisions citing article 53 in cases involving judgments requiring the buyer to pay the price.⁴ On the other hand, few decisions have referred to article 53 in connection with judgments requiring the buyer to take delivery of the goods⁵ or, more generally, in relation to the buyer’s breach of the obligation to take delivery of the goods.⁶

BURDEN OF PROOF

4. The Vienna Convention does not deal expressly with the burden of proof. According to most court decisions, this is a matter which is governed by the Convention and has to be settled by application of a general principle on which the Convention is based (article 7 (2)).⁷ According to one of the principles developed in case law, the party relying on the legal consequences attaching to a provision of the Convention has to prove that the legal requirements of the provision have been met.⁸ It follows from this principle that the seller has to prove that the buyer must pay the price and also what that amount is.⁹ However, in cases where the buyer claims a reduction or discount, the buyer bears the burden of proving that it is entitled to reduce the initial contract price.¹⁰ If a buyer who is sued by the seller for payment of the price claims in defence that it has settled the price, the burden is on the buyer to prove settlement, as several decisions have noted.¹¹

Notes

¹CLOUT case No. 652 [Tribunale di Padova, Italy, 10 January 2006]; CLOUT case No. 904 [Tribunal cantonal du Jura, Switzerland, 3 November 2004]; Tribunale di Padova, Italy, 25 February 2004, *Giurisprudenza italiana*, 2004, 1405, available in Italian on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/819.pdf, available in English on the Internet at www.cisg.law.pace.edu/cases/040225i3.html; CLOUT case No. 608 [Tribunale di Rimini, Italy, 26 November 2002], available in Italian on the Internet at www.unilex.info/case.cfm?pid=1&do=case&id=823&step=FullText, English translation available on the Internet at www.cisg.law.pace.edu/cisg/wais/db/cases2/021126i3.html; Kantonsgericht Schaffhausen, Switzerland, 25 February 2002, available in German on the Internet at www.cisg-online.ch/cisg/urteile/723.htm, available in English on the Internet at www.cisg.law.pace.edu/cases/020225s1.html; CLOUT case No. 480 [Cour d’appel de Colmar, France, 12 June 2001]; Tribunal de grande instance de Colmar, France, 18 December 1997, available on the Internet at www.cisg-france.org/decisions/181297v.htm; Tribunal Cantonal de Vaud, Switzerland, 11 March 1996, available on the Internet at www.cisg.law.pace.edu/cisg/wais/db/cases2/960311s1.html.

²See articles 61 (1) and 62.

³CLOUT case No. 154 [Cour d’appel de Grenoble, France, 22 February 1995], available in French on the Internet at www.cisg-france.org/decisions/220295v.htm, available in English on the Internet at www.cisg.law.pace.edu/cases/950222f1.html (on this decision see the Digest for article 64, paragraph 6, note 17 *infra*).

⁴Oberlandesgericht Saarbrücken, Germany, 12 May 2010, *Internationales Handelsrecht*, 2010, 202, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/2155.pdf; Landgericht Stuttgart, Germany, 29 October 2009, available in German on

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Germany (Federal Republic), 20 July 1990, available on the Internet at www.cisg-online.ch/cisg/urteile/241.htm; Landgericht Frankfurt, Germany (Federal Republic), 2 May 1990, available on the Internet at www.cisg-online.ch/cisg/urteile/183.htm; CLOUT case No. 46, [Landgericht Aachen, Germany (Federal Republic), 3 April 1990], *Recht der Internationalen Wirtschaft*, 1990, 491, available in German on the Internet at www.cisg-online.ch/cisg/urteile/12.htm (see full text of the decision); see also CLOUT case No. 632, [Federal Bankruptcy Court, United States, 10 April 2001] (*Victoria Alloys v. Fortis Bank*) (holding that the buyer's obligation to pay the price under CISG article 53 was a significant factor in determining whether title to the goods had passed to the buyer); CLOUT case No. 4, [Landgericht Stuttgart, Germany (Federal Republic), 31 August 1989], *Praxis des Internationalen Privat- und Verfahrensrechts*, 1990, 317, available in German on the Internet at www.cisg-online.ch/cisg/urteile/11.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/890831g1.html>.

⁵Alexandria Centre for International Arbitration, Egypt, 16 January 2005, available on the Internet at <http://cisgw3.law.pace.edu/cases/050116e1.html>; CLOUT case No. 217, [Handelsgericht Aargau, Switzerland, 26 September 1997], available in German on the Internet at www.cisg-online.ch/cisg/urteile/329.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/970926s1.html>; Arrondissementsrechtbank Amsterdam, the Netherlands, 15 June 1994, *Nederlands Internationaal Privaatrecht*, 1995, 194, available on the Internet at www.unilex.info/case.cfm?pid=1&do=case&id=126&step=FullText.

⁶Landgericht Köln, Germany, 5 December 2006, *Internationales Handelsrecht*, 2007, 162, available in German on the Internet at www.cisg-online.ch/cisg/urteile/1440.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/061205g1.html> (reimbursement of costs of preservation following unjustified return of the goods to the seller in violation of article 53); International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 16 February 2004, available on the Internet at <http://cisgw3.law.pace.edu/cases/040216r1.html>; China International Economic and Trade Arbitration Commission, People's Republic of China, 9 September 2002, available on the Internet at <http://cisgw3.law.pace.edu/cases/020909c1.html> (the buyer was ordered to pay damages for, inter alia, failure to take delivery of the goods); CLOUT case No. 133, [Oberlandesgericht München, Germany, 8 February 1995], available in German on the Internet at www.cisg-online.ch/cisg/urteile/143.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/950208g1.html>; Oberlandesgericht Hamburg, Germany, 14 December 1994, available on the Internet at www.cisg-online.ch/cisg/urteile/216.htm.

⁷See the Digest for article 7.

⁸See the Digest for article 7, paragraph 13.

⁹Oberlandesgericht Saarbrücken, Germany, 12 May 2010, *Internationales Handelsrecht*, 2010, 202, available on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/2155.pdf; Landgericht Kassel, Germany, 15 February 1996, *Neue Juristische Wochenschrift—Rechtsprechungsreport* 1996, 1146, available in German on the Internet at www.cisg-online.ch/cisg/urteile/191.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/960215g1.html>.

¹⁰Oberlandesgericht Saarbrücken, Germany, 12 May 2010, *Internationales Handelsrecht*, 2010, 202, available on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/2155.pdf (the court differentiated between this case and that where the price is determined on the basis of the amount of the orders, the seller thus bearing the burden of proving the amount of the price); cf. Landgericht Kassel, Germany, 15 February 1996, *Neue Juristische Wochenschrift—Rechtsprechungsreport*, 1996, 1146, available in German on the Internet at www.cisg-online.ch/cisg/urteile/191.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/960215g1.html> (the buyer alleged that it was authorized to deduct a discount for settlement of the price within a certain period; since the seller had been unable to prove the contrary, the court allowed the reduction).

¹¹See CLOUT case No. 906, [Kantonsgericht Nidwalden, Switzerland, 23 May 2005], *Internationales Handelsrecht*, 2005, 253; Juzgado Sexto de Primera Instancia del Partido de Tijuana, Mexico, 14 July 2000, available in Spanish on the Internet at www.unilex.info/case.cfm?pid=1&do=case&id=514&step=FullText, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/000714m1.html>; CLOUT case No. 273, [Oberlandesgericht München, Germany, 9 July 1997], available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/282.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/970709g1.html>.

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 very specific circumstances: article 55 determines the price when one is not expressly or implicitly fixed in the contract, and article 56 specifies the way to calculate 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 documents”, 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 of sale), as is shown in the Digest for article 55.¹ Furthermore, in some decisions, article 57 (place for payment) has been associated with the provisions governing contract avoidance, in particular the rule in 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 imposes on the buyer the obligation to take steps to enable payment to be made, 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

¹See the Digest for article 55, paragraphs 1, 3, 4, 5, 6 and 7.

²See the Digest for article 57, paragraph 16.

³See the Digest for article 54, paragraphs 1 and 4.

⁴See the Digest for article 57, paragraphs 11, 12 and 13.

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 to guarantee payment, or the acceptance of a bill of exchange. Preparatory actions required by applicable laws or regulations might involve, for example, an administrative authorization needed for the transfer of funds to enable payment to be made.

2. Article 54 is frequently cited by the courts. Although the provision is concerned solely with actions preparatory to payment of the price, many decisions nevertheless cite article 54 in cases of non-payment of the price by the buyer where the dispute did not specifically relate to steps or formalities required to enable payment to be made. In those cases, article 54 was referred to by the courts either in conjunction with article 53¹ or in isolation.² Conversely, a series of decisions rely exclusively on article 54 where the buyer has not taken such steps or complied with such formalities as might be required to enable payment to be made.³ However, the precise textual basis for the judgment against a breaching buyer is immaterial. Violation of the obligation to pay the price in accordance with article 53 and non-performance of the obligation to take steps and comply with formalities required to enable payment to be made in accordance with article 54 lead to the same outcome.⁴

3. Article 54 has a double effect. First, unless otherwise provided for in the contract, article 54 imposes these obligations on the buyer, who must thus bear the costs thereof.⁵ Secondly, the steps for which the buyer is responsible under article 54 are obligations whose violation permits the seller to resort to the remedies specified in articles 61 et seq.; they do not merely relate to "conduct in preparing to perform or in performing the contract", as stated in article 71 (1). Thus, failure to perform those steps constitutes a breach and not merely an anticipatory breach of contract.⁶

SCOPE OF THE BUYER'S OBLIGATIONS

4. The question arises whether article 54 merely obliges the buyer to perform the steps necessary to satisfy the pre-conditions for payment, but does not automatically make the buyer responsible for the result, or whether the buyer breaches its obligations if the measures implemented prove

unsuccessful.⁷ Many decisions have adopted the second interpretation, which is harsher for the buyer. The obligation to take steps and comply with formalities required to enable payment to be made is in all respects comparable to the obligation to pay the price. For the most part those decisions are concerned with the buyer's undertaking to issue a letter of credit or to provide a bank guarantee. A buyer who fails to issue a contractually stipulated letter of credit within the agreed period and for the agreed amount violates its obligations by that fact alone.⁸ The same is true if a buyer does not furnish a contractually agreed bank guarantee.⁹ It is also true if a buyer who gives instructions to its bank to make a transfer does not ensure that payment can be effected in convertible currency.¹⁰ On the other hand, it could be held that mere prior bank confirmation (as stipulated in the contract) of the opening of a letter of credit to be issued after inspection of each delivery was not a step required to enable payment to be made within the meaning of article 54.¹¹

5. Article 54 gives rise to particular difficulties with regard to administrative measures imposed by applicable laws or regulations in order that payment can be effected. Under one possible interpretation of article 54, a distinction is made between measures of a commercial nature, in respect of which the buyer assumes a commitment to achieve the result stated in the contract, and administrative measures, with regard to which the buyer takes on only an obligation to employ its best efforts without being answerable for the outcome. The rationale for the distinction is that the buyer cannot guarantee, for example, that administrative authorities will authorize a transfer of funds, so that the buyer should only be obliged to carry out the steps needed to obtain the relevant administrative authorization. A possible argument against this distinction is that, under article 54, the buyer is automatically responsible if a pre-requisite to payment, whatever its nature, is not satisfied, subject to the possibility of exemption under article 79 of the Convention.¹²

CURRENCY OF PAYMENT

6. Article 54 says nothing about the currency of payment. Most often the parties indicate the currency when fixing the price. As several court decisions have stated, such an agreement is binding on the parties pursuant to article 6.¹³ Where the price is not contractually stipulated, reference has to be made to commercial usages (article 9 (2)) or to practices which the parties have established between themselves (article 9 (1)). In cases where the currency of payment cannot

be established by these means, the method for fixing the price is unclear. There have been few court decisions which have ruled on this issue.

7. Most courts adopt the premise that the question of determining the currency of payment is governed by the Vienna Convention and not domestic law.¹⁴ Consequently, the currency has to be determined by a general principle on which the Convention is based, within the meaning of article 7 (2). Several courts have accordingly relied on article 57, which determines the place of payment of the price, and this has led them to rule in favour of the currency where the seller's place of business is located (article 57 (1) (a)).¹⁵ Conversely, one court on several occasions ruled in favour of the national law applicable by virtue of the rules of private international law, which led it to apply the domestic law governing the contract of sale on matters not covered by the Vienna Convention.¹⁶

8. The Vienna Convention does not provide for the buyer's right to discharge its debt in the currency of the place of payment if the price has been contractually specified in a different currency. Various courts have been faced with the question whether domestic laws which establish such an entitlement in the debtor's favour can nonetheless be applied under choice-of-law rules. One supreme court refused to allow this on the ground that no entitlement of the buyer to pay the price in a currency other than the currency of the contract could be derived from the Convention,

since payment in an alternative currency would require an agreement of the parties to that effect.¹⁷ Conversely, lower courts in other countries have, without giving any specific grounds, implicitly allowed the applicability, in principle, of domestic law provisions which recognize the debtor's right to discharge its debt in the currency of the place of payment.¹⁸

9. Nor does the Vienna Convention establish the seller's right to request payment of the price in the currency of the place of payment. Nevertheless, various courts have accepted the applicability of national laws which authorize or require the seller to request payment of the price in the currency of the place of payment.¹⁹

ALLOCATION OF PAYMENTS

10. Where a buyer has several debts to the seller, the buyer will generally indicate the debt which it intends to settle when effecting payment.²⁰ The Vienna Convention does not provide for a system of appropriation by law that can be applied in the absence of any indication by the buyer as to the assignment of the funds paid or any agreement of the parties. Since the Convention says nothing about this question, and there appears to be no relevant general principle on which the Convention is based, one court has applied domestic law as determined by the rules of private international law, pursuant to article 7 (2).²¹

Notes

¹See, in particular, International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 28 September 2004, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/040928r1.html>; International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 30 December 2003, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/031230r1.html>; Oberlandesgericht Karlsruhe, Germany, 10 December 2003, *Internationales Handelsrecht*, 2/2004, 62-65, available in German on the Internet at www.cisg-online.ch/cisg/urteile/911.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/031210g1.html>; International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 22 October 2003, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/031022r1.html>; International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 17 September 2003, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/030917r1.html>; China International Economic and Trade Arbitration Commission, People's Republic of China, 7 July 2003, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/030707c1.html>; International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 10 December 2002, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/021210r1.html>; International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 17 January 2000, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/000117r1.html>; Oberlandesgericht Dresden, Germany, 27 December 1999, *Transportrecht-Internationales Handelsrecht*, 2000, 20, 22, available in German on the Internet at www.cisg-online.ch/cisg/urteile/511.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/991227g1.html>; International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Russia, 25 June 1998, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/980625r1.html>; CLOUT case No. 236 [Bundesgerichtshof, Germany, 23 July 1997], *Neue Juristische Wochenschrift*, 1997, 3309, 3311; Arbitration Court of the International Chamber of Commerce, February 1997 (Arbitral award No. 8716), ICC International Court of Arbitration Bulletin, vol. 11, No. 2 (Fall 2000), 61, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/978716i1.html>; CLOUT case No. 5 [Landgericht Hamburg, Germany, 26 September 1990], *Praxis des internationalen Privat- und Verfahrensrechts*, 1991, 400.

²Amtgericht Freiburg, Germany, 6 July 2007, available in German on the Internet at www.cisg-online.ch/cisg/urteile/1596.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/070706g1.html>; Tribunal de grande instance, Strasbourg, France, 22 December 2006, available in French on the Internet at www.cisg-online.ch/cisg/urteile/1629.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/061222f1.html>; Okresný súd Nitra, Slovakia, 27 June 2006] available in Slovak on the Internet at <http://cisgw3.law.pace.edu/cisg/text/060627slovak.pdf>, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/060627k1.html>; Krajský súd Nitra, Slovakia, 23 June 2006, available in Slovak on the Internet at <http://cisgw3.law.pace.edu/cisg/text/060627slovak.pdf>, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/060627k1.html> (the fact that the invoice was also sent to a third party does not exempt the buyer from its obligation to pay the price); China International Economic and Trade Arbitration Commission, People's Republic of China, 25 May 2005, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/050525c1.html>; International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 23 March 2005 (Arbitral award No. 126, 2004), available in English on the Internet at <http://cisgw3.law.pace.edu/cases/050323r1.html>; Foreign Trade Court of Arbitration at the Serbian Chamber of Commerce, Serbia, 21 February 2005, available in Serbian on the

Internet at <http://cisgw3.law.pace.edu/cisg/text/050221serbian.pdf>, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/050221sb.html>; CLOUT case No. 904 [Tribunal cantonal du Jura, Switzerland, 3 November 2004]; International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry, Ukraine, 19 October 2004, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/041019u5.html>; Oberlandesgericht Graz, Austria, 31 May 2002, available in German on the Internet at <http://cisgw3.law.pace.edu/cisg/text/020531a3german.pdf>, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/020531a3.html>; Oberlandesgericht Hamm, Germany, 12 November 2001, available in German on the Internet at www.cisg-online.ch/cisg/urteile/1430.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/011112g1.html>; Foreign Trade Court of Arbitration at the Serbian Chamber of Commerce, Serbia, 24 September 2001, *Journal Arbitraza No. 1 (2001)*, 89, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/010924sb.html>; International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 30 May 2001, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/010530r2.html>; International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 30 May 2001, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/010530r1.html>; Oberlandesgericht Graz, Austria, 24 January 2001, available in German on the Internet at www.cisg-online.ch/cisg/urteile/800.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/010124a3.html>; CLOUT case No. 429 [OLG Frankfurt, Germany, 30 August 2000], *Recht der Internationalen Wirtschaft*, 2001, 383, 384; CLOUT case No. 397 [Audiencia Provincial Navarra, Spain, 27 March 2000]; International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 10 February 2000, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/000210r1.html>; CLOUT case No. 333 [Handelsgericht des Kantons Aargau, Switzerland, 11 June 1999]; Hamburger Freundschaftliche Arbitrage, Germany, 29 December 1998, *Neue Juristische Wochenschrift-Rechtsprechungsreport*, 1999, 780, available in German on the Internet at www.unilex.info/case.cfm?pid=1&do=case&id=394&step=FullText, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/981229g1.html>; Landgericht Hamburg, Germany, 17 June 1996, available in German on the Internet at www.cisg-online.ch/cisg/urteile/240.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/960617g1.html>.

³See, in particular, Arbitration Court of the International Chamber of Commerce, 2003 (Arbitral award No. 11849), *Yearbook Commercial Arbitration XXXI*, 2006, 148, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/031849i1.html>; CLOUT case No. 631 [Supreme Court of Queensland, Australia, 17 November 2000], [2000] QSC 421, available in English on the Internet at <http://archive.sclqld.org.au/qjudgment/2000/QSC00-421.pdf#xml=http://courts.qld.gov.au.mas>; CLOUT case No. 261 [Bezirksgericht der Saane, Switzerland, 20 February 1997], *Schweizerische Zeitschrift für Internationales und Europäisches Recht*, 1999, 195, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/426.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/970220s1.html>; Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 17 November 1995, available in German on the Internet at www.unilex.info/case.cfm?pid=1&do=case&id=217&step=FullText, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/951117h1.html>; CLOUT case No. 142 [International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 17 October 1995], available in English on the Internet at <http://cisgw3.law.pace.edu/cases/951017r1.html>.

⁴See paragraphs 3 and 4 *infra*.

⁵Landgericht Duisburg, Germany, 17 April 1996, *Recht der Internationalen Wirtschaft*, 1996, 774, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/186.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/960417g1.html> (concerning costs associated with payment of the price by cheque).

⁶Secretariat Commentary to draft article 50, paragraph 5, and the decisions cited in paragraphs 4 and 5 *infra*.

⁷Secretariat Commentary to draft article 50, paragraph 3.

⁸Arbitration Court of the International Chamber of Commerce, 2003 (Arbitral award No. 11849), *Yearbook Commercial Arbitration XXXI*, 2006, 148, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/031849i1.html>; CLOUT case No. 986 [China International Economic and Trade Arbitration Commission, People's Republic of China, 4 February 2002], available in English on the Internet at <http://cisgw3.law.pace.edu/cases/020204c1.html>; CLOUT case No. 631 [Supreme Court of Queensland, Australia, 17 November 2000] (*Down Investments Pty Ltd. v. Perjawa Steel SDN BHD*), QSC, 2000, 421, available in English on the Internet at <http://archive.sclqld.org.au/qjudgment/2000/QSC00-421.pdf#xml=http://courts.qld.gov.au.mas>; CLOUT case No. 717 [China International Economic and Trade Arbitration Commission, China, 6 January 1999]; China International Economic and Trade Arbitration Commission, People's Republic of China, 16 June 1997, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/970616c1.html>; CLOUT case No. 261 [Bezirksgericht der Saane, Switzerland, 20 February 1997], *Schweizerische Zeitschrift für Internationales und Europäisches Recht*, 1997, 195, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/426.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/970220s1.html>; CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996], available in German on the Internet at www.cisg.at/10_51895.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/960206a3.html> (the buyer was, however, not deemed in breach of its obligations since the seller had omitted to indicate the port of embarkation, and that fact was necessary, under the contract, for establishing the letter of credit); Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 17 November 1995, available in German on the Internet at www.unilex.info/case.cfm?pid=1&do=case&id=217&step=FullText, (referring to article 73 (2)); CLOUT case No. 301 [ICC International Court of Arbitration, 7585, 1992], *ICC International Court of Arbitration Bulletin*, November 1995, 60, available in French in *ICC International Court of Arbitration Bulletin*, November 1995, 59, available in English on the Internet at www.unilex.info/case.cfm?pid=1&do=case&id=134&step=FullText.

⁹International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 25 May 1998, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/980625r1.html>.

¹⁰International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 17 October 1995 (Arbitral award No. 123/1992).

¹¹Landgericht Kassel, Germany, 21 September 1995, available in German on the Internet at www.cisg-online.ch/cisg/urteile/192.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/950921g1.html> (failure to furnish such a bank confirmation, therefore, subjected the buyer to penalty under article 71 only and not under article 54).

¹²See CLOUT case No. 142 [International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 17 October 1995], available in English on the Internet at <http://cisgw3.law.pace.edu/cases/951017r1.html>

(in connection with the obligation to pay the price in a convertible currency; the court refused, however, to accept force majeure since the buyer did not take sufficient steps to make payment possible).

¹³CLOUT case No. 934, Tribunal cantonal du Valais, Switzerland, 27 April 2007, *Revue suisse de droit international et européen*, 2008, 184, available in French on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1721.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/070427s1.html>; Tribunal cantonal du Valais, Switzerland, 27 October 2006, available in French on the Internet at www.cisg-online.ch/cisg/urteile/1563.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/061027s1.html>; CLOUT case No. 930 [Tribunal cantonal du Valais, Switzerland, 23 May 2006], available in English on the Internet at <http://cisgw3.law.pace.edu/cases/060523s1.html>; CLOUT case No. 907 [Tribunal cantonal du Valais, Switzerland, 27 May 2005], available in French on the Internet at www.cisg-online.ch/cisg/urteile/1137.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/050527s1.html>; CLOUT case No. 215 [Bezirksgericht St. Gallen, Switzerland, 3 July 1997], available in German on the Internet at www.unilex.info/case.cfm?pid=1&do=case&id=306&step=FullText, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/970703s1.html>; CLOUT case No. 80 [Kammergericht Berlin, Germany, 24 January 1994], *Recht der Internationalen Wirtschaft*, 1994, 683, available in German on the Internet at www.unilex.info/case.cfm?pid=1&do=case&id=306&step=FullText, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/970703s1.html>. See, however, Cámara Nacional de Apelaciones de Buenos Aires, Argentina, 31 May 2007, available in Spanish on the Internet at <http://turan.uc3m.es/uc3m/dpto/PR/dppr03/cisg/sargen16.htm>, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/070531a1.html> (national law as determined by private international law rules was applied by the court to the agreement between the parties).

¹⁴CLOUT case No. 80 [Kammergericht Berlin, Germany, 24 January 1994], *Recht der Internationalen Wirtschaft*, 1994, 683, available in German on the Internet at www.unilex.info/case.cfm?pid=1&do=case&id=306&step=FullText, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/970703s1.html>; CLOUT case No. 52 [Fovárosi Biróság, Budapest, Hungary, 24 March 1992].

¹⁵CLOUT case No. 80 [Kammergericht Berlin, Germany, 24 January 1994], *Recht der Internationalen Wirtschaft*, 1994, 683, available in German on the Internet at www.unilex.info/case.cfm?pid=1&do=case&id=306&step=FullText, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/970703s1.html>. (see full text of the decision) (in cases of doubt, the currency of payment is the currency of the place of payment); CLOUT case No. 281 [Oberlandesgericht Koblenz, Germany, 17 September 1993], *Recht der Internationalen Wirtschaft*, 1993, 934, available in German on the Internet at www.cisg-online.ch/cisg/urteile/91.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/930917g1.html> (the currency of the seller's place of business is the currency in which the price should be paid); CLOUT case No. 52 [Fovárosi Biróság, Budapest, Hungary, 24 March 1992] (without stating a reason, the court ordered the buyer to pay the price to the seller in the latter's currency).

¹⁶CLOUT case No. 934 [Tribunal cantonal du Valais, Switzerland, 27 April 2007], *Revue suisse de droit international et européen*, 2008, 184, available in French on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1721.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/070427s1.html>; Tribunal cantonal du Valais, Switzerland, 27 October 2006, available in French on the Internet at www.cisg-online.ch/cisg/urteile/1563.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/061027s1.html>; CLOUT case No. 930 [Tribunal cantonal du Valais, Switzerland, 23 May 2006], available in English on the Internet at <http://cisgw3.law.pace.edu/cases/060523s1.html>; CLOUT case No. 907 [Tribunal cantonal du Valais, Switzerland, 27 May 2005], available in French on the Internet at www.cisg-online.ch/cisg/urteile/1137.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/050527s1.html>; Tribunal cantonal du Valais, Switzerland, 19 August 2003, available in French on the Internet at www.cisg-online.ch/cisg/urteile/895.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/030819s1.html>; CLOUT case No. 255 [Tribunal cantonal du Valais, Switzerland, 30 June 1998], *Schweizerische Zeitschrift für Internationales und Europäisches Recht*, 1999, 192, available in German on the Internet at www.cisg-online.ch/cisg/urteile/419.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/980630s1.html>.

¹⁷Oberster Gerichtshof, Austria, 22 October 2001, available in German on the Internet at www.cisg.at/1_7701g.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/011022a3.html>.

¹⁸Handelsgericht des Kantons Aargau, Switzerland, 25 January 2005, available in German on the Internet at www.cisg-online.ch/cisg/urteile/1091.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/050125s1.html> (the court, however, rejected the applicability of article 84 (2) of the Swiss Code of Obligations since that provision confers the right of conversion solely on the debtor, i.e., in this case, the buyer, and not on the creditor, who sought to rely on it); CLOUT case No. 281 [Oberlandesgericht Koblenz, Germany, 17 September 1993], *Recht der Internationalen Wirtschaft*, 1993, 934, available in German on the Internet at www.cisg-online.ch/cisg/urteile/91.htm; available in English on the Internet at <http://cisgw3.law.pace.edu/cases/930917g1.html> (the court held that section 244 of the German Civil Code (BGB) was not applicable in favour of the buyer, who wished to discharge its debt in Deutschmarks (DM), since payment of the price, which was expressed in French Francs, had to be effected in France and not in Germany).

¹⁹CLOUT case No. 255 [Tribunal cantonal du Valais, Switzerland, 30 June 1998], *Schweizerische Zeitschrift für Internationales und Europäisches Recht*, 1999, 192, available in German on the Internet at www.cisg-online.ch/cisg/urteile/419.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/980630s1.html> (the court applied the Italian Civil Code (article 1277), which required the creditor to denominate the debt in Italian Lire, whereas the creditor had taken legal action seeking payment of the price in Swiss Francs); CLOUT case No. 106 [Oberster Gerichtshof, Austria, 10 November 1994], *Zeitschrift für Rechtsvergleichung*, 1995, 79, available in German on the Internet at www.cisg-online.ch/cisg/urteile/117.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/941110a3.html> (it can be seen from the judgment that the appeal court had allowed the seller to claim payment of the price in Schillings on the basis of Austrian law, whereas the agreed price had been expressed in DM); cf. Tribunal cantonal du Valais, Switzerland, 27 October 2006, available in French on the Internet at www.cisg-online.ch/cisg/urteile/1563.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/061027s1.html> (default judgment ordering the buyer, whose place of business was in France, to pay the price in Swiss Francs although the price on the invoices had been denominated in Euros, on the grounds that the seller's judicial claim, which made reference to Swiss Francs, constituted a modification of the contract by reason of the buyer's silence).

²⁰See the following decision, which opposed a lower-court decision that had referred to article 59 in connection with the allocation of payments: CLOUT case No. 911 [Cour de Justice de Genève, Switzerland, 12 May 2006], available in English on the Internet at <http://cisgw3.law.pace.edu/cases/060512s1.html>.

²¹CLOUT case No. 828 [Gerechtshof's-Hertogenbosch, Netherlands, 2 January 2007], available in Dutch on the Internet at www.unilex.info/case.cfm?pid=1&do=case&id=1437&step=FullText.

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 With regard to the constitution of the offer, article 14 requires the price to be fixed or made determinable while article 55 provides a formula for establishing the price where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price of the goods sold. Apart from the key question whether a contract of sale may be validly concluded without a price, the application of article 55 is subject to requirements of a general nature, as shown in existing case law. Judges and arbitrators have also ruled on the methodology for establishing the price to which the parties are presumed to have impliedly made reference in accordance with article 55.

APPLICABILITY REQUIREMENTS OF A GENERAL NATURE

Conclusion of a contract of sale

2. For the implementation of article 55 a contract of sale, within the meaning of the Convention, has to have been concluded. Several decisions have thus rejected claims concerning the determination of the price based on article 55, since the claimants had been unable to prove that the alleged contracts had actually been concluded.² Also, article 55 is inapplicable if the contract involved is not a contract of sale within the meaning of the Convention.³

Observance of the intention of the parties

3. Court and arbitral decisions consistently hold that, in order to determine whether article 55 is applicable, one must refer first and foremost to the intention of the parties. Article 55 does not empower a judge or an arbitrator to establish the contract price when the parties have agreed on a fixed or determinable price within the meaning of article 14.⁴ In other words, article 55 is not a means of judicial price-setting, by reason of the principle of freedom of contract embodied in the CISG.⁵ Moreover, in several arbitral decisions it has been held that article 55 of the Convention was inapplicable where the parties wished to make the formation of the contract subject to subsequent agreement on the price. In the absence of any

such agreement, the sales contract is not concluded.⁶ One arbitration tribunal refused to apply article 55 owing to the existence of a clause allowing the buyer to amend the price after examining the goods, although the buyer had not exercised that contractual right.⁷

4. Where no price has been specified by the parties or where an open-price term applies, judges and arbitrators, in order to arrive at a fixed or determinable price in accordance with article 14, interpret the contract in the light of articles 8 and 9.⁸ This ascertainment of the parties' intention can lead to the conclusion that the parties wished to refer to the price formula set out in article 55.⁹

VALIDITY OF A CONTRACT SPECIFYING NO PRICE

5. Three different interpretations have been adopted in case law with regard to the meaning to be ascribed to the preliminary requirement in article 55, which gives rise to the difficulty of reconciling article 14—which requires, for the constitution of the offer, a fixed or determinable price—with article 55.

6. According to the most liberal view, a contract whose price is not fixed or determinable pursuant to article 14 is nonetheless effective owing to the subsidiary method of price determination set forth in article 55. Several courts have so ruled with respect to contracts whose performance had been commenced by the parties.¹⁰ In support of that interpretation it may be argued that, by commencing the performance of a contract whose price was not contractually established, the contracting parties wished to derogate from the requirement of a fixed or determinable price, as set forth in article 14. Arbitration case law also appears to indicate a willingness to give effect to contracts whose price was not specified by the parties, by reason, *inter alia*, of the needs of international trade.¹¹

7. A few decisions have given precedence to article 14 over article 55, concluding that the contract had not been formed since no price had been specified by the parties. In one famous case, a court held 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 from which the buyer could choose, and that the contract allegedly resulting from the proposal could not come into being.¹²

8. According to a third position taken by the courts, the question of the validity of a contract without a price is governed by domestic law, in accordance with CISG article 4. It should therefore be ascertained whether the national law applicable by virtue of choice-of-law rules allows the conclusion of a contract of sale without a fixed or determinable price before CISG article 55 can be implemented.¹³

DETERMINING THE PRICE UNDER ARTICLE 55

9. 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”. As was observed by one court, “this provision protects the buyer from paying too much” by establishing an objective standard for determining the price.¹⁴ Conversely, this provision would work against the buyer if the seller was prepared to sell the goods at a price lower than that generally applied to goods sold under comparable circumstances.¹⁵

10. When referring 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,” article 55 says nothing about the geographical area where the trade is carried on. Court decisions favouring the trade at the seller’s place of business can be cited.¹⁶ According

to another view, reference should be made first and foremost to the price at the place where delivery of the goods should have been made. This approach may be advantageous in regard to the choice of such place under article 76 (2) for calculating damages in the event of contract avoidance. While no court decisions have adopted that second approach, a link between article 76 and article 55 was nonetheless established by one court, which took article 55 as a basis for interpreting the concept of a current price for the goods, as stated in article 76 (1).¹⁷

11. Determining the price generally charged in the trade concerned gives rise to difficulties where there is no market price. That is mainly the case with sales involving manufactured products. In order nevertheless to determine the price, some decisions have referred to the seller’s list prices,¹⁸ thus rendering the sales contract effective. Conversely, the court which gave precedence to article 14 over article 55 in the well-known case involving an airline and an aircraft engine manufacturer had also held that the price of the aircraft engines could not be determined under article 55 since there was no market price for the goods, and it therefore concluded that the contract had not been formed.¹⁹

12. The reference to sales made “under comparable circumstances” requires that consideration be given to delivery and payment terms, such as those defined by the Incoterms, or to discounts generally applied.²⁰

Notes

¹1980 Vienna Diplomatic Conference, Summary Records of Meetings of the First Committee, 8th meeting, Monday, 17 March 1980. See also the Digest for article 14, paragraphs 13-17.

²See Nejvyšší soud České republiky, Czech Republic, 25 June 2008, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/080625cz.html> (it is necessary to assess whether a contract of sale has been concluded and whether it is valid); CLOUT case No. 908 [Handelsgericht Zürich, Switzerland, 22 December 2005], *Internationales Handelsrecht*, 2006, 161 (determining the price under article 55 requires the conclusion of a valid contract).

³CLOUT case No. 695 [U.S. District Court, Eastern District of Pennsylvania, United States, 29 March 2004], 312 F. Supp. 2d 681 (Amco Ukrservice et al. v. American Meter Company), available in English on the Internet at <http://cisgw3.law.pace.edu/cases/040329u1.html> (the court referred to the contradiction between article 14 and article 55 but without resolving it, since the contract involved was not a sales contract but a joint venture agreement).

⁴CLOUT case No. 343 [Landgericht Darmstadt, Germany, 9 May 2000] *Internationales Handelsrecht*, 2001, 27, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/560.htm, available in English on the Internet at www.cisg.law.pace.edu/cases/000509g1.html (freedom of contract underlies United Nations uniform sales law); CLOUT case No. 151 [Cour d’appel de Grenoble, France, 26 April 1995], available in French on the Internet at www.cisg-france.org/decisions/2604952v.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/950426f1.html> (rejection of a claim for a price reduction on the basis of the market price pursuant to article 55, which was inapplicable by reason of the price fixed by the parties); CLOUT case No. 106 [Oberster Gerichtshof, Austria, 10 November 1994], *Zeitschrift für Rechtsvergleichung*, 1995, 79, available in German on the Internet at www.cisg-online.ch/cisg/urteile/117.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/941110a3.html> (chinchilla furs case: if a price may be considered sufficiently determined within the meaning of article 14, it is not necessary to resolve the question whether a contract can be validly concluded through the fiction of an agreement under article 55).

⁵CLOUT case No. 343 [Landgericht Darmstadt, Germany, 9 May 2000] *Internationales Handelsrecht*, 2001, 27, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/560.htm, available in English on the Internet at www.cisg.law.pace.edu/cases/000509g1.html (freedom of contract underlies United Nations uniform sales law).

⁶CLOUT case No. 981 [China International Economic and Trade Arbitration Commission, People’s Republic of China, 25 December 1998], *Zhōngguó guójì jīngjì mào yì zhōngcái cáijué shū xuānbǎn*, vol. 1998, 3034, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/981225c2.html>; International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 22 November 1995, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/951122r1.html>; International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 3 March 1995 (Arbitral award No. 304/1993), available in English on the Internet at <http://cisgw3.law.pace.edu/cases/950303r2.html>; CLOUT case No. 139 [International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Russia, 3 March 1995 (Arbitral award No. 309/1993)]. These cases have to be distinguished from those where the parties refer to a subsequent agreement on the price without making that agreement a condition of the sale; see Landgericht Neubrandenburg,

Germany, 3 August 2005, *Internationales Handelsrecht*, 2006, 26, available in German on the Internet at www.cisg-online.ch/cisg/urteile/1190.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/050803g1.html>, and the reasoning elaborated in footnote 9.

⁷International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Russia, 16 February 1998, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/980216r2.html>.

⁸Arbitration Court of the International Chamber of Commerce, France, 1995 (Arbitral award No. 8324), *Journal du droit international* 1996, 1019, available in French on the Internet at www.unilex.info/case.cfm?pid=1&do=case&id=240&step=FullText, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/958324i1.html> (application of articles 8 and 9 to interpret the contract in connection with a clause providing for a provisional price which was to be revised according to the actual price obtained from the final buyer); CLOUT case No. 106 [Oberster Gerichtshof, Austria, 10 November 1994], *Zeitschrift für Rechtsvergleichung*, 1995, 79, available in German on the Internet at www.cisg-online.ch/cisg/urteile/117.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/941110a3.html> (chinchilla furs case: application of article 8 (1) and (2) in connection with a clause providing for a price range from 35 DM to 65 DM per pelt depending on the quality).

⁹Landgericht Neubrandenburg, Germany, 3 August 2005, *Internationales Handelsrecht*, 2006, 26, available in German on the Internet at www.cisg-online.ch/cisg/urteile/1190.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/050803g1.html> (in connection with a clause providing that the price of jars of fruit had to be determined during the season, the court held, as the main argument, that the clause referred to the seasonal price applied by the seller and thereby provided for a determination under the standards of article 55).

¹⁰CLOUT case No. 934 [Tribunal cantonal du Valais, Switzerland, 27 April 2007], *Revue suisse de droit international et européen*, 2008, 184, available in French on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1721.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/070427s1.html> (concerning an urgent order for an oven by a restaurant owner; “[i]f the seller does not indicate the price of the delivered goods, the price is deemed to be the price currently practised for such goods”; also, the contract of sale may be concluded without any price having been indicated by the parties); Landgericht Neubrandenburg, Germany, 3 August 2005, *Internationales Handelsrecht*, 2006, 26, available in German on the Internet at www.cisg-online.ch/cisg/urteile/1190.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/050803g1.html> (in connection with a contract of sale relating to jars of fruit which provided that the “price is to be fixed during the season”, the court stated subsidiarily (for the main argument, see footnote 9 *supra*) that, assuming the clause was construed as referring to a subsequent agreement by the parties on the price, the validity of the contract was unaffected since the parties were free to derogate from article 14 and that, in the absence of a later agreement, article 55 had to be implemented; the court held that the Russian arbitration ruling of 3 March 1995 was markedly different since the parties, in commencing performance of the contract, did not wish to make the formation of the contract subject to an agreement on the price); CLOUT case No. 215 [Bezirksgericht St. Gallen, 3 July 1997], *Revue suisse de droit international et européen*, 1998, 84, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/336.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/970703s1.html> (see, for this decision, the Digest for article 14). See also Landesgericht für Zivilrechtssachen Graz, Austria, 4 March 1993 (for the higher-court ruling in the chinchilla furs case see CLOUT case No. 106 [Oberster Gerichtshof, Austria, 10 November 1994], *Zeitschrift für Rechtsvergleichung*, 1995, 79, available in German on the Internet at www.cisg-online.ch/cisg/urteile/117.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/941110a3.html>; the intermediate appeals court relied on article 55, basing its finding on the principle that the price was not fixed or determinable in accordance with article 14, whereas the Oberster Gerichtshof held that the price was fixed or determinable within the meaning of article 14).

¹¹Arbitration Court of the International Chamber of Commerce, September 1999 (Arbitral award No. 9819), extracts in *International Court of Arbitration Bulletin*, 2001, vol. 12, No. 2, 56 (“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 (article 55) [...]”); Arbitration Court at the Chamber of Commerce and Industry of Bulgaria, Bulgaria, 30 November 1998, *Praktika Bălgarska tărgovsko-promishlena palata* (BTPP) 1998-1999, No. 4, 15, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/981130bu.html> (according to CISG article 55, the contract is valid even if the contractual price is not expressly or implicitly fixed).

¹²CLOUT case No. 53 [Legfelsőbb Bíróság, Budapest, Hungary, 25 September 1992], available on the Internet in Hungarian at www.unilex.info/case.cfm?pid=1&do=case&id=20&step=FullText and in English at <http://cisgw3.law.pace.edu/cases/920925h1.html>; for more on this decision, see paragraph 11 *infra*.

¹³International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 30 May 2001, available on the Internet in English at <http://cisgw3.law.pace.edu/cases/010530r2.html> (“Since, according to article 4 CISG, [the CISG] does not deal with the validity of the contract itself, its validity has to be determined according to the applicable national (in the present case—Russian) law. Russian law, according to article 424 of the Russian Federation Civil Code, allows conclusion of contracts without setting forth the price.”); cf. International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 22 November 1995, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/951122r1.html>.

¹⁴CLOUT case No. 934 [Tribunal cantonal du Valais, Switzerland, 27 April 2007], *Revue suisse de droit international et européen*, 2008, 184, available in French on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1721.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/070427s1.html>.

¹⁵CLOUT case No. 934 [Tribunal cantonal du Valais, Switzerland, 27 April 2007], *Revue suisse de droit international et européen*, 2008, 184, available in French on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1721.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/070427s1.html>.

¹⁶Landgericht Neubrandenburg, Germany, 3 August 2005, *Internationales Handelsrecht*, 2006, 26, available in German on the Internet at www.cisg-online.ch/cisg/urteile/1190.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/050803g1.html> (in connection with the sale of jars of fruit, the court referred to the seller’s market price since the seller fixed its financial terms on the basis of that market); see also the reasoning elaborated in footnote 9 *supra*; cf. Oberlandesgericht Rostock, Germany, 10 October 2001, *Internationales Handelsrecht*, 2003, 17, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/671.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/011010g1.html> (in connection with the sale of fish products, the court, applying article 55, referred to the seller’s list price since the orders had been placed in accordance with the seller’s product lists);

CLOUT case No. 934 [Tribunal cantonal du Valais, Switzerland, 27 April 2007], *Revue suisse de droit international et européen*, 2008, 184, available in French on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1721.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/070427s1.html>.

¹⁷CLOUT case No. 595 [Oberlandesgericht München, Germany, 15 September 2004], *Internationales Handelsrecht*, 2005, 70, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1013.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/040915g2.html>.

¹⁸CLOUT case No. 934 [Tribunal cantonal du Valais, Switzerland, 27 April 2007], *Revue suisse de droit international et européen*, 2008, 184, available in French on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1721.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/070427s1.html> (in connection with an order for an oven placed by a hotel owner); see, in support such an approach, even in regard to non-manufactured products, Oberlandesgericht Rostock, Germany, 10 October 2001, *Internationales Handelsrecht*, 2003, 17, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/671.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/011010g1.html> (sale of fish products). This approach is, however, impracticable for goods, such as equipment, which are specially designed to the buyer's requirements.

¹⁹CLOUT case No. 53 [Legfelsőbb Bíróság, Budapest, Hungary, 25 September 1992], available on the Internet in Hungarian at www.unilex.info/case.cfm?pid=1&do=case&id=20&step=FullText and in English at <http://cisgw3.law.pace.edu/cases/920925h1.html>. To prevent a contract being regarded as not having been formed in the absence of a market price, the reasonableness standard, conceived as a general principle within the meaning of article 7 (2), could lead a judge to fix a reasonable price. This approach has not yet been established in case law.

²⁰Landgericht Neubrandenburg, Germany, 3 August 2005, *Internationales Handelsrecht*, 2006, 26, available in German on the Internet at www.cisg-online.ch/cisg/urteile/1190.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/050803g1.html> (an order for a larger quantity of goods generally leads to a more favourable price); Arbitration Court of the International Chamber of Commerce, France, 1995 (Arbitral award No. 8324), *Journal du droit international*, 1996, 1019, available in French on the Internet at www.unilex.info/case.cfm?pid=1&do=case&id=240&step=FullText, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/958324i1.html> (referring to customary or negotiated discounts in connection with a provisional price to be revised by the parties).

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 states that, in cases where the parties fix the price according to the weight of the goods without expressly or impliedly indicating that they intend to refer to gross weight or net weight, it is net weight—the weight remaining after subtracting the weight of the packaging—that governs the price. This is a rule of interpretation which is applied in the absence of contractual stipulations, usages or practices established between the parties on the matter. Where the rule set forth in article 52 applies, the buyer does not pay for the weight of the packaging.¹
2. Court decisions referring to article 56 have been extremely rare.²

Notes

¹See UNCITRAL Secretariat Commentary to draft article 52.

²See CLOUT case No. 632 [U.S. Bankruptcy Court, Northern District of Ohio, United States, 10 April 2001] (Victoria Alloys, Inc. v. Fortis Bank SA/NV), 2001 Bankr. LEXIS 309, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/010410u1.html> (the decision merely cites CISG articles 53, 54, 56 and 57); Verhovnyi Sud Rossiiskoi Federats, Russian Federation, 23 September 1999, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/990923r1.html> (the judgment states that articles 48, 50 and 56 are unrelated to the question of the validity of an instruction of the exchange control authority); Verhovnyi Sud Rossiiskoi Federats, Russian Federation, 3 December 1998, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/981203r1.html> (while the claimant had maintained that an instruction of the exchange control authority conflicted with CISG articles 48, 50 and 56, the court did not reply to that point and invalidated the instruction on procedural grounds).

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, setting out three rules. First, the parties may have contractually specified the place of payment, in which case the buyer must pay the price at that place ("If the buyer is not bound to pay the price at any other particular place," article 57 (1)). Secondly, in the absence of an express or implicit choice, the buyer must pay the price at the place where the handing over of the goods or documents takes place against payment (article 57 (1) (b)). Thirdly, where the parties have not agreed on a place for payment and payment does not have to be made against handover of the goods or documents, the buyer must pay the price at the seller's place of business (article 57 (1) (a)). By thus determining the place of payment, article 57 (1) indirectly settles the question of who bears the risks of loss of the funds allocated for payment and the risks of delay in remittance of the funds.

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.

3. Article 57 is often referred to in case law. In addition to its direct effects, article 57 plays an indirect role, which manifests itself particularly in connection with the currency of payment¹ or with regard to determining the court having international jurisdiction.²

CHOICE OF PLACE OF PAYMENT BY THE PARTIES

4. As is stated in the Secretariat Commentary, "the contract will usually contain specific provisions on the (...) place of payment".³ The choice of place may be express or implicit.⁴ The use of payment clauses often determines implicitly the place of payment. This applies to a "cash against delivery" clause, under which payment has to be made at the place of handover.⁵ The indication of a bank account on an invoice from the seller is open to various

interpretations. One court held that the mere indication of a bank account on an invoice may be construed not as an offer to agree on a new place of payment but, on the contrary, as a simple authorization to pay the funds to that account.⁶ The place of payment may also be inferred from practices established between the parties (article 9 (1))⁷ or from commercial usages (article 9 (2)).

PAYMENT OF THE PRICE AGAINST THE HANDING OVER OF THE GOODS OR OF DOCUMENTS WHERE THE HANDING OVER TAKES PLACE (ARTICLE 57 (1) (b))

5. In cases where payment has to be made against the handing over of the goods or documents, article 57 (1) (b) requires the buyer to pay the price at the place of such handing over. Article 57 (1) (b) accordingly relates to the rule set forth in article 58 (1).⁸ It follows from this latter provision that handing over the goods simultaneously with payment of the price is the general rule, which will apply in the absence of any other agreement of the parties (article 58 (1), first sentence). In other words, for article 57 (1) (b) to be applicable there has to be simultaneous performance of the buyer's obligation to pay the price and of the seller's obligation to place the goods or documents at the buyer's disposal. This means that article 57 (1) (b) is inapplicable if one party is obliged to render performance before the other party is required to do so. That was the case in connection with a sale of an industrial plant where 30 per cent of the sale price was payable at the time of the order, 30 per cent at the beginning of assembly, 30 per cent on completion of assembly and 10 per cent on start-up.⁹ The inapplicability of article 57 (1) (b) also occurs, as was noted by one court, where the price is payable 30 days following presentation of the bill of lading.¹⁰

6. Article 57 (1) (b) treats handover of documents in the same way as handover of goods. The provision does not include a definition of documents. Insofar as article 57 (1) (b) reflects (in connection with the place of payment) the rule set forth in article 58 (1) regarding the time of payment, the term "documents" used in article 57 (1) (b) has the same meaning as under article 58 (1).¹¹

7. Where the contract involves carriage of the goods, the seller will generally perform the obligation to deliver before the buyer pays the price. In fact, the obligation to deliver consists, in a case of carriage, in “handing the goods over to the first carrier for transmission to the buyer” (article 31 (a)), whereas the buyer is not required to pay the price until the time when the seller places either the goods or documents controlling their disposition at the buyer’s disposal (article 58 (1)). However, under article 58 (2), the seller may make the dispatch of the goods subject to the condition that the goods or documents controlling their disposition will not be handed over to the buyer except against payment of the price. In that case, handing over the goods and payment of the price will be simultaneous, thus giving rise to application of article 57 (1) (b).

PAYMENT OF THE PRICE AT THE SELLER’S PLACE OF BUSINESS (ARTICLE 57 (1) (a))

8. Article 57 (1) (a) applies on a subsidiary level. Where a place of payment has not been agreed on by the parties or payment does not have to be effected against handover of the goods, the buyer must pay the seller at the seller’s place of business.¹² Article 57 (1) (a) therefore applies only if one party is required to perform its obligations before the other, in which case the price is payable at the seller’s place of business, unless otherwise agreed by the parties. Article 57 (1) (a) is thus applicable, as shown by various decisions, if the seller has to perform all or part of its obligations before the buyer is required to pay the price.¹³

CHANGE IN THE SELLER’S PLACE OF BUSINESS (ARTICLE 57 (2))

9. By providing that the seller must bear any increase in the buyer’s expenses incidental to payment that is caused by a change in the seller’s place of business subsequent to the conclusion of the contract, article 57 (2) implicitly imposes on the buyer the obligation to pay the price at the seller’s new address. The seller must accordingly inform the buyer of the change in a timely manner. Pursuant to the principle set forth in article 80 of the Convention, the seller would be unable to rely on any delay in payment of the price that is caused by late notification of its change of address.

10. A seller often assigns the right to receive payment of the sale price, in particular for refinancing purposes. If the place of payment is that of the seller’s business premises (article 57 (1) (a)), the question arises whether the buyer has to pay the price at the place of business of the assignor or that of the assignee. According to one decision, assignment of the right to receive the sale price results in the transfer of the place of payment from the business premises of the assignor to those of the assignee.¹⁴ That decision may be cited to support the view that article 57 (2) embodies a general principle, within the meaning of article 7 (2), which is applicable in the specific case of the assignment of debts. According to a different interpretation, not yet endorsed by case law, the effects of debt assignment on the place of payment of the price are governed by the law applicable according to choice-of-law rules.

PLACE OF PAYMENT OF THE PRICE AND JURISDICTIONAL COMPETENCE

11. Article 57 (1) can play a role in the determination of jurisdiction when the plaintiff is entitled to bring a case relating to a contractual matter before the court for the place of performance of the obligation forming the basis of the legal proceedings, by virtue of national laws¹⁵ or international instruments. Article 57 (1) has accordingly been applied in numerous court decisions in connection with both the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, of 27 September 1968, which is binding for the States of the European Union, and the Lugano Convention of 16 September 1988, which binds the States of the European Union together with those of the European Free Trade Association. These two instruments have since been replaced by Council Regulation No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and by the Lugano Convention of 30 October 2007. Council Regulation No. 44/2001 of 22 December 2000 applies whenever the defendant, whatever its nationality, is domiciled (article 2) or has its statutory seat, its central administration, or its principal place of business (article 60) in a State that is a member of the Union. A similar rule exists in the 1968 Brussels Convention (articles 2 and 53) and in the Lugano Conventions of 1988 (articles 2 and 53) and 2007 (articles 2 and 60). In relation to the two new instruments, i.e. the Regulation of 22 December 2000 and the 2007 Lugano Convention, article 57 CISG plays only a secondary role.¹⁶

12. Article 5.1 (b) of the 1968 Brussels Convention 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 appears in the Lugano Convention of 16 September 1988 (article 5.1 (b)). The result of the combined application of article 5.1 (b) of the Brussels and Lugano Conventions and of CISG article 57 is that, in the case of an international sale governed by the Vienna Convention, a seller can take legal action to seek payment of the price from a defaulting buyer by suing that buyer before the court of the place of payment of the price instead of before the court of the buyer’s place of domicile (article 2 of the Brussels and Lugano Conventions). Any justifiable doubts as to the applicability of CISG article 57 in connection with the implementation of article 5.1 of the Brussels Convention were removed by the Court of Justice of the European Community. The latter in fact stated that the place of performance of the obligation to pay the price “must be determined pursuant to the substantive law applicable to the obligation in issue under the conflict rules of the court seized, even if those rules refer to the application to the contract of provisions such as those of the Uniform Law on the International Sale of Goods [ULIS], annexed to the Hague Convention of 1 July 1964”.¹⁷ What was held in regard to ULIS is, for the same reasons, also valid in respect of the Vienna Convention, which replaces ULIS. Decisions applying CISG article 57 in connection with the implementation of article 5.1 of the Brussels¹⁸ and Lugano¹⁹ Conventions have been numerous.

13. On 1 March 2002, in the countries of the European Union, Council Regulation No. 44/2001 of 22 December

2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters²⁰ entered into force, replacing the Brussels Convention.²¹ For those European States, article 57 of the United Nations Convention on Contracts for the International Sale of Goods ceases to play the role that it previously played in the determination of jurisdictional competence. The provisions on special jurisdiction in contractual matters are in fact revised by the new text. Although the principle rule whereby “[a] person domiciled in a Member State may, in another Member State, be sued: ... in matters relating to a contract, in the courts for the place of performance of the obligation in question” (article 5.1 (a)) is retained, the Regulation specifies 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 Regulation accordingly establishes the place of delivery of the goods as a linking factor applicable to all claims relating to a contract for the sale of goods and not merely to claims founded on the obligation to deliver.²² This rule makes it possible to group together actions relating to a sales contract before the court of the place of delivery, whatever the obligations at issue might be. Thus, a claim for payment of the price must, by virtue of the special jurisdiction provision in article 5.1 (b), be filed with the court for the place of delivery of the goods.²³ Both “sale of goods”²⁴ and “place of delivery of the goods”²⁵ are autonomous concepts that have to be defined according to the origin, objectives and scheme of the Regulation.²⁶ The Lugano Convention of 30 October 2007 was aligned with Regulation No. 44/2001 in this and other areas. Article 5.1 of the new Lugano Convention is thus in all respects comparable to article 5.1 of Regulation No. 44/2001. Whether in connection with Regulation No. 44/2001 or the new Lugano Convention, CISG article 57 continues to play its traditional role when the place of delivery is not in a member State. In that case, the basic rule (article 5.1 (a)) is applicable and CISG article 57 retains all its importance if the seller sues the buyer for payment of the price in regard to a contract of sale governed by the Vienna Convention. Similarly, the parties are at liberty to derogate from article 5.1 (b) of the Council Regulation, in which case CISG article 57 will resume its traditional role in the determination of the court having jurisdiction to hear the action for non-payment of the price.²⁷

APPLICATION OF ARTICLE 57 (1) TO SUMS OF MONEY OTHER THAN THE PRICE

14. The question arises whether article 57 (1) is also applicable to determine the place for payment of monetary obligations other than the price. Various courts have been faced with this difficulty in connection with claims for damages and claims for restitution of all or part of the price or payment of a bonus promised by the seller.

15. Several decisions have ruled on the place of performance of the obligation to pay damages, following breach of contract, in order to determine the court having jurisdiction. Decision-makers accordingly avoid resorting to national laws and apply the rules of the Vienna Convention. Two interpretations have been adopted in case law. Some decisions have, in regard to damage claims, opted for the creditor’s place of business, as a general principle inferred from the rule whereby the price is normally payable at the place of business of the seller (article 57 (1) (a)), the party entitled to receive the sale price.²⁸ Other decisions have held that the place of performance for damages claims should be the place of performance of the breached contractual obligation.²⁹ This second line of judicial reasoning can be linked to the approach adopted by the Court of Justice of the European Community, which, in connection with article 5.1 of the Brussels Convention, locates the place of performance in respect of a claim for damages at the place for performance of the obligation whose breach was alleged by the party seeking damages.³⁰

16. Comparable difficulties arise with regard to determining the place of performance of the obligation to refund the price following avoidance of the contract for breach of contract or following termination of the contract by agreement of the contracting parties, or the place of reimbursement of an overpayment to the buyer. These difficulties have also arisen in connection with the implementation of the Brussels Convention. Some decisions refer to the national law governing the contract.³¹ Other decisions rely on the Convention to determine the place of performance by virtue of a general principle of the Convention, according to which the price has to be refunded at the creditor’s place of business.³²

17. It has also been held, in connection with the promise of a bonus made by a mail-order company to a buyer of goods, that the place of performance of that promise was the place of business of the creditor—i.e., in this case, the buyer, by analogous application of CISG article 57 (1) (a).³³

Notes

¹See the Digest for article 54.

²See paragraphs 11 et seq. *infra*.

³Secretariat Commentary to draft article 53, paragraph 1.

⁴Landgericht Trier, Germany, 7 December 2000, *Internationales Handelsrecht*, 2001, 35, English abstract available on the Internet at www.unilex.info/case.cfm?pid=1&do=case&id=800&step=Abstract (under a long-standing business relationship, the seller regularly debited the price directly to an account of the buyer, which could be regarded as an implicit choice of the manner of payment).

⁵Landgericht Nürnberg-Fürth, Germany, 27 February 2003, *Internationales Handelsrecht*, 2004, 20, available on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/818.pdf.

⁶CLOUT case No. 221 [Zivilgericht des Kantons Basel-Stadt, Switzerland, 3 December 1997], *Revue suisse de droit international et européen*, 1999, 190, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/346.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/971203s2.html>; cf. CLOUT case No. 890 [Tribunale di appello Lugano, Switzerland, 29 October 2003], *Revue suisse de droit international et européen*, 2004, 109.

⁷CLOUT case No. 363 [Landgericht Bielefeld, Germany, 24 November 1998], *Internationales Handelsrecht*, 2001, 199, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/697.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/981124g1.html> (practice established over many years whereby the seller bore the payment costs to the benefit of the distributor (buyer)); CLOUT case No. 221 [Zivilgericht des Kantons Basel-Stadt, Switzerland, 3 December 1997], *Revue suisse de droit international et européen*, 1999, 190, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/346.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/971203s2.html> (the procedure followed under two previous contracts was not sufficient to constitute a practice).

⁸CLOUT case No. 194 [Tribunal fédéral, Switzerland, 18 January 1996], *Arrêts du Tribunal fédéral*, 122 III, 43, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/214.pdf (in connection with determining the court having jurisdiction pursuant to the Lugano Convention of 16 September 1988—article 5.1).

⁹CLOUT case No. 194 [Tribunal fédéral, Switzerland, 18 January 1996], *Arrêts du Tribunal fédéral*, 122 III, 43, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/214.pdf (the court found that the price was payable at the seller's place of business, in accordance with article 57 (1) (a)).

¹⁰CLOUT case No. 221 [Zivilgericht des Kantons Basel-Stadt, Switzerland, 3 December 1997], *Revue suisse de droit international et européen*, 1999, 190, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/346.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/971203s2.html>.

¹¹See the Digest for article 58.

¹²CLOUT case No. 605 [Oberster Gerichtshof, Austria, 22 October 2001], *Juristische Blätter*, 2002, 327, also available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/614.pdf.

¹³Landgericht Krefeld, Germany, 20 September 2006, *Internationales Handelsrecht* 2007, 161, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1459.pdf (in connection with a contract involving sea carriage, in which the price was payable 60 days after arrival in Germany or 85 days after loading); Landgericht Freiburg, Germany, 26 April 2002, *Internationales Handelsrecht* 2002, 72, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/690.htm (in connection with a payment which, in accordance with the invoice, was to be made 14 days after dispatch of the goods); CLOUT case No. 194 [Tribunal fédéral, Switzerland, 18 January 1996], *Arrêts du Tribunal fédéral*, 122 III, 43, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/214.pdf (on this decision, see footnotes 8 et seq. *supra*). These three decisions were rendered in regard to determining the court having international jurisdiction (see paragraphs 11 et seq. *infra*).

¹⁴CLOUT case No. 274 [Oberlandesgericht Celle, Germany, 11 November 1998], *Praxis des Internationalen Privat- und Verfahrensrechts*, 1999, 456, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/507.htm.

¹⁵See, in connection with the application of section 29 (1) of the German Code of Civil Procedure (Zivilprozessordnung), Oberlandesgericht Saarbrücken, Germany, 12 May 2010, *Internationales Handelsrecht* 2010, 202, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/2155.pdf; CLOUT case No. 49 [Oberlandesgericht Düsseldorf, Germany, 2 July 1993], *Recht der Internationalen Wirtschaft*, 1993, 845, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/74.htm (from CISG article 57 (1) (a) it is possible to infer a general principle under which the place of settlement of a monetary claim is the creditor's place of business); Landgericht Krefeld, Germany, 19 December 1995, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/397.htm; Landgericht Nürnberg-Fürth, Germany, 26 July 1994, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/266.htm (the debtor's obligation to pay the price has to be performed at the creditor's place of business).

¹⁶See paragraph 13 *infra*.

¹⁷CLOUT case No. 298 [Court of Justice of the European Community, European Community, 29 June 1994 (case C-288/92)], *Report of Cases before the Court of Justice and the Court of First Instance*, 1994, I-2913 (Custom Made Commercial).

¹⁸See, in particular, CLOUT case No. 843 [Korkein oikeus, Finland, 14 October 2005], *Korkeimman oikeuden ratkaisuja II*, KKO 2005:114; Oberlandesgericht Wien, Austria, 1 June 2004, available on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/954.pdf; Oberster Gerichtshof, Austria, 29 March 2004, available on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/926.pdf; Bundesgerichtshof, Germany, 25 February 2004, *Neue Juristische Wochenschrift—Rechtsprechungsreport Zivilrecht* (NJW-RR), 2004, 1292, available on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1051.pdf; Retten i Randers, Denmark, 12 September 2003, available in Danish on the Internet at www.cisgnordic.net/index.php/cases/danishcases/34-danishcaselaw/95-2003-sep-12-dc; Cour d'appel de Liège, Belgium, 28 April 2003, available in French on the Internet at www.law.kuleuven.be/ipr/eng/cases/2003-04-28.html, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/030428b1.html>; CLOUT case No. 772 [Bundesgerichtshof, Germany, 30 April 2003], *Neue Juristische Wochenschrift—Rechtsprechungsreport Zivilrecht* (NJW-RR), 2003, 1582, English translation available on the Internet at www.cisg.law.pace.edu/cisg/wais/db/cases2/030430g1.html; Rechtbank van Koophandel Veurne, Belgium, 19 March 2003, available in Dutch on the Internet at www.law.kuleuven.be/ipr/eng/cases/2003-03-19.html, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/030319b1.html>; Oberster Gerichtshof, Austria, 18 December 2002, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1279.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/021218a3.html>; Bundesgerichtshof, Germany, 2 October 2002, *Internationales Handelsrecht*, 2003, 28, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/700.htm; Landgericht Göttingen, Germany, 20 September 2002, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/655.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/020920g1.html>; CLOUT case No. 1017 [Hof van Beroep Gent, Belgium, 15 May 2002], *Tijdschrift voor Belgisch Handelsrecht*, 2003, 155, available in Dutch on the Internet at www.law.kuleuven.be/ipr/eng/cases/2002-05-15.html, available in English on the Internet at www.cisg.law.pace.edu/cisg/wais/db/cases2/020515b1.html; Hof van Beroep Gent, Belgium, 31 January 2002, *Rechtskundig Weekblad*, 2002-2003, 664, available in Dutch on the Internet with an English abstract at <http://www.law.kuleuven.be/ipr/eng/cases/2002-01-31.html>; Cour de cassation, 1^{re} chambre civile, France, 26 June 2001, *Recueil Dalloz*, 2001, 2593, available in French on the Internet

at www.cisg-france.org/decisions/2606013v.htm; Landgericht Flensburg, Germany, 19 January 2001, available on the Internet at www.cisg-online.ch/cisg/urteile/619.htm; CLOUT case No. 379 [Corte di Cassazione, Sezioni Unite, Italy, 14 December 1999], *Giustizia civile*, 2000, 2333; CLOUT case No. 343 [Landgericht Darmstadt, Germany, 9 May 2000], *Internationales Handelsrecht*, 2001, 27-30 (see full text of the decision); Landgericht Trier, Germany, 7 December 2000, *Internationales Handelsrecht*, 2001, 35, abstract available on the Internet at www.unilex.info/case.cfm?pid=1&do=case&id=800&step=Abstract; Tribunal de commerce de Charleroi, Belgium, 20 October 2000, available in French on the Internet at www.unilex.info/case.cfm?pid=1&do=case&id=781&step=FullText; Landgericht Memmingen, Germany, 13 September 2000, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/820.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/000913g1.html>; Oberlandesgericht Stuttgart, Germany, 28 February 2000, *Internationales Handelsrecht*, 2001, 65, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/583.htm; CLOUT case No. 361 [Oberlandesgericht Braunschweig, Germany, 28 October 1999], *Internationales Handelsrecht*, 2000, 4; CLOUT case No. 377 [Landgericht Flensburg, Germany, 24 March 1999], *Internationales Handelsrecht*, 2001, 202, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/719.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/990324g2.html>; CLOUT case No. 725 [Corte di Cassazione, Sezioni Unite, Italy, 1 February 1999]; CLOUT case No. 320 [Audencia Provinciale de Barcelona, Spain, 7 June 1999], *Actualidad Civil*, 2000, No. 5, 87 (see full text of the decision); CLOUT case No. 274 [Oberlandesgericht Celle, Germany, 11 November 1998], *Praxis des Internationalen Privat- und Verfahrensrechts*, 1999, 456, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/507.htm; 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¹⁹Cour suprême du canton de Berne, Switzerland, 19 May 2008, available in French on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1738.pdf; Handelsgericht Aargau, Switzerland, 5 February 2008, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1740.pdf; Handelsgericht Aargau Switzerland, 19 June 2007, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1741.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/070619s1.html>; Oberlandesgericht Düsseldorf, Germany, 24 July 2007, available on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1531.pdf; CLOUT case No. 906 [Kantonsgesicht Nidwalden, Switzerland, 23 May 2005], *Internationales Handelsrecht*, 2005, 253; Handelsgericht St. Gallen, Switzerland, 29 April 2004, *Revue suisse de droit international et européen*, 2005, 121, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/962.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/040429s1.html>; Oberster Gerichtshof, Austria, 18 November 2003, *Österreichische Juristen-Zeitung*, 2004, 305, available in German on the Internet at www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_20031118_OGH0002_00400B00191_03X0000_000; Handelsgericht St. Gallen, Switzerland, 11 February 2003, *Revue suisse de droit international et européen*, 2004, 107, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/900.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/030211s1.html>; CLOUT case No. 882 [Handelsgericht Aargau, Switzerland, 5 November 2002], *Revue suisse de droit international et européen*, 2003, 103, *Internationales Handelsrecht*, 2003, 160; Landgericht Freiburg, Germany, 26 April 2002, *Internationales Handelsrecht*, 2002, p. 72, available in German on the Internet at www.cisg-online.ch/cisg/urteile/690.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/020426g1.html>; Corte di Appello di Milano, Italy, 23 January 2001, *Rivista di diritto internazionale privato e processuale*, 2001, 1008, available in Italian on the Internet at www.unilex.info/case.cfm?pid=1&do=case&id=768&step=FullText, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/010123i3.html>; CLOUT case No. 325 [Handelsgericht Zürich, Switzerland, 8 April 1999], *Revue suisse de droit international et européen*, 2000, 113, *Internationales Handelsrecht*, 2001, 45; CLOUT case No. 221 [Zivilgericht Basel-Stadt, Switzerland, 3 December 1997], *Revue suisse de droit international et européen*, 1999, 190, *Internationales Handelsrecht*, 1999, 11; CLOUT case No. 194 [Bundesgericht, Switzerland, 18 January 1996], *Amtliche Sammlung der Entscheidungen des Schweizerischen Bundesgerichts* (BGE), Jahrgang 122, Band III, 43.

²⁰*Official Journal of the European Community* L 12 of 16 January 2001, 1.

²¹The Regulation applies to legal proceedings instituted after 1 March 2002 (article 66). Initially, the Regulation was not applicable to Denmark. It has been applicable to Denmark since 1 July 2007, the date of entry into force of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial

matters (*Official Journal of the European Union* L 299 of 16 November 2005, 62; see also the Information on the date of entry into force of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *Official Journal of the European Union* L 94 of 4 April 2007, 70).

²²Court of Justice of the Community, European Union, 3 May 2007 (case C-386/05), *Report of Cases before the Court of Justice and the Court of First Instance*, 2007, I-03699 (*Color Drack*), available on the Internet at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0386:FR:NOT> (“[In a case involving] several places of delivery within a single Member State ..., the court having jurisdiction to hear all the claims based on the contract for the sale of goods is that for the principal place of delivery, which must be determined on the basis of economic criteria. In the absence of determining factors for establishing the principal place of delivery, the plaintiff may sue the defendant in the court for the place of delivery of its choice”).

²³See Bundesgerichtshof, Germany, 23 June 2010, available in German on the Internet at www.globalsaleslaw.com/content/api/cisg/urteile/2129.pdf; Polymeles Protodikio Athinon, Greece, 2009, *Dikeo Epirhiseon ke Eterion*, 2009, 831, English abstract available on the Internet at <http://cisgw3.law.pace.edu/cases/092282gr.html>; Oberster Gerichtshof, Austria, 3 April 2008, *Zivilrecht aktuell*, 2008, 259, available in German on the Internet at www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JIT_20080403_OGH0002_0010OB00205_07I0000_000, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/080403a3.html>; Monomeles Protodikio Thessalonikis, Greece, 2008, *Hronika Idiotikou Dikeou*, 2008, 146, available in Greek on the Internet at <http://cisgw3.law.pace.edu/cisg/text/080001greek.pdf>, English abstract available on the Internet at <http://cisgw3.law.pace.edu/cases/080001gr.html>; Oberlandesgericht Köln, Germany, 21 December 2005, *Internationales Handelsrecht*, 2006, 86, available in German on the Internet at www.justiz.nrw.de/nrwe/olgs/koeln/j2005/16_U_47_05beschluss20051221.html, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/051221g1.html>; Oberlandesgericht Hamm, Germany, 6 December 2005, *Internationales Handelsrecht*, 2006, 84, available in German on the Internet at www.justiz.nrw.de/nrwe/olgs/hamm/j2005/19_U_120_05urteil20051206.html, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/051206g1.html>; Oberster Gerichtshof, Austria, 8 September 2005, *Entscheidungen des OGH in Zivilsachen*, 2005, 128, available in German on the Internet at www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JIT_20050908_OGH0002_0080OB00083_05X0000_000; Tribunale di Rovereto, Italy, 28 August 2004, *Rivista di diritto internazionale privato e processuale*, 2005, 162, available in Italian on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/902.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/040828i3.html>; Landgericht München, Germany, 23 March 2004, *Praxis des Internationalen Privat- und Verfahrensrechts*, 2005, 143, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/998.pdf.

²⁴Court of Justice of the European Union, European Union, 25 February 2010 (case C-381/08) (*Car Trim*), available on the Internet at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0381:EN:NOT>, paragraphs 33 et seq. (in this judgment, the Court relied, inter alia, on CISG article 3 (1) and article 6 (2) of the Convention on the Limitation Period in the International Sale of Goods); Court of Justice of the European Community, European Union, 3 May 2007 (case C-386/05), *Report of Cases before the Court of Justice and the Court of First Instance*, 2007, I-3699 (*Color Drack*), paragraph 18, available on the Internet at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0386:FR:NOT>.

²⁵Court of Justice of the European Union, European Union, 25 February 2010 (case C-381/08) (*Car Trim*), available on the Internet at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0381:EN:NOT> (in connection with the place of delivery concerning a sale involving carriage of the goods, the Court held that, in the absence of a contractual provision, the place of delivery was that of the physical transfer of the goods, as a result of which the buyer obtained or should have obtained actual power of disposal over the goods, without having to refer to the substantive law applicable to the contract); see also Bundesgerichtshof, Germany, 23 June 2010, available in German on the Internet at www.globalsaleslaw.com/content/api/cisg/urteile/2129.pdf (the judgment reproduces the findings of the judgment of the Court of Justice of the European Union of 25 February 2010); Corte Suprema di Cassazione, Italy, 5 October 2009, available in Italian on the Internet at www.unilex.info/case.cfm?pid=1&do=case&id=1502&step=FullText (the place of delivery is that of the final destination of the goods); Oberster Gerichtshof, Austria, 3 April 2008, *Zivilrecht aktuell*, 2008, 259, available in German on the Internet at www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JIT_20080403_OGH0002_0010OB00205_07I0000_000, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/080403a3.html> (the decisive criterion is that of the place where performance was actually effected).

²⁶Court of Justice of the European Union, European Union, 25 February 2010 (case C-381/08) (*Car Trim*), paragraphs 33 et seq., available on the Internet at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0381:FR:NOT>; Court of Justice of the European Community, European Union, 9 July 2009 (case C-204/08), *Report of Cases before the Court of Justice and the Court of First Instance*, 2009, I-6073 (*Rehder*), paragraphs 30 et seq., available on the Internet at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0204:FR:NOT> (in connection with the concepts of sale and provision of services); Court of Justice of the European Community, European Union, 3 May 2007 (case C-386/05), *Report of Cases before the Court of Justice and the Court of First Instance*, 2007, I-3699 (*Color Drack*), paragraph 18, available on the Internet at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0386:FR:NOT>.

²⁷See Oberster Gerichtshof, Austria, 8 September 2005, *Entscheidungen des OGH in Zivilsachen*, 2005, 128, available on the Internet at www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JIT_20050908_OGH0002_0080OB00083_05X0000_000.

²⁸See Oberster Gerichtshof, Austria, 29 March 2004, *Zeitschrift für Europarecht, Internationales Privatrecht und Rechtsvergleichung (ZfRV)*, 2004, 156, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/926.pdf, English abstract available on the Internet at <http://cisgw3.law.pace.edu/cases/040329a3.html> (subsidiary argument in connection with the implementation of article 5.1 of the Brussels Convention); CLOUT case No. 589 [Landgericht Gießen, Germany, 17 December 2002], *Internationales Handelsrecht*, 2003, 276 (in connection with the application of Council Regulation No. 44/2001 of 22 December 2000, thus disregarding the scope of article 5.1 (b) of the Regulation); CLOUT case No. 49 [Oberlandesgericht Düsseldorf, Germany, 2 July 1993], *Recht der Internationalen Wirtschaft*, 1993, 845 (in connection with the implementation of section 29 of the German Code of Civil Procedure).

²⁹Oberster Gerichtshof, Austria, 29 March 2004, *Zeitschrift für Europarecht, Internationales Privatrecht und Rechtsvergleichung (ZfRV)*, 2004, 156, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/926.pdf (principal argument in connection with the implementation of article 5.1 of the Brussels Convention); Cour d’appel de Liège, Belgium, 28 April 2003, available in French on the Internet at www.law.kuleuven.be/ipr/eng/cases/2003-04-28.html, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/030428b1.html> (in connection with the implementation of article 5.1 of the Brussels Convention); CLOUT case No. 361 [Oberlandesgericht Braunschweig, Germany, 28 October 1999], *Internationales Handelsrecht*, 2000, 4 (in connection with the implementation of article 5.1 of the Brussels Convention).

³⁰Court of Justice of the European Community, European Union, 6 October 1976 (case C-14/76), *Report of Cases before the Court of Justice*, 1976, 1497 (*De Bloos*).

³¹CLOUT case No. 421 [Oberster Gerichtshof, Austria, 10 March 1998], *Österreichische Zeitschrift für Rechtsvergleichung*, 1998, 161 (the Vienna Convention is not applicable for determining the place of performance with regard to a claim for restitution of the sale price following termination of the contract by agreement); CLOUT case No. 312 [Cour d'appel de Paris, France, 14 January 1998] (a general principle cannot be inferred from the Convention, since article 57 (1) can correspond both to the principle of payment at the seller's domicile and to that of payment at the creditor's domicile).

³²Oberster Gerichtshof, Austria, 29 June 1999, *Transportrecht-Internationales Handelsrecht*, 1999, 48, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/483.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/990629a3.html> (the gap in the Convention with respect to the performance of restitutionary obligations should be filled by reference to a general principle of the Convention according to which the "place of performance for the obligations concerning restitution should mirror the place of performance for the primary contractual obligations"; the wording is general whereas the obligation in question, following termination by agreement, was concerned with the restitution of the goods); CLOUT case No. 205 [Cour d'appel de Grenoble, France, 23 October 1996], *Revue critique de droit international privé*, 1997, 762 (see full text of the decision) (in an action for restitution of excess payments received by the seller, the court stated that there was a general principle under which "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").

³³Oberster Gerichtshof, Austria, 18 December 2002, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1279.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/021218a3.html>.

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 matter.¹ Where it fixes the time at which the price is payable, article 58 also determines the moment at which interest based on article 78 of the Convention begins to accrue, as has been observed in many 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 handover of the goods (or of documents controlling their disposition) and payment of the price:³ the buyer must pay the price when the seller places either the goods or documents controlling their disposition at its disposal (article 58 (1) first sentence). This main rule is accompanied by two complementary rules. First, article 58 (3) grants the buyer the right to examine the goods prior to payment unless the delivery or payment terms agreed on by the parties do not afford the buyer that right. Secondly, the handover of the goods or documents controlling their disposition to the buyer may be refused if the buyer does not pay the price at the time fixed by the Convention (article 58 (1), second sentence, and article 58 (2)). The seller thus has the right to retain the goods (or documents controlling their disposition) in these circumstances.

3. Contract terms, commercial usages and practices established between the parties (article 9)⁴ may give rise to derogation from the rule of simultaneous exchange of goods and price, a principle which, according to article 58 (1), applies only "[i]f the buyer is not bound to pay the price at any other specific time." The primacy of party autonomy has been emphasized by various courts.⁵ Account also has to be taken of any contract modifications made by the parties (article 29).⁶

4. As reflected in case law, it often happens that the parties to an international sale covered by the Convention expressly or impliedly agree on the time for payment of the price. Contractual stipulations may take very varied forms. The courts have accordingly given effect to clauses that provide for payment of the price upon the issuance of notice from the seller that the goods are ready for delivery⁷ or that stipulate that the price is payable upon receipt of the invoice⁸ or within a specific period from issuance or receipt of the invoice⁹ or on a calendar day¹⁰ or within a specific period from delivery of the goods¹¹ or from receipt of the documents referred to in the contract¹² or within a time limit preceding takeover of the goods by the buyer¹³ or within a specific period after delivery of the goods on board the vessel.¹⁴ Some decisions have also given effect to a clause which provides for payment of the price within a specific period from the buyer's acceptance of seasonal order confirmation¹⁵ or within a specific period from payment by a sub-buyer.¹⁶ Similarly, one decision gave effect, in connection with a consignment sale, to a clause which had made payment of the price of goods consigned and stored at a separate location conditional on their withdrawal from stock by the buyer.¹⁷ The time of payment can very often be determined from a payment clause contained in the contract, such as clauses providing for "cash on delivery",¹⁸ "cash before delivery", "payment on invoice" or "cash against documents". The Incoterms (2000 and 2010) stipulate solely that "the buyer must pay the price of the goods as provided in the contract of sale" without directly determining the time for payment of the price. By specifying the place of delivery of the goods, the Incoterms can nevertheless influence the time for payment of the price.¹⁹ Contractual provisions relating to payment due dates can also include settlement by instalments, under different modalities. In a dispute heard by the Swiss Higher Federal Court, the contract stipulated that 30 per cent of the price was to be paid at the time when an industrial plant was ordered, 30 per cent at the commencement of assembly and 30 per cent on completion of installation, the final 10 per cent being due after successful start-up of the facility.²⁰ The court observed that

the parties had thus derogated from the principle of simultaneous performance as embodied in CISG article 58. It has similarly been held that a seller who had granted credit to the buyer could not rely on the principle of simultaneous performance in CISG article 58.²¹ Also, the parties derogate from the principle of simultaneous performance if they decide to postpone the payment date by arranging, after delivery of the goods, for settlement by bill of exchange.²²

5. The place for handing over the goods or documents depends on the rules set forth in the Convention. Article 31 acknowledges the primacy of party autonomy, which is often expressed, in contract practice, by reference to trade terms, such as the Incoterms. For the sale of goods at a particular place, the price becomes payable when the goods are at the buyer's disposal at the place agreed on by the parties (article 31) or, failing that, at the place of manufacture or production of the goods (article 31 (b)) or at the seller's place of business (article 31 (c)). If the seller has to deliver the goods at the buyer's place of business or at any other place (article 31), the price becomes payable when the goods are placed at the buyer's disposal at that place.²³ If the sale involves carriage of the goods, the seller fulfils its obligation to deliver by handing the goods over to the first carrier for transmission to the buyer (article 31 (a)). In accordance with the general rule set forth in article 58 (1), the buyer is not bound to pay for the goods until they are placed at the buyer's disposal by the last carrier. In the absence of a particular contractual provision, the seller is thus not entitled to make handover of the goods to the first carrier conditional on advance payment of the price by the buyer.

DOCUMENTS CONTROLLING THE DISPOSITION OF THE GOODS (ARTICLE 58 (1) AND (2))

6. Article 58 (1) imposes on the buyer the obligation to pay the price only when the seller has placed "either the goods or documents controlling their disposition" at the buyer's disposal. This provision, like article 58 (2),²⁴ thus puts delivery of the goods and handing over of documents controlling their disposition on the same level. The difficulty, in the absence of any contractual stipulation,²⁵ is determining what is meant by "documents controlling the disposition of the goods". According to the predominant view, this concept is narrower than that in article 34, which refers to the obligation to hand over "documents relating to the goods".²⁶ It has been held that certificates of origin and quality,²⁷ as well as customs documents,²⁸ do not constitute documents controlling the disposition of the goods within the meaning of article 58 (1), and that their non-delivery could therefore not justify a buyer's refusal to pay the price.

RIGHT OF RETENTION (ARTICLE 58 (1) AND (2))

7. Unless otherwise agreed by the parties, "[t]he seller may make such payment a condition for handing over the goods or documents" (article 58 (1), second sentence). In other words, unless otherwise agreed the seller has the right to retain the goods until the buyer has paid their price. A seller who decides to exercise that right is nevertheless required to grant the buyer an opportunity to examine the goods (article 58 (3)).²⁹ Unless otherwise agreed by the parties, the buyer has a corresponding right to refuse to pay the price until the seller has placed the goods or documents controlling their disposition at the buyer's disposal and granted the buyer the right to examine them.³⁰ Article 58 (2) also establishes a right of retention in the seller's favour in the case of a sale involving carriage of the goods within the meaning of article 31 (a): 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. The implementation of the seller's right of retention entails the cooperation of the carrier. In this case also, a seller who decides to exercise that right is required to grant the buyer an opportunity to examine the goods (article 58 (3)).³¹

BUYER'S RIGHT TO EXAMINE THE GOODS IN ADVANCE (ARTICLE 58 (3))

8. In accordance with article 58 (3), the buyer is not, in principle, bound to pay the price until afforded an opportunity to examine the goods. The right to prior examination of the goods may be excluded by a contractual stipulation or by procedures for delivery or payment that are incompatible with such examination, such as clauses specifying "payment against handing over of documents" or "payment against handing over of the delivery slip". The buyer's right is limited to a brief and superficial examination of the goods, unlike the obligation established in article 38.³²

9. Article 58 (3) says nothing about whether the buyer is entitled to suspend payment of the price if the examination of the goods reveals that the goods are not in conformity with the contract. The question of suspension of payment of the price by the buyer can also arise subsequently in a situation where notice of a lack of conformity is given under article 39 and all or part of the price is still due. The Supreme Court of Austria has ruled that the buyer was entitled to suspend payment of the price, as a general principle within the meaning of article 7 (2) of the Convention.³³ The Court observed, *inter alia*, that the principle of simultaneous performance underlay the Convention, being expressed in CISG articles 71 and 58 (3), and that the right to examine the goods, as recognized by article 58 (3), would be meaningless if a buyer was bound to pay the price immediately in a case where the buyer had been able to establish non-conformity and demanded substitute goods or the repair of the goods.

Notes

¹See, in particular, Handelsgericht des Kantons Bern, Switzerland, 17 August 2009, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1995.pdf; Landgericht Mönchengladbach, Germany, 15 July 2003, *Internationales Handelsrecht*, 2003, 229, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/813.pdf, available in English on the

Internet at <http://cisgw3.law.pace.edu/cases/030715g1.html>; Kantonsgericht Schaffhausen, Switzerland, 25 February 2002, available in German on the Internet at www.cisg-online.ch/cisg/urteile/723.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/020225s1.html> (the general rules in article 58 are applicable since the parties, by their conduct, waived application of the contractual conditions concerning payment as stated in the contract); CLOUT case No. 197 [Tribunal cantonal du Valais, Switzerland, 20 December 1994], *Revue valaisanne de jurisprudence* (RVJ), 1995, 164; see also the decisions cited in note 5 *infra*.

²See, in particular, Handelsgericht des Kantons Bern, Switzerland, 17 August 2009, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1995.pdf; Tribunal cantonal du Valais, Switzerland, 28 January 2009, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/2025.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/090128s1.html>; Handelsgericht Aargau, Switzerland, 26 November 2008, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1739.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/081126s1.html>; Okresný súd Dolný Kubín, Slovakia, 17 June 2008, available in Slovak on the Internet at www.cisg.sk/sk/9cb-183-2007.html, available in English on the Internet at www.cisg.sk/en/9Cb-183-2007.html; Monomeles Protodikio Thessalonikis, Greece, 2008, *Hronika Idiotikou Dikeou*, 2008, 52, available in Greek on the Internet at <http://cisgw3.law.pace.edu/cisg/text/080002greek.pdf>, English abstract available on the Internet at <http://cisgw3.law.pace.edu/cases/080002gr.html>; Kantonsgericht von Appenzell-Ausserrhoden, Switzerland, 6 September 2007, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1781.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/070906s1.html>; Tribunal cantonal du Valais, Switzerland, 27 October 2006, available in French on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1563.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/061027s1.html>; Handelsgericht Aargau, Switzerland, 25 January 2005, *Internationales Handelsrecht*, 2006, 34, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1091.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/050125s1.html>; Tribunal cantonal du Valais, Switzerland, 19 August 2003, *Revue suisse de droit international et européen*, 2004, 106, available in French on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/895.pdf; Landgericht Mönchengladbach, Germany, 15 July 2003, *Internationales Handelsrecht*, 2003, 229, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/813.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/030715g1.html>; Amtsgericht Viechtach, Germany, 11 April 2002, *Das juristische Büro*, 2002, 429, available in German on the Internet at www.cisg.law.pace.edu/cisg/wais/db/cases2/020411g1.html, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/020411g1.html>; Landgericht Berlin, Germany, 25 May 1999, available in German on the Internet at www.unilex.info/case.cfm?pid=1&do=case&id=445&step=FullText, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/990525g1.html>; CLOUT case No. 228 [Oberlandesgericht Rostock, Germany, 27 July 1995], *Transportrecht-Internationales Handelsrecht*, 1999, 23; CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995], *Neue Juristische Wochenschrift*, 1995, 2099 (see full text of the decision); CLOUT case No. 79 [Oberlandesgericht Frankfurt am Main, Germany, 18 January 1994], *Neue Juristische Wochenschrift*, 1994, 1013 (see full text of the decision); CLOUT case No. 1 [Oberlandesgericht Frankfurt am Main, Germany, 13 June 1991], *Neue Juristische Wochenschrift*, 1991, 3102 (see full text of the decision).

³CLOUT case No. 933 [Bundesgericht, Switzerland, 20 December 2006], *Schweizerische Zeitschrift für internationales und europäisches Recht*, 2008, 173; CLOUT case No. 907 [Tribunal cantonal du Valais, Switzerland, 27 May 2005], *Schweizerische Zeitschrift für internationales und europäisches Recht*, 2007, 152; Tribunale di Padova, Italy, 25 February 2004, *Giurisprudenza italiana*, 2004, 1405, available in Italian on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/819.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/040225i3.html>; CLOUT case No. 255 [Tribunal cantonal du Valais, Switzerland, 30 June 1998], *Schweizerische Zeitschrift für internationales und europäisches Recht*, 1999, 192.

⁴Landgericht München, Germany, 20 February 2002, *Internationales Handelsrecht*, 2003, 24, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/712.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/020220g1.html> (the court noted that a commercial usage relied on by one party, according to which the price was not payable until 60 days after the invoice date, was not proven, and it stated that such a usage would be contrary to article 58).

⁵Handelsgericht des Kantons Bern, Switzerland, 17 August 2009, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1995.pdf; Najvyšší súd Slovenskej republiky, Slovakia, 19 June 2008, available in Slovak on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1875.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/080619k1.html>; Handelsgericht Aargau, Switzerland, 26 November 2008, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1739.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/081126s1.html>; CLOUT case No. 930 [Tribunal cantonal du Valais, Switzerland, 23 May 2006]; Kantonsgericht Zug, Switzerland, 2 December 2004, *Internationales Handelsrecht*, 2006, 158, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1194.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/041202s1.html>; CLOUT case No. 893 [Amtsgericht Willisau, Switzerland, 12 March 2004], *Schweizerische Zeitschrift für internationales und europäisches Recht*, 2005, 124; Tribunale di Padova, Italy, 25 February 2004, *Giurisprudenza italiana*, 2004, 1405, available in Italian on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/819.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/040225i3.html>; Tribunal cantonal du Valais, Switzerland, 19 August 2003, *Revue suisse de droit international et européen*, 2004, 106, available in French on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/895.pdf; Landgericht Mönchengladbach, Germany, 15 July 2003, *Internationales Handelsrecht*, 2003, 229, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/813.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/030715g1.html>; Kantonsgericht Schaffhausen, Switzerland, 25 February 2002, available in German on the Internet at www.cisg-online.ch/cisg/urteile/723.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/020225s1.html> (the general rules in article 58 are applicable since the parties, by their conduct, waived application of the contractual conditions concerning payment as stated in the contract); Oberlandesgericht Graz, Austria, 11 March 1998, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/670.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/980311a3.html>; CLOUT case No. 197 [Tribunal cantonal du Valais, Switzerland, 20 December 1994], *Revue valaisanne de jurisprudence*, 1995, 164.

⁶CLOUT case No. 649 [Tribunale di Padova, Italy, 31 March 2004], *Giurisprudenza di merito*, 2004, 1065 (the court observed that the essential condition in CISG article 29, i.e. the agreement of the parties, was not fulfilled in this case, and then relied on the principle of *venire contra factum proprium* to give effect to an invoice entry specifying a payment date subsequent to delivery of the goods, since the seller could not, under that principle, claim immediate payment of the price); Tribunal cantonal du Valais, Switzerland, 19 August 2003, *Revue suisse de droit international et européen*, 2004, 106, available in French on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/895.pdf (the court relied on the payment date specified by the seller in its legal action, which was subsequent to the date resulting from application of CISG article 58); CLOUT case No. 882 [Handelsgericht des Kantons Aargau, Switzerland, 5 November

2002], *Schweizerische Zeitschrift für internationales und europäisches Recht*, 2003, 103 (the court construed the invoice entry “20 days net” as a deferment of the payment date, but did not give any further details); Kantonsgericht Schaffhausen, Switzerland, 25 February 2002, available in German on the Internet at www.cisg-online.ch/cisg/urteile/723.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/020225s1.html> (the general rules in article 58 were applicable since the parties, by their conduct, waived application of the contractual conditions concerning payment as stated in the contract).

⁷CLOUT case No. 826 [Oberlandesgericht München, Germany, 19 October 2006], *Internationales Handelsrecht*, 2007, 30 (in connection with the sale of a series of motor vehicles, payment of the price would become due when notice announcing that the vehicles were ready for delivery was given and the chassis numbers were specified).

⁸Oberlandesgericht Braunschweig, Germany, 28 October 1999, *Transportrecht-Internationales Handelsrecht*, 2000, 4, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/510.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/991028g1.html> (immediate payment on receipt of the invoice); CLOUT case No. 217 [Handelsgericht Aargau, Switzerland, 26 September 1997], *Schweizerische Zeitschrift für Internationales und Europäisches Recht*, 1998, 78, *Transportrecht-Internationales Handelsrecht*, 1999, 11 (immediate payment on receipt of the invoice, in accordance with a clause inserted in the invoice).

⁹Kantonsgericht Zug, Switzerland, 27 November 2008, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/2024.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/081127s1.html> (90 days from the invoicing date); CLOUT case No. 934 [Tribunal cantonal du Valais, Switzerland, 27 April 2007], *Revue suisse de droit international et européen*, 2008, 184 (invoice payable within 60 days); CLOUT case No. 909 [Kantonsgericht von Appenzell-Ausserrhoden, Switzerland, 9 March 2006], *Schweizerische Zeitschrift für internationales und europäisches Recht*, 2007, 150 (invoice payable within 30 days); Handelsgericht des Kantons Bern, Switzerland, 22 December 2004, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1192.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/041222s1.html> (price due 60 days after invoicing); Kantonsgericht Zug, Switzerland, 2 December 2004, *Internationales Handelsrecht*, 2006, 158, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1194.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/041202s1.html> (payment within 14 days following issuance of the invoice); CLOUT case No. 649 [Tribunale di Padova, Italy, 31 March 2004], *Giurisprudenza di merito*, 2004, 1065 (30 days after expiry of the month of issue of the invoice, this payment term having been entered on the invoice; see, on this decision, footnote 6 *supra*); Tribunal cantonal du Valais, Switzerland, 19 August 2003, *Revue suisse de droit international et européen*, 2004, 106, available in French on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/895.pdf (“payment at 30 days”, according to an invoice entry); Tribunal cantonal du Valais, Switzerland, 30 April 2003, *Revue suisse de droit international et européen*, 2004, 107, available in French on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/896.pdf (payment deadline of 30 days, according to an invoice entry); CLOUT case No. 882 [Handelsgericht des Kantons Aargau, Switzerland, 5 November 2002], *Schweizerische Zeitschrift für internationales und europäisches Recht*, 2003, 103 (payment “20 days net”, according to an invoice entry). See also the following decisions, which refused to give effect to invoice entries relating to payment due dates: Najvyšší súd Slovenskej republiky, Slovakia, 30 April 2008, available in Slovak on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1873.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/080430k1.html> (the invoice entry “payment 80 days” does not in itself constitute an agreement of the parties concerning the date of payment); for a similar observation, Najvyšší súd Slovenskej republiky, Slovakia, 27 June 2007, available in Slovak on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1952.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/070627k2.html>.

¹⁰CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000], *Internationales Handelsrecht*, 2001, 114 (calendar day indicated on the invoice).

¹¹U.S. District Court, Southern District of New York, United States, 29 May 2009 (*Doolim Corp. v. R. Doll, LLC et al.*), available in English on the Internet at <http://cisgw3.law.pace.edu/cases/090529u1.html> (payment within 15 days from receipt of the garments); CLOUT case No. 1020 [Foreign Trade Court of Arbitration at the Serbian Chamber of Commerce, Serbia, 28 January 2009], available in English on the Internet at <http://cisgw3.law.pace.edu/cases/090128sb.html#cx> (45 days after delivery); CLOUT case No. 591 [Oberlandesgericht Düsseldorf, Germany, 28 May 2004], *Internationales Handelsrecht*, 2004, 203 (five days after delivery); Handelsgericht St. Gallen, Switzerland, 29 April 2004, *Schweizerische Zeitschrift für internationales und europäisches Recht*, 2005, 121, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/962.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/040429s1.html> (30 per cent of the price prior to delivery, 70 per cent within 30 days of delivery); CLOUT case No. 882 [Handelsgericht Aargau, Switzerland, 5 November 2002], *Internationales Handelsrecht*, 2003, 178 (payment 20 days net, this invoice entry having been construed by the court as a deferment of the due date).

¹²Hovioikeus/hovrätt Helsinki, Finland, 31 May 2004, case presentation in English at <http://cisgw3.law.pace.edu/cases/040531f5.html> (seven days after receipt of the documents).

¹³CLOUT case No. 883 [Kantonsgericht von Appenzell Ausserrhoden, Switzerland, 10 March 2003], *Internationales Handelsrecht*, 2004, 254 (price payable 14 days before delivery to the buyer).

¹⁴Landgericht Krefeld, Germany, 20 September 2006, *Internationales Handelsrecht*, 2007, 161, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1459.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/060920g1.html> (price payable 85 days after delivery of the goods on board the vessel in a CFR sale).

¹⁵Arbitration Court of the International Chamber of Commerce, France, 2003 (Arbitral award No. 11849), Albert Jan van den Berg (ed.), *Yearbook Commercial Arbitration*, vol. XXXI, 2006, 148, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/031849i1.html>.

¹⁶China International Economic and Trade Arbitration Commission, People’s Republic of China, 21 February 2005, available in English on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1706.pdf.

¹⁷U.S. District Court, Northern District of Alabama, United States, 27 April 2005 (*Treibacher Industrie A.G. v. TDY Industries, Inc.*), available in English on the Internet at <http://cisgw3.law.pace.edu/cisg/text/050427-decision.pdf> (following withdrawal of the goods from stock, the buyer had to report such withdrawal to the seller, the price then being payable on receipt of the invoice).

¹⁸Landgericht Nürnberg-Fürth, Germany, 27 February 2003, *Internationales Handelsrecht*, 04, 20, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/818.pdf.

¹⁹Foreign Trade Court of Arbitration at the Serbian Chamber of Commerce, Serbia 28 January 2009, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/090128sb.html> (the time limit of 45 days following delivery, as provided for in the contract, was computed from when the goods were delivered on board the vessel, in accordance with the CIP Tirana clause); Landgericht Krefeld, Germany, 20 September 2006, *Internationales Handelsrecht*, 2007, 161, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1459.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/060920g1.html> (price payable 85 days after delivery of the goods on board the vessel under a CFR sale).

²⁰CLOUT case No. 194 [Bundesgericht, Switzerland, 18 January 1996] (see full text of the decision); see also Polimeles Protodikio Athinon, Greece, 2009, English abstract available on the Internet at <http://cisgw3.law.pace.edu/cases/094505gr.html> (40 per cent of the price in advance, the balance being payable 30 days after receipt of the invoice for each of the instalment deliveries); Oberlandesgericht Köln, Germany, 3 April 2006, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1218.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/060403g1.html> (25 per cent on conclusion of the contract and 75 per cent two weeks before the first delivery); Oberster Gerichtshof, Austria, 8 November 2005, *Österreichische Juristen-Zeitung*, 2006, 162, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1156.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/051108a3.html> (20 per cent as an advance payment, 60 per cent on delivery or on notice of delivery and 20 per cent on start-up of the equipment); Handelsgericht St. Gallen, Switzerland, 11 February 2003, *Schweizerische Zeitschrift für internationales und europäisches Recht*, 2004, 107, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/900.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/030211s1.html> (50 per cent of the price payable 60 days after receipt of the goods and 50 per cent of the price payable 90 days after issuance of the invoice by the buyer to its customer); CLOUT case No. 882 [Handelsgericht Aargau, Switzerland, 5 November 2002], *Schweizerische Zeitschrift für internationales und europäisches Recht*, 2003, 103, available on the Internet at www.cisg-online.ch/cisg/urteile/715.htm (payment 20 days net).

²¹CLOUT case No. 297 [Oberlandesgericht München, Germany, 21 January 1998], *Internationales Handelsrecht*, 2001, 197.

²²CLOUT case No. 5 [Landgericht Hamburg, Germany, 26 September 1990], *Europäische Zeitschrift für Wirtschaftsrecht*, 1991, 188.

²³CLOUT case No. 591 [Oberlandesgericht Düsseldorf, Germany, 28 May 2004], *Internationales Handelsrecht*, 2004, 203.

²⁴See paragraph 7 *infra*.

²⁵Hovioikeus/hovrätt Helsinki, Finland, 31 May 2004, case available in English at <http://cisgw3.law.pace.edu/cases/040531f5.html>.

²⁶See the Digest for article 34.

²⁷CLOUT case No. 171 [Bundesgerichtshof, Germany, 3 April 1996], *Neue Juristische Wochenschrift*, 1996, 2364.

²⁸CLOUT case No. 216 [Kantonsgericht St. Gallen, Switzerland, 12 August 1997].

²⁹See paragraphs 8 and 9 *infra*.

³⁰CLOUT case No. 432 [Landgericht Stendal, Germany, 12 October 2000], *Internationales Handelsrecht*, 2001, 30.

³¹See paragraphs 8 and 9 *infra*.

³²See, however, CLOUT case No. 432 [Landgericht Stendal, Germany, 12 October 2000], *Internationales Handelsrecht*, 2001, 30 (ruling, in connection with article 58, by reference to article 38, that a two-month period for examination was reasonable).

³³Oberster Gerichtshof, Austria, 8 November 2005, *Österreichische Juristen-Zeitung*, 2006, 162, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1156.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/051108a3.html>.

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.

INTRODUCTION

1. Article 59 clearly sets out the rule whereby the buyer must pay the price as soon as it becomes due, without the need for any request or compliance with any other formality by the seller. Article 59 can accordingly be distinguished from those national legal systems under which settlement of a debt is due only if a notice to pay or other formal demand has first been served by the creditor on the debtor.¹

DISPENSING WITH FORMALITIES PRIOR TO PAYMENT OF THE PRICE

2. The sale price becomes due automatically on the date specified in the contract or, failing that, at a specific time in accordance with the rules set forth in article 58.² Because it relieves the seller of the requirement to issue a demand or comply with any other formality in order for the price to become payable, article 59 is frequently cited by judges and arbitrators.³ Article 59 is referred to more rarely in other contexts.⁴

3. The rule that the price becomes due automatically without any request or formality on the part of the seller is subject to various limits. As was observed in one court decision, the price is not automatically payable if at the due date the buyer does not know the exact amount of the price.⁵ Also, a requirement that the seller send an invoice in advance to the buyer frequently derives from the contract or from usages.⁶ The Incoterms all set forth the rule that the seller must provide a commercial invoice to the buyer.⁷ Subject to these exceptions, the principle under which the

obligation to pay the price is not conditional on the issuance of an invoice remains applicable.⁸

4. The buyer's failure to pay the price at the due date entitles the seller to resort to the various remedies for breach of contract by the buyer, as provided in the Convention, without any prior demand for payment. Such remedies include the seller's right to interest on any sum owed by the buyer (article 78). As noted in many court decisions which refer to article 59 in that regard, the interest provided for under article 78 begins to accumulate as soon as the price becomes due.⁹

DISPENSING WITH FORMALITIES PRIOR TO SETTLEMENT OF OTHER MONETARY OBLIGATIONS

5. It is generally accepted that article 59 expresses a general principle (within the meaning of article 7 (2)) that is applicable to the different types of monetary claims made by one party to a sales contract against the other.¹⁰ Such claims include payment of interest on the price or on any sum that is in arrears (article 78), damages claims arising from, *inter alia*, penalty clauses,¹¹ claims for restitution of the price or payment of interest or benefits following contract avoidance (article 81 (2) and article 84 (2)), claims for reimbursement of the difference between the price paid and the price reduced in accordance with article 50, and reimbursement of expenses incurred for preservation of the goods (articles 85 and 86). In order for article 59 to be applicable in these different cases, however, it is necessary for the debtor to know the amount of the sum owed.

Notes

¹See Secretariat Commentary to article 55 of the draft Convention.

²See the Digest for article 58.

³See, for example, Rechtbank Rotterdam, Netherlands, 1 July 2009, available in Dutch on the Internet at www.globalsaleslaw.com/content/api/cisg/urteile/1905.pdf; Landgericht München, Germany, 18 May 2009, available in German on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/1998.pdf>; Foreign Trade Court of Arbitration at the Serbian Chamber of Commerce, Serbia, 16 March 2009, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/090316sb.html>; Tribunal cantonal du Valais, Switzerland, 28 January 2009], available in French on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/2025.pdf>, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/090128s1.html>; Handelsgericht Aargau, Switzerland, 26 November 2008, available in German on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/1739.pdf>, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/081126s1.html>; Okresný súd Bratislava III, Slovakia, 22 May 2008, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/080522k1.html>; Najvyšší súd Slovenskej republiky, Slovakia, 30 April 2008, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/080430k1.html>; Okresný súd Banská Bystrica, Slovakia, 29 April 2008, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/080429k1.html>; Okresný súd Banská Bystrica, Slovakia, 7 March 2008,

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Tribunal cantonal du Vaud, Switzerland, 28 October 1997, available in French on the Internet at www.cisg-online.ch/cisg/urteile/328.pdf; CLOUT case No. 273 [Oberlandesgericht München, Germany, 9 July 1997], available in English on the Internet at <http://cisgw3.law.pace.edu/cases/970709g1.html>; CLOUT case No. 163 [Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 10 December 1996], available in English on the Internet at <http://cisgw3.law.pace.edu/cases/961210h1.html> (see full text of the decision); CLOUT case No. 854 [China International Economic and Trade Arbitration Commission, People's Republic of China, 15 February 1996]; Amtsgericht Augsburg, Germany, 29 January 1996, available in German on the Internet at www.cisg-online.ch/cisg/urteile/172.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/960129g1.html>; CLOUT case No. 197 [Tribunal Cantonal du Valais, Switzerland, 20 December 1994], available in French on the Internet at www.unilex.info/case.cfm?pid=1&do=case&id=168&step=FullText, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/941220s1.html> (see full text of the decision); 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⁴See the following decisions, which cited article 59 as a textual basis for an action for payment: Oberlandesgericht Hamm, Germany, 12 November 2001, available in German on the Internet at www.cisg-online.ch/cisg/urteile/1430.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/011112g1.html>; International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 25 September 2001, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/010925r1.html>; CLOUT case No. 256 [Tribunal cantonal du Valais, Switzerland, 29 June 1998], available in French on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/420.pdf (the decision cited article 59 as the sole textual basis of the payment claim); International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 26 May 1998, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/980525r1.html>; Landgericht Marburg, Germany, 12 December 1995, *Neue Juristische Wochenschrift—Rechtsprechungsreport*, 1996, p. 760, available in German on the Internet at www.cisg-online.ch/cisg/urteile/148.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/951212g1.html>; CLOUT case No. 135 [Oberlandesgericht Frankfurt am Main, Germany, 31 March 1995], available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/137.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/950331g1.html>. See also the following decision, which referred, inter alia, to article 59 to establish the seller's place of business as the place for performance of the obligation to pay the price: Handelsgericht St-Gallen, Switzerland, 29 April 2004, available in German on the Internet at www.cisg-online.ch/cisg/urteile/962.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/040429s1.html>. And see the following decision, which overturned a lower-court decision that had referred to article 59 in connection with the allocation of payments: CLOUT case No. 911 [Cour de Justice de Genève, Switzerland, 12 May 2006].

⁵CLOUT case No. 273 [Oberlandesgericht München, Germany, 9 July 1997], available in English on the Internet at <http://cisgw3.law.pace.edu/cases/970709g1.html> (the court stated that, because the defendant had been unaware, at the due date, of the exact amount of the price, the invoices had to be paid, at the latest, at the time of their presentation in the course of the proceedings).

⁶See, by way of illustration, Oberlandesgericht Köln, Germany, 3 April 2006, available in German on the Internet at www.cisg-online.ch/cisg/urteile/1218.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/060403g1.html> (the court interpreted the contract as establishing an obligation to provide an invoice and added, in support, that the buyer was required to have an invoice in its dealings with its country's tax authorities). See also the Digest for article 58, paragraph 4.

⁷See Incoterms 2010, the seller's obligations, A 1.

⁸See Najvyšší súd Slovenskej republiky, Slovakia, 3 April 2008, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/080403k1.html> ("the obligation to pay the purchase price is not subject to the drawing of an invoice").

⁹See, for example, Foreign Trade Court of Arbitration at the Serbian Chamber of Commerce, Serbia, 16 March 2009, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/090316sb.html>; Tribunal cantonal du Valais, Switzerland, 28 January 2009, available in French on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/2025.pdf>; Polimeles Protodikio Athinon, Greece, 2009 (docket No. 4505/2009), English abstract available on the Internet at <http://cisgw3.law.pace.edu/cases/094505gr.html>; Monomeles Protodikio Thessalonikis, Greece, 2007 (docket No. 43945/2007), available in Greek on the Internet at <http://cisgw3.law.pace.edu/cisg/text/080002greek.pdf>, English abstract available on the Internet at <http://cisgw3.law.pace.edu/cases/080002gr.html>; Kantonsgericht Appenzell Ausserrhoden, Switzerland, 6 September 2007, available in German on the Internet at [www.globalsaleslaw.com/content/api/cisg/urteile/1781.pdf](http://globalsaleslaw.com/content/api/cisg/urteile/1781.pdf), available in English on the Internet at <http://cisgw3.law.pace.edu/cases/070906s1.html>; Okresný súd Bardejov, Slovakia, 9 March 2007, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/070309k1.html>; Krajský súd Žilina, Slovakia, 8 January 2007, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/070108k2.html>; Tribunal cantonal du Valais, Switzerland, 27 October 2006, available in French on the Internet at www.cisg-online.ch/cisg/urteile/1563.pdf; CLOUT case No. 930 [Tribunal cantonal du Valais, Switzerland, 23 May 2006]; CLOUT case No. 911 [Cour de Justice de Genève, Switzerland, 12 May 2006]; CLOUT case No. 907 [Tribunal cantonal du Valais, 27 May 2005]; CLOUT case No. 906 [Kantonsgericht Nidwalden, Switzerland, 23 May 2005]; Handelsgericht Aargau, Switzerland, 25 January 2005, *Internationales Handelsrecht* 2006/1, pp. 34 et seq., available in German on the Internet at www.cisg-online.ch/cisg/urteile/1091.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/050125s1.html>; Handelsgericht Bern, Switzerland, 22 December 2004, *Internationales Handelsrecht*, 2005, 253, available in German on the Internet at www.cisg-online.ch/cisg/urteile/1086.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/050523s1.html>; Landgericht Bayreuth, Germany, 10 December 2004, available in German on the Internet at www.cisg-online.ch/cisg/urteile/1131.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/041210g1.html>; Foreign Trade Court of Arbitration at the Serbian Chamber of Commerce, Serbia, 27 May 2004, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/040527sb.html>; Tribunale di Padova, Italy, 31 March 2004, available in Italian on the Internet at www.cisg-online.ch/cisg/urteile/823.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/040331i3.html>; CLOUT case No. 893 [Amtsgericht Willisau, Switzerland, 12 March 2004]; CLOUT case No. 889 [Handelsgericht Zürich, 24 October 2003]; Handelsgericht St. Gallen, Switzerland, 11 February 2003, available in German on the Internet at www.cisg-online.ch/cisg/urteile/900.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/030211s1.html>; Oberlandesgericht Rostock, Germany, 25 September 2002, available in German on the Internet at www.cisg-online.ch/cisg/urteile/672.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/020925g1.html>. See also (implicitly), Tribunal de commerce de Namur, Belgium, 15 January 2002, available in French on the Internet at www.law.kuleuven.ac.be/int/tradelaw/WK/2002-01-15.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/020115b1.html>; Foreign Trade Court of Arbitration at the Serbian Chamber of Commerce Serbia, 12 April 2002, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/020412sb.html>; Arbitration Court attached to the Bulgarian Chamber of Commerce and Industry, Bulgaria, 12 March 2001, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/010312bu.html>; Landgericht München, Germany, 6 April 2000, available in German on the Internet at www.cisg-online.ch/cisg/urteile/665.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/000406g1.html>; CLOUT case No. 255 [Kantonsgericht Wallis, Switzerland, 30 June 1998], available in German on the Internet at www.cisg-online.ch/cisg/urteile/419.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/980630s1.html>; Landgericht Berlin, Germany, 24 March 1998, available in German on the Internet at www.unilex.info/case.cfm?pid=1&do=case&id=440&step=FullText, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/980630s1.html>; CLOUT case No. 833 [Hoge Raad, Netherlands, 20 February 1998], available in Dutch on the Internet at www.unilex.info/case.cfm?pid=1&do=case&id=328&step=FullText; CLOUT case No. 254 [Handelsgericht Aargau, Switzerland, 19 December 1997], available in German on the Internet at <http://www.cisg.law.pace.edu/cisg/text/971219s1german.html>, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/971219s1.html>; CLOUT case No. 283 [Oberlandesgericht Köln, Germany, 9 July 1997], available in German on the Internet at www.cisg-online.ch/cisg/urteile/495.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/970709g3.html>; CLOUT case No. 215 [Bezirksgericht St-Gallen, Switzerland, 3 July 1997]; CLOUT case No. 275 [Oberlandesgericht Düsseldorf, Germany, 24 April 1997], available in German on the Internet at www.unilex.info/case.cfm?pid=1&do=case&id=306&step=FullText, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/970703s1.html>; Tribunal cantonal du Vaud, Switzerland, 11 March 1996, available in French on the Internet at www.cisg-online.ch/cisg/urteile/894.pdf; CLOUT case No. 211 [Tribunal cantonal du Vaud, Switzerland, 11 March 1996], available in French on the Internet at <http://www.cisg-online.ch/cisg/urteile/333.pdf>, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/960311s2.html>; CLOUT case No. 409 [Landgericht Kassel, Germany, 15 February 1996], available in German on the Internet at www.cisg-online.ch/cisg/urteile/190.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/960215g2.html>; Landgericht München, Germany, 25 January 1996, available in German on the Internet at www.cisg-online.ch/cisg/urteile/278.htm, available in English on the Internet at www.cisg-online.ch/cisg/urteile/278.htm; Amtsgericht Kehl, Germany, 6 October 1995, *Recht der internationalen Wirtschaft*, 1996, 957, available in German on the Internet at www.cisg-online.ch/cisg/urteile/162.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/951006g1.html>; CLOUT case No. 410 [Landgericht Alsfeld, Germany, 12 May 1995], available in German on the Internet at www.cisg-online.ch/cisg/urteile/170.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/950512g1.html>; Tribunal de commerce de Bruxelles, Belgium, 5 October 1994, available in French on the Internet at www.unilex.info/case.cfm?pid=1&do=case&id=176&step=FullText, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/941005b1.html>; CLOUT case No. 79 [Oberlandesgericht Frankfurt am Main, Germany, 18 January 1994], available in German on the Internet at www.cisg-online.ch/cisg/urteile/123.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/940118g1.html> (see full text of the decision); Landgericht Berlin, Germany, 6 October 1992, available on the Internet at www.cisg-online.ch/cisg/urteile/173.htm; Landgericht Mönchengladbach, Germany, 22 May 1992, available in German on the Internet at www.cisg-online.ch/cisg/urteile/56.htm; Arbitration Court of the International Chamber of Commerce, 1992 (Arbitral award No. 7153), available in English on the Internet at <http://cisgw3.law.pace.edu/cases/927153i1.html>; CLOUT case No. 55 [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).

¹⁰See, in support of this interpretation, Oberlandesgericht Hamburg, Germany, 25 January 2008, *Internationales Handelsrecht* 2008/3, pp. 98 et seq., available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1681.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/080125g1.html> (after stating that article 59 was applicable to all monetary claims, the court implemented this principle in connection with a sum due under a penalty clause); cf. Commercial Court of the Donetsk Region, Ukraine, 13 April 2007, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/071211u5.html> (applying article 59 solely to the sale price owed, the court stated that the “money obligations” had to be fulfilled on the date fixed by the contract without the need for any request or compliance with any other formality on the part of the seller).

¹¹Oberlandesgericht Hamburg, Germany, 25 January 2008, *Internationales Handelsrecht*, 2008/3, pp. 98 et seq., available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1681.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/080125g1.html> (after stating that article 59 was applicable to all monetary claims, the court noted that the amount of the penalty clause was payable without any request or formality on the creditor’s part, thus causing interest as provided for under article 78 to accrue automatically).

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 elements of the second fundamental obligation of the buyer, as set forth 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, but come within the scope of provisions governing the seller’s obligation to make delivery. Thus, article 31, which regulates the place for the seller to make delivery, and article 33, which governs the time for the seller to deliver, impact the buyer’s obligation to take delivery.

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,¹ one of the two basic obligations of the buyer² set forth in article 53.³ 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". The acts of cooperation which could reasonably be expected of the buyer are often defined in the contract. Price-delivery terms used by the parties to the sale play a key role in this regard. Acts of cooperation can take a variety of forms: the preliminary examination of the goods by the buyer prior to delivery and the signing of a qualification certificate;⁴ the obtaining of the import licence⁵ and, more rarely, the export licence;⁶ the conclusion of the contract of carriage or notification of the name of the vessel on board which the goods are to be delivered;⁷ the obligation to give notice to the seller within a reasonable period in connection with deliveries to be made at the buyer's request⁸ or the obligation of a contracting party bound by a purchase obligation to place orders required under the contract.⁹ If the place of delivery is the buyer's place of business, the buyer must ensure that the seller has access to those premises. If the seller is required to, for example, install equipment, the site must be prepared for that purpose.¹⁰

3. It is important to differentiate between the duty to cooperate within the meaning of article 60 (a) and the buyer's other, subsidiary obligations, since only a breach of the former can be penalized by avoidance of the contract after an additional period of time has elapsed without performance (article 64 (1) (b)).¹¹

4. The question whether the duties of the buyer come within the scope of the acts referred to in article 60 (a) is the subject of debate especially in connection with the buyer's obligation to provide plans, documents or data necessary for the manufacture of the goods. According to one legal view, such an obligation cannot be linked to article 60

because it is too far removed from the obligation to take delivery of the goods, while another view holds that article 60 is applicable. That judicial position supporting the application of article 60 was referred to in an American court decision.¹² Doubts also arise in connection with the buyer's obligation to specify the form, measurement or other features of the goods, which one view would place outside the sphere of article 60 (a), primarily for the reason that the seller could, in the event of the buyer's failure, make the specification itself (article 65).¹³

5. The buyer's duty to cooperate is limited to acts "which could reasonably be expected of him in order to enable the seller to make delivery". It has been held, in connection with a re-export prohibition involving a third country, that it was not for the buyer to ensure the absence of delivery restrictions but rather for the seller to inform the buyer of such limitations.¹⁴

BUYER'S DUTY TO TAKE OVER THE GOODS

6. Article 60 (b) sets out the second element of the buyer's obligation to take delivery, namely the duty to take over the goods. As noted in several court decisions, taking delivery within the meaning of article 60 (b) is the physical handing over of the goods.¹⁵ The place where the goods are to be taken over, which is not specified in article 60 (b), and the takeover arrangements depend on the procedures for delivery agreed on by the parties or, in their absence, on the rules set forth in article 31 (a), (b) and (c).¹⁶ For example, when the obligation to deliver consists in placing the goods at the disposal of the buyer at the seller's place of business (article 31 (c)), the buyer must either go to that place in order to remove the goods or have them removed by a third party of its own choice.

7. Taking delivery applies not only to the goods, but also to the documents which the seller has to hand over in accordance with articles 30 and 34.¹⁷

8. Taking delivery of the goods or documents does not imply their approval by the buyer.¹⁸ In other words, taking delivery does not affect the buyer's right to give notice of a lack of conformity in the goods or documents (article 39 (1)) or to resort to the remedies available to the buyer in the event of late delivery or delivery at an unsuitable place.

RIGHT TO REJECT THE GOODS

9. Article 60 does not specify in which situations the buyer is entitled to reject the goods. Other articles of the Convention provide for two specific cases. Where the seller delivers the goods before the date fixed, the buyer may refuse to take delivery (article 52 (1)), and where the seller delivers a quantity of goods greater than that provided for in the contract (article 52 (2)), the buyer may refuse to take delivery of the excess quantity. It is almost unanimously accepted that the buyer has the right to reject the goods if the seller commits a fundamental breach of contract (article 25), which entitles the buyer to declare the contract avoided (article 49 (1) (a)) or to demand delivery of substitute goods (article 46 (2)). Similarly, the buyer also has

a right to avoid (and thus a right to reject delivery) if the seller fails to deliver within an additional period of time fixed in accordance with article 47 (see article 49 (1) (b)). A much debated question is whether the buyer is also entitled to reject the goods if the breach committed by the seller is not a fundamental breach. According to the predominant view, the buyer is, in that event, obliged to take delivery of the goods and one court decision is often cited in support of this position.¹⁹

10. If the buyer intends to reject the goods, the buyer is required to take reasonable steps to preserve them and may even be obliged to take possession of the goods for this purpose, but will be entitled to reimbursement for the expenses of preservation (article 86).²⁰

Notes

¹Polimeles Protodikio Athinon, Greece, 2009, English abstract available on the Internet at <http://cisgw3.law.pace.edu/cases/094505gr.html> (the court saw in CISG article 60 an important innovation in comparison with the Greek Civil Code).

²Arbitration Court attached to the Bulgarian Chamber of Commerce and Industry, Bulgaria, 12 February 1998, *Praktika Bălgarska tărgovsko-promishlena palata*, 1998-1999, No. 3 [12], No. 5 [18], available in English and German on the Internet at <http://cisgw3.law.pace.edu/cases/980212bu.html>.

³See the Digest for article 53.

⁴China International Economic and Trade Arbitration Commission, People's Republic of China, 29 September 2000, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/000929c1.html> (the breach of article 60 was asserted solely by the seller without any ruling by the arbitration tribunal on that point); International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry, Ukraine, 8 September 2000, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/000908u5.html>.

⁵See, for example, in connection with a CIP clause (Incoterms 1990), International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 24 January 2002, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/020124r1.html>.

⁶See, for example, EXW, Incoterms.

⁷See, for example, FOB and FCA, Incoterms; CLOUT case No. 987 [China International Economic and Trade Arbitration Commission, People's Republic of China, 22 March 2001] (a buyer who, under an FOB sale, fails to book shipping space and does not notify the seller of the name of the vessel, the place of loading or the time of delivery to be observed is in breach of CISG article 60); CLOUT case No. 163 [Választottbírószág csatolták a Magyar Kereskedelmi és Iparkamara, Hungary, 10 December 1996] (FOB sale: "taking over the goods" means taking over the goods as provided for in the Incoterms); CLOUT case No. 680 [China International Economic and Trade Arbitration Commission, People's Republic of China, 8 March 1996], *Zhōngguó guójì jīngjì màoyì zhōngcái cáijué shū xuānbīān*, 1996, 957 (FOB sale).

⁸CLOUT case No. 579 [U.S. District Court, Southern District of New York, United States, 10 May 2002], 201 F. Supp. 2d 236 (*Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc. et al.*), available in English on the Internet at www.cisg.law.pace.edu/cisg/wais/db/cases2/020510u1.html and at www.cisg.law.pace.edu/cisg/wais/db/cases2/020821u1.html.

⁹See CLOUT case No. 591 [Oberlandesgericht Düsseldorf, Germany, 28 May 2004], *Internationales Handelsrecht*, 2004, 203. For a contrary position, Oberlandesgericht Brandenburg Germany, 18 November 2008, *Internationales Handelsrecht*, 2009, 105, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1734.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/081118g1.html>, according to which the placing of orders by the buyer to attain the quantities fixed by the contract could not be linked to article 60 and the requirements for application of article 64 (1) (b) were thus not met.

¹⁰CLOUT case No. 732 [Audiencia Provincial de Palencia, Spain, 26 September 2005], in connection with the installation of a printing machine whose operating defects had been attributed by the seller to the poor condition of the factory, the buyer was considered to have fulfilled its obligation under article 60).

¹¹See the Digest for article 64.

¹²CLOUT case No. 579 [U.S. District Court, Southern District of New York, United States, 10 May 2002], 201 F. Supp. 2d 236, available in English on the Internet at www.cisg.law.pace.edu/cisg/wais/db/cases2/020510u1.html and at www.cisg.law.pace.edu/cisg/wais/db/cases2/020821u1.html (preparatory measures such as the furnishing of plans or data are also within the scope of the cooperation required of the buyer since they ultimately serve to enable the seller to make delivery).

¹³See the Digest for article 65.

¹⁴CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996], *Zeitschrift für Rechtsvergleichung* (ZfRV), 1996, 248 (when giving grounds for this interpretation, the court did not, however, mention article 60).

¹⁵Oberlandesgericht Brandenburg, Germany, 18 November 2008, *Internationales Handelsrecht*, 2009, 105, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1734.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/081118g1.html>; CLOUT case No. 721 [Oberlandesgericht Karlsruhe, Germany, 8 February 2006], *Internationales Handelsrecht*, 2007, 106; CLOUT case No. 885 [Tribunal fédéral, Switzerland, 13 November 2003], *Schweizerische Zeitschrift für internationales und*

europäisches Recht, 2005, 116; Landgericht Saarbrücken, Germany, 2 July 2002, *Internationales Handelsrecht*, 2003, 27, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/713.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/020702g1.html>; CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998], *Schweizerische Zeitschrift für Internationales und Europäisches Recht*, 1999, 185; CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995], *Entscheidungssammlung des Bundesgerichtshofes in Zivilsachen* (BGHZ), 129, 75.

¹⁶CLOUT case No. 47 [Landgericht Aachen, Germany, 14 May 1993], *Recht der Internationalen Wirtschaft*, 1993, 760 (see full text of the decision).

¹⁷CLOUT case No. 251 [Handelsgericht des Kantons Zürich, 30 November 1998], *Schweizerische Zeitschrift für Internationales und Europäisches Recht*, 1999, 185.

¹⁸CLOUT case No. 892 [Kantonsgericht Schaffhausen, Switzerland, 27 January 2004], *Schweizerische Zeitschrift für Internationales und Europäisches Recht*, 2005, 122.

¹⁹CLOUT case No. 79 [Oberlandesgericht Frankfurt am Main, Germany, 18 January 1994], *Neue Juristische Wochenschrift*, 1994, 1013 (see full text of the decision) (in accordance with the Vienna Convention, the buyer is expected to agree to take delivery of non-conforming goods and to resort to remedies other than avoidance provided that the non-conformity does not constitute a fundamental breach).

²⁰See the Digest for article 86.

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 who has suffered a breach of contract by the buyer are dealt with 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 make 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 provisions within these sections form matched pairs. Thus, article 61, which catalogues the seller's remedies, closely parallels article 45, which catalogues the buyer's remedies. Other provisions in the current section that have analogues in the section on the buyer's remedies include article 62,

on the seller's right to require the buyer's performance (parallel to article 46); article 63, on the seller's right to fix an additional period for the buyer to perform (parallel to article 47); and article 64, on the seller's right to avoid the contract (parallel to article 49).

3. As was the case with the provisions on the buyer's remedies,¹ the articles governing the seller's 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 right granted by article 61 (1) (b) to a seller to claim damages for a buyer's breach of contract operates in conjunction with articles 74 to 76; indeed, article 61 (1) (b) expressly refers to these articles, which specify how damages are to be measured. Article 64, stating when an aggrieved seller can avoid the contract, is part of a network of provisions that address avoidance; related provisions include those governing the definition of fundamental breach (article 25), the requirement of notice of avoidance (article 26), avoidance in certain special circumstances (articles 72 and 73), methods of calculating damages applicable when the contract has been avoided (articles 75 and 76), and the effects of avoidance (the provisions of Section V of Part III, Chapter V).

Notes

¹See the Digest for Part III, Chapter II, Section III, paragraph 3.

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. Where it states that the seller may “exercise the rights provided in articles 62 to 65,” article 61 (1) (a) merely refers to those provisions: 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 in the absence of the reference in article 61 (1) (a).¹ However, in stating that the seller may “claim damages as provided in articles 74 to 77,” article 61 (1) (b) serves as the legal basis for the seller’s right to claim compensation for the loss sustained; 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 various court and arbitral decisions have done,² and not to refer merely to, for example, article 74.

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 such remedies is not subject to the requirement that the seller prove that the buyer was at fault.³ It follows from this, *inter alia*, that payment of damages does not require the establishment of wrongful conduct on the buyer’s part. However, the buyer can, where applicable, avoid an award of damages if the requirements in article 79 or 80 are met.

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 of contract by the buyer. These remedies are set out in articles 71, 72, 73, 78 and 88 of the Convention.⁴ Unless otherwise agreed, furthermore, the seller additionally has the right, in principle, to retain the goods until the buyer has settled the price (article 58 (1) and (2)). Also, the question arises as to whether the Vienna Convention applies to setting-off against the sale price claims that a buyer may have against the seller, such as a

damages claim for non-performance by the seller of an obligation owed to the buyer. Since nothing in the Convention addresses this question expressly, most court decisions hold that set-off is subject to national laws.⁵

4. One particular implementation difficulty in regard to article 61 (1) arises in cases where the contract of sale imposes on the buyer obligations not provided for by the Convention. As is indicated in article 61 (1), failure by the buyer to perform “any of his obligations under the contract or this Convention” gives the seller recourse to the remedies provided in the Convention, even when the failure relates to a contractual obligation created by the exercise of party autonomy. Thus, in these cases, the national law governing the contract on matters not covered by the Convention does not have to be applied in order to determine the seller’s remedies, as the approach generally adopted by the courts confirms.⁶

CLAIMING DAMAGES IN COMBINATION WITH OTHER REMEDIES (ARTICLE 61 (2))

5. Article 61 (2) states that the seller is not deprived of the right to claim damages by choosing to exercise its right to other remedies.⁷ This provision is particularly useful when the seller avoids the contract.⁸ CISG articles 75 and 76 indicate how damages are to be calculated in the event of contract avoidance.⁹

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. Periods of grace provided for by various national laws have been judged contrary to the needs of international trade.¹⁰ Only the seller can grant the buyer additional periods of time for performance of contractual obligations.¹¹ However, it is generally accepted that domestic rules relating to insolvency proceedings remain applicable and thus supersede article 61 (3).¹²

Notes

¹Article 61 (1) (a) is, nevertheless, cited in many decisions: Okrěsný súd Bratislava III, Slovakia, 22 May 2008, available in Slovak on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1765.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/080522k1.html>; International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 15 November 2006, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/061115r2.html>; International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 7 April 2006, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/060407r1.html>; International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 2 June 2005, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/050602r1.html>; International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 10 February 2005, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/050210r1.html>; International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 28 June 2004, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/050210r1.html>; International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 17 June 2004, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/040617r1.html>; International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 19 March 2004, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/040319r1.html>; International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 12 March 2004, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/040312r1.html>; Tribunal fédéral, Switzerland, 19 February 2004, *Revue suisse de droit international et européen*, 2005, 121, available in French on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/839.pdf; International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 3 February 2004, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/040203r1.html>; International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 2 February 2004, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/040202r1.html>; Landgericht Mönchengladbach, Germany, 15 July 2003, *Internationales Handelsrecht*, 2003, 229, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/813.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/030715g1.html>; CLOUT case No. 496 [Hosjaistvennyi sud Gomel'skoi oblasti, Belarus, 6 March 2003]; International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 17 February 2003, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/030217r1.html>; CLOUT case No. 978 [China International Economic and Trade Arbitration Commission, People's Republic of China, 30 December 2002]; CLOUT case No. 629 [Kantonsgericht Zug, Switzerland, 12 December 2002], *Internationales Handelsrecht*, 2004, 65; CLOUT case No. 886 [Handelsgericht St. Gallen, Switzerland, 3 December 2002], *Schweizerische Zeitschrift für internationales und europäisches Recht*, 2003, 104; CLOUT case No. 636 [Cámara Nacional de Apelaciones en lo Comercial de Buenos Aires, Argentina, 21 July 2002] (*Cervecería y Maltería Paysandú S.A. v. Cervecería Argentina S.A.*); International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 7 June 2002, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/020607r1.html>; CLOUT case No. 539 [Oberlandesgericht Graz, Austria, 31 May 2002], available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1197.pdf; International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 25 May 2001, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/010525r1.html>; International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation [Russian Federation, 25 January 2001], available in English on the Internet at <http://cisgw3.law.pace.edu/cases/010125r1.html>; CLOUT case No. 807 [China International Economic and Trade Arbitration Commission, People's Republic of China, 30 June 1999], *Zhōngguó guóji jīngjì màoyì zhōngcái cáijué shū xuānbīān*, vol. 1999, 2004, 2133, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/990630c2.html>; China International Economic and Trade Arbitration Commission, People's Republic of China, 11 June 1999, *Zhōngguó guóji jīngjì màoyì zhōngcái cáijué shū xuānbīān*, vol. 1999, 2004, 2064, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/990611c1.html>.

²See Landgericht München, Germany, 18 May 2009, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1998.pdf; Kantonsgericht Zug, Switzerland, 27 November 2008, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/2024.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/081127s1.html>; Kantonsgericht St. Gallen, Switzerland, 13 May 2008, *Internationales Handelsrecht*, 2009, 161, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1768.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/080513s1.html>; Bundesgerichtshof, Germany, 27 November 2007, *Internationales Handelsrecht*, 2008, 49, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1617.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/071127g1.html>; Handelsgericht Aargau, Switzerland, 19 June 2007, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1741.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/070619s1.html>; Zivilgericht Basel-Stadt, Switzerland, 8 November 2006, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1731.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/061108s1.html>; CLOUT case No. 826 [Oberlandesgericht München, Germany, 19 October 2006], *Internationales Handelsrecht*, 2007, 30; CLOUT case No. 930 [Tribunal cantonal du Valais, Switzerland, 23 May 2006], *Revue suisse de droit international et européen*, 2008, 206; CLOUT case No. 721 [Oberlandesgericht Karlsruhe, Germany, 8 February 2006], *Internationales Handelsrecht*, 2006, 106; CLOUT case No. 746 [Oberlandesgericht Graz, Austria, 29 July 2004], available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1627.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/040729a3.html>; Oberlandesgericht Düsseldorf, Germany, 22 July 2004, *Internationales Handelsrecht*, 2005, 29, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/916.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/040722g1.html>; CLOUT case No. 893 [Amtsgericht Willisau, Switzerland, 12 March 2004]; Landgericht Berlin, Germany, 21 March 2003, available on the Internet at www.cisg.law.pace.edu/cisg/wais/db/cases2/030321g1.html; Landgericht Göttingen, Germany, 20 September 2002, *Internationales Handelsrecht*, 2005, 29, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/916.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/040722g1.html>; Landgericht München, Germany, 30 August 2001, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/668.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/020830g1.html>; Cour de Justice de Genève, Switzerland, 13 September 2002, available in French on the Internet at www.cisg-online.ch/cisg/urteile/722.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/020913s1.html>; Cour d'appel de Colmar, France, 12 June 2001, available in French on the Internet at www.cisg-france.org/decisions/120601v.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/010612f1>.

html; Amtsgericht Viechtach, Germany, 11 April 2002, *Das Juristische Büro*, 2002, 429, available in German on the Internet at www.cisg.law.pace.edu/cisg/text/020411g1german.html, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/020411g1.html>; CLOUT case No. 986 [China International Economic and Trade Arbitration Commission, People's Republic of China, 4 February 2002]; International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 22 January 2002, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/020122r1.html>; CLOUT case No. 361 [Oberlandesgericht Braunschweig, 28 October 1999], *Transportrecht-Internationales Handelsrecht*, 2000, 4; CLOUT case No. 717 [China International Economic and Trade Arbitration Commission, People's Republic of China, 6 January 1999], *Zhōngguó guójì jīngjì mào yì zhōngcái cáijué shū xuānbǎn*, vol. 1999, 2004, 1417; CLOUT case No. 288 [Oberlandesgericht München, 28 January 1998], *Recht der Internationalen Wirtschaft*, 1998, 559; International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 29 September 1997, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/970929r1.html>; CLOUT case No. 283 [Oberlandesgericht Köln, 9 July 1997], available in German on the Internet at www.cisg-online.ch/cisg/urteile/495.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/970709g3.html>; China International Economic and Trade Arbitration Commission, People's Republic of China, 6 August 1996, *Zhōngguó guójì jīngjì mào yì zhōngcái cáijué shū xuānbǎn*, vol. 1996, 2004, 1621, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/960806c1.html>; CLOUT case No. 376 [Landgericht Bielefeld, Germany, 2 August 1996]; CLOUT case No. 169 [Oberlandesgericht Düsseldorf, Germany, 11 July 1996], *Recht der Internationalen Wirtschaft*, 1996, 958; CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 21 March 1996, 21 June 1996], *Neue Juristische Wochenschrift*, 1996, 3229; CLOUT case No. 133 [Oberlandesgericht München, Germany, 8 February 1995], available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/143.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/950208g1.html>; Oberlandesgericht Hamburg, Germany, 14 December 1994, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/216.htm; CLOUT case No. 281 [Oberlandesgericht Koblenz, Germany, 17 September 1993], *Recht der Internationalen Wirtschaft*, 1993, 934; CLOUT case No. 47 [Landgericht Aachen, Germany, 14 May 1993], *Recht der Internationalen Wirtschaft*, 1993, 760; CLOUT case No. 227 [Oberlandesgericht Hamm, Germany, 22 September 1992], *Transportrecht-Internationales Handelsrecht*, 1999, 24.

³CLOUT case No. 281 [Oberlandesgericht Koblenz, Germany, 17 September 1993], *Recht der Internationalen Wirtschaft*, 1993, 934 (see full text of the decision).

⁴See Landgericht München, Germany, 18 May 2009, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1998.pdf (the decision cites article 61 (b) in conjunction with article 78); CLOUT case No. 296 [Amtsgericht Berlin-Tiergarten, Germany, 13 March 1997], *Praxis des Internationalen Privat- und Verfahrensrechts* (IPRax), 1999, 172 (the decision cites article 61 (b) in conjunction with article 78).

⁵See the Digest for article 4.

⁶See *Krajský súd v Nitre*, Slovakia, 12 November 2008, available in Slovak on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/2040.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/081112k2.html> (obligation to return the packaging of the goods); *Kantonsgesicht St. Gallen*, Switzerland, 13 May 2008, *Internationales Handelsrecht*, 2009, 161, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1768.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/080513s1.html> (breach of a re-export prohibition); CLOUT case No. 154 [Cour d'appel, Grenoble, France, 22 February 1995], *Journal du droit international*, 1995, 632 (breach of a re-export prohibition) (see full text of the decision); CLOUT case No. 217 [Handelsgericht des Kantons Aargau, Switzerland, 26 September 1997], *Schweizerische Zeitschrift für Internationales und Europäisches Recht*, 1998, 78 (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 Court of the International Chamber of Commerce, 1992 (Arbitral award No. 7197)], *Journal du droit international*, 1993, 1028 (failure to open a letter of credit); CLOUT case No. 261 [Bezirksgericht der Saane, Switzerland, 20 February 1997], *Schweizerische Zeitschrift für internationales und europäisches Recht*, 1999, 195; CLOUT case No. 631 [Supreme Court of Queensland, Australia, 17 November 2000] (*Downs Investments v. Perwaja Steel*), 2000 WL 33657824 (QSC), [2000] QSC 421, available in English on the Internet at www.austlii.edu.au/au/cases/qld/QSC/2000/421.html.

⁷See, for a recital of this principle, Polimeles Protodikio Athinon, Greece, 2009, English abstract available on the Internet at <http://cisgw3.law.pace.edu/cases/094505gr.html>; International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 30 May 2001, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/010530r2.html>; CLOUT case No. 261 [Bezirksgericht der Saane, Switzerland, 20 February 1997], *Schweizerische Zeitschrift für internationales und europäisches Recht*, 1999, 195.

⁸See, as examples, CLOUT case No. 986 [China International Economic and Trade Arbitration Commission, People's Republic of China, 4 February 2002]; Cour de Justice de Genève, Switzerland, 13 September 2002, available in French on the Internet at www.cisg-online.ch/cisg/urteile/722.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/020913s1.html>; CLOUT case No. 261 [Bezirksgericht der Saane, Switzerland, 20 February 1997], *Schweizerische Zeitschrift für internationales und europäisches Recht*, 1999, 195.

⁹See the Digest for article 75 and article 76.

¹⁰United 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.

¹¹*Rechtbank van Koophandel Hasselt*, Belgium, 25 February 2004, available in Dutch on the Internet at www.law.kuleuven.be/ipr/eng/cases/2004-02-25w.html, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/040225b1.html>; *Rechtbank van Koophandel Hasselt*, Belgium, 2 June 1999, available in Dutch on the Internet at www.law.kuleuven.be/ipr/eng/cases/1999-06-02.html, English abstract available on the Internet at www.unilex.info/case.cfm?pid=1&do=case&id=791&step=Abstract; *Rechtbank van Koophandel Hasselt*, Belgium, 5 May 1999, text of the decision in Dutch and an English abstract available on the Internet at www.law.kuleuven.be/ipr/eng/cases/1999-05-05.html.

¹²*Vysšij Choziajstviennyj Sud Rjespubliki Bielarúš*, kassacionnoj kollegii (Supreme Economic Court of the Republic of Belarus, Appeal Committee), Belarus, 31 July 2006, available in Russian on the Internet at <http://cisgw3.law.pace.edu/cisg/text/060731russian.pdf>, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/060731b5.html> (application of national measures of financial support in the agricultural sector); CLOUT case No. 187 [U.S. District Court, Southern District of New York, United States, 21 July 1997], 1997

U.S. Dist. LEXIS 10630, available in English on the Internet at www.unilex.info/case.cfm?pid=1&do=case&id=325&step=FullText (*obiter dictum* supporting the applicability of bankruptcy law to sales governed by the Vienna Convention; the case was concerned with a distribution agreement not governed by the Convention).

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 recognized in civil law systems, whereas common law systems generally allow for the remedy (often under the designation “specific performance”) only in limited circumstances.¹ Article 62 parallels article 46, which also provides this remedy for a buyer who suffers a breach of contract by the seller.² Within the section on the seller’s remedies, the right to performance of the buyer’s obligations is set forth at the beginning of the various remedies available to the seller, mirroring the position occupied by the buyer’s parallel remedy for breach of contract by the seller.³

2. Article 62 is frequently implemented or cited by judges and arbitrators in that it enables the seller to require payment of the price of the goods sold.⁴ On the other hand, as shown in case law, it is very rare that a seller takes legal action to claim specific performance of the obligation to take delivery of the goods⁵ or that court decisions cite article 62 in connection with the obligation to take delivery.⁶ Most often, the seller prefers, when faced with a buyer who refuses to take delivery of the goods, to avoid the contract and claim damages.

GENERAL CONDITIONS RELATING TO THE SELLER’S RIGHT TO REQUIRE PERFORMANCE

3. As can be seen from the provision, the seller’s right to require performance applies to all the buyer’s obligations. The seller has to have suffered a breach of contract,⁷ but the nature and extent of the breach are immaterial.

4. The right to require performance under article 62 is subject to two kinds of limitations: the first is set forth in article 62 itself; the second results from article 28.

5. Under article 62, a seller is deprived of the right to require the buyer to perform its obligations if it has “resorted to a remedy which is inconsistent” with requiring performance. Cases of inconsistency are varied. Inconsistency exists, *inter alia*, in the event of avoidance (article 64)⁸ or, where an additional period of time has been fixed for performance by the buyer (article 63 (1)), during that period (article 63 (2)). Similarly, a seller who sold goods which had to be preserved by the seller as provided for in article 88 is deprived of the right to require the buyer to take delivery of them.

6. The second limitation derives from article 28 of the Convention, under which a court is not bound to order specific performance in the seller’s favour, 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.⁹

IMPLEMENTATION

7. In order to be able to rely on its rights under article 62, a seller has to “require” performance of the buyer’s obligations. Accordingly, there must be a clear demand by the seller that the buyer fulfil the obligation at issue.¹⁰ No prior notice of the breach or other particular formality on the part of the seller is necessary.

8. The seller’s right to require the buyer to perform its obligations is not confined by the Convention to a particular period of time.¹¹ This right is subject to the normal periods of limitation imposed by applicable national law or, insofar as it applies, by the Convention on the Limitation Period in the International Sale of Goods.

Notes

¹For further comments on the matter, see the Digest for article 28, paragraph 1.

²See the Digest for article 46.

³See the Digest for article 46.

⁴Okresný súd Komárno, Slovakia, 12 March 2009, available in Slovak on the Internet at www.unilex.info/case.cfm?pid=1&do=case&id=1506&step=FullText, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/090312k1.html>; Okresný súd Komárno, Slovakia, 24 February 2009, available in Slovak on the Internet at www.unilex.info/case.cfm?pid=1&do=case&id=1471&step=FullText, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/090224k1.html>; CLOUT case No. 1020 [Foreign Trade Court of

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CLOUT case No. 135 [Oberlandesgericht Frankfurt, Germany, 31 March 1995], available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/137.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/950331g1.html>; CLOUT case No. 134 [Oberlandesgericht München, Germany, 8 March 1995], *Neue Juristische Wochenschrift-Rechtsprechungsreport*, 1996, 1532, available in German on the Internet at www.cisg-online.ch/cisg/urteile/145.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/950308g1.html>; CLOUT case No. 139 [International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 3 March 1995]; Amtsgericht Nordhorn, Germany, 14 June 1994, available in German on the Internet at www.cisg-online.ch/cisg/urteile/259.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/940614g1.html>; Landgericht Hannover, Germany, 1 December 1993, available in German on the Internet at www.cisg-online.ch/cisg/urteile/244.htm; Comisión para la Protección del Comercio Exterior de México, Mexico, 4 May 1993, available in Spanish on the Internet at <http://turanc3m.es/uc3m/dpto/PR/dppr03/cisg/rmex1.htm>, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/930504m1.html>; CLOUT case No. 104 [Arbitration Court of the International Chamber of Commerce, 1992, (Arbitral award No. 7197)], *Journal du droit international*, 1993, 1028.

⁵See Zhèjiāng shèng gāojí rénmin fāyuàn (High People's Court of Zhejiang Province), People's Republic of China, 24 April 2008, available in Chinese on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/2058.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/080424c1.html>; Amtsgericht Hamburg-Altona, Germany, 14 December 2000, *Praxis des Internationalen Privat- und Verfahrensrechts* (IPRax), 2001, 582, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/692.htm; Landgericht Hamburg, Germany, 5 November 1993, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/215.htm; cf. CLOUT case No. 133 [Oberlandesgericht München, Germany, 8 February 1995], available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/143.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/950208g1.html> (see full text of the decision).

⁶Polimeles Protodikio Athinon, Greece, 2009, English abstract available on the Internet at <http://cisgw3.law.pace.edu/cases/094505gr.html>; CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998], *Schweizerische Zeitschrift für Internationales und Europäisches Recht*, 1999, 186, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/415.pdf; CLOUT case No. 217 [Handelsgericht des Kantons Aargau, Switzerland, 26 September 1997], *Schweizerische Zeitschrift für Internationales und Europäisches Recht*, 1998, 78, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/329.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/970926s1.html>; Arbitration Court of the International Chamber of Commerce, January 1997 (Arbitral award No. 8786), *ICC International Court of Arbitration Bulletin*, vol. 11, No. 2, 2000, 70, available in English on the Internet at www.unilex.info/case.cfm?pid=1&do=case&id=463&step=FullText.

⁷See article 61 (1): "If the buyer fails to perform any of his obligations"

⁸See the commentary on the draft Convention prepared by the UNCITRAL secretariat in regard to draft article 58, paragraph 10.

⁹See the Digest for article 28.

¹⁰For a similar assertion, see the Digest for article 46.

¹¹For a comparable observation concerning the implementation of article 46, see the Digest for article 46.

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 its obligations, article 63 grants the seller a right equivalent to that conferred on the buyer by article 47: the two provisions are conceived in the same fashion and worded in comparable terms. Article 63 is especially useful in regard to the seller's right to declare the contract avoided pursuant to article 64: article 64 (1) (b) states that, if the buyer does not pay the price or take delivery of the goods within the additional period of time set in accordance with article 63, the seller may declare the contract avoided. The fixing of an additional period thus facilitates contract avoidance.¹ However, this mechanism for avoiding the contract applies only in cases of non-payment of the price or failure to take delivery of the goods.

2. Article 63 (2) states that a seller who grants the buyer an additional period of time may not, during that period, resort to any remedy for breach of contract but nevertheless retains the right to claim damages for the delay in performance. The binding effect for the seller of the notice fixing such additional period is intended to protect the buyer, who is entitled to expect, in particular when preparing to perform its obligations, that the seller will accept the requested performance.²

FIXING AN ADDITIONAL PERIOD OF TIME (ARTICLE 63 (1))

3. The seller is entitled to set an additional period of time for the buyer but is not obliged to do so in order to be able to pursue the various remedies provided for by the Convention, including avoidance of the contract.³ Several decisions have emphasized the optional nature of granting an additional period.⁴ However, the opposite interpretation is sometimes adopted by the courts.⁵

4. A seller is authorized to set an additional period of time only upon the expiry of the time for performance of the obligation at issue, as can be seen from the *ratio legis* of the provision.⁶ One decision accordingly stated that "the determination of an additional period of time even before the respective claim has become mature cannot constitute a relevant period in terms of article 63", even if the period

fixed elapses after the due date.⁷ Another court ruled similarly after pointing out that article 63 "presupposes in fact that the buyer has already been declared in breach" before the seller grants the additional period, and that the payment date indicated on the invoice, which was issued at the time of dispatch of the goods, could not be construed as an additional period.⁸ However, faced with a similar difficulty in connection with the sale of motor vehicles where the date for payment of the price was subject to the seller's prior notification of the availability of the vehicles and their chassis numbers, one court accepted that the seller could fix an additional period in the same notice as that by which the price became due; it would, the court observed, have been "pure formalism" to require two separate communications from the seller.⁹

5. The additional period of time granted by the seller is established by means of a notice by the seller to the buyer.¹⁰ The seller must clearly indicate that the buyer has to perform within a fixed or determinable additional period.¹¹ A general demand that the buyer perform or discharge its obligations immediately or promptly does not meet the requirements of article 63 (1).¹² The period may be determined by the date at which performance must be rendered (e.g., by 30 September) or by a time period (e.g., within one month from today).¹³ As was noted in one court decision, it is not necessary for the notice to state that performance of the obligation at issue would be rejected if occurring after expiration of the additional period.¹⁴

6. The additional period of time set by the seller must be of reasonable length to satisfy the requirements of article 63. The reasonableness of the length of the additional period is assessed according to the circumstances of the case, including commercial usages and practices established between the parties.¹⁵ A reasonable period with regard to taking delivery of the goods will generally be longer than that applying to payment of the price.¹⁶ A period of 29 days for taking delivery of 200 tons of bacon was deemed reasonable,¹⁷ as was a period of two and a half months for taking delivery of a printing machine,¹⁸ whereas a period of slightly more than one month fixed unilaterally by the seller after conclusion of the contract of sale, followed by an additional period of seven days, for the buyer to take delivery of 1,600 tons of used cathode ray tubes, representing 110 lorry loads, was deemed unreasonable.¹⁹ Periods of time expressly or implicitly held to

be reasonable have included: a period of nearly four months for payment of the price;²⁰ a period of 20 days for opening a letter of credit;²¹ a period of 20 days for payment of the price;²² a period of 13 days for opening a letter of credit or payment of the price and for taking delivery of the goods;²³ a period of 10 days for payment of the price;²⁴ a period of seven days for payment of the price;²⁵ a period of two days for payment of the price where the seller had previously agreed to several deferments of the due date;²⁶ a period of nine days for payment of the price, fixed in a notice by which the price also became due;²⁷ a period of 10 days for payment of the price and taking delivery of the goods;²⁸ a period of 10 days for payment of the price;²⁹ a period of 10 days for payment by letter of credit where the buyer was already several months in arrears;³⁰ and a payment time limit of four months fixed following negotiations between the parties.³¹ Conversely, one court held that a period of seven days where the buyer had previously refused to pay the price was too short; the judges set the reasonable period at two weeks.³² Similarly, a period of three days for presenting bank confirmation of the opening of a letter of credit was deemed in the circumstances too short.³³

7. The legal consequences attaching to an additional period that is too short to constitute a reasonable time are uncertain. According to one view, such a period is devoid of effect. According to another, an additional period of reasonable length replaces a period that was rejected owing to its shortness. One court decision expressly adopted this second approach.³⁴

8. The granting of an additional period of time is not subject to any requirements as to form, in accordance with the general principle of freedom-from-form requirements,

as established by article 11;³⁵ the parties, however, may derogate from this.³⁶

EFFECTS OF FIXING AN ADDITIONAL PERIOD OF TIME (ARTICLE 63 (2))

9. The seller affords the buyer a final opportunity by granting an additional period for the buyer to perform its obligations.³⁷ The seller is bound by its undertaking. Thus, the seller “may not, during that period, resort to any remedy for breach of contract” (article 63 (2), first sentence). In particular, the seller’s right to avoid the contract and the right to claim damages for non-performance of the contract are suspended during such period. However, as stated in the second sentence of article 63 (2), the seller, in granting an additional period of time, is not deprived of the right to claim damages for delay in performance.³⁸

10. Suspension of the seller’s remedies ceases upon the expiration of the additional period without performance by the buyer. Such suspension also ceases in the specific case where, as stated in article 63 (2), the seller has received notice from the buyer that it will not perform its obligations within the period fixed. In order to be effective, the notice from the buyer has to have been received by the seller, which derogates from the general rule in article 27 of the Convention. In both cases, the seller will be free to resort to the various remedies provided for in article 61.

11. Should the buyer perform its obligations within the additional period fixed, the seller is deprived of all remedies available for breach of contract by the buyer except the right to claim damages for delay in performance (article 63 (2), second sentence).

Notes

¹See CLOUT case No. 649 [Tribunale di Padova, Italy, 31 March 2004], available in Italian on the internet at www.unilex.info/case.cfm?pid=1&do=case&id=966&step=FullText, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/040331i3.html>; CLOUT case No. 243 [Cour d’appel de Grenoble, France, 4 February 1999], available in French on the Internet at www.cisg-france.org/decisions/040299.htm (“in the absence of a fundamental breach on the part of the buyer, the seller had to grant the buyer an additional period of time to take delivery”). See, however, CLOUT case No. 629 [Kantonsgericht Zug, Switzerland, 12 December 2002], *Internationales Handelsrecht*, 2004, 65 (the court reasoned in terms of a fundamental breach and did not attach any particular legal consequences to the additional period of time fixed by the seller for the buyer to take over the goods); Supreme Court of Queensland, Court of Appeal, Australia, 12 October 2001, [2001] QCA 433 (*Downs Investments v. Perwaja Steel*), available in English on the Internet at <http://cisgw3.law.pace.edu/cases/011012a2.html> (the court found article 63 to be of little relevance in this case since the buyer was already in fundamental breach when the seller fixed an additional period for the buyer); CLOUT case No. 631 [Supreme Court of Queensland, Australia, 17 November 2000] (*Downs Investments v. Perwaja Steel*), 2000 WL 33657824 (QSC), [2000] QSC 421, available in English on the Internet at www.austlii.edu.au/au/cases/qld/QSC/2000/421.html (the judge reasoned in terms of avoidance of the contract for fundamental breach and did not attach any particular legal consequences to the additional period fixed by the seller for the buyer to open a letter of credit).

²See commentary to draft article 59, paragraph 9, Commentary on the draft Convention on Contracts for the International Sale of Goods prepared by the UNCITRAL secretariat.

³See the Digest for article 64.

⁴See Oberlandesgericht Brandenburg, Germany, 18 November 2008, *Internationales Handelsrecht*, 2009, 105, esp. 111, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1734.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/081118g1.html>; CLOUT case No. 649 [Tribunale di Padova, Italy, 31 March 2004], available in Italian on the Internet at www.unilex.info/case.cfm?pid=1&do=case&id=966&step=FullText, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/040331i3.html>; CLOUT case No. 243 [Cour d’appel de Grenoble, France, 4 February 1999], available in French on the Internet at www.cisg-france.org/decisions/040299.htm; CLOUT case No. 281 [Oberlandesgericht Koblenz, Germany, 17 September 1993], *Recht der Internationalen Wirtschaft*, 1993, 934.

⁵See Landgericht Göttingen, Germany, 20 September 2002, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/655.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/020920g1.html>; CLOUT case No. 293

[Schiedsgericht der Hamburger Freundschaftlichen Arbitrage, Germany, 29 December 1998], *Neue Juristische Wochenschrift-Rechtsprechungsreport*, 1999, 780; CLOUT case No. 307 [Oberster Gerichtshof, Austria, 11 September 1997], *Österreichische Zeitschrift für Rechtsvergleichung*, 1997, 245, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/340.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/970911a3.html>.

⁶See also article 61 (“If the buyer fails to perform any of his obligations ...”).

⁷See Oberlandesgericht Brandenburg, Germany, 18 November 2008, *Internationales Handelsrecht*, 2009, 105, esp. 111-112, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1734.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/081118g1.html>.

⁸CLOUT case No. 649 [Tribunale di Padova, Italy, 31 March 2004], available in Italian on the Internet at www.unilex.info/case.cfm?pid=1&do=case&id=966&step=FullText, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/040331i3.html>.

⁹Oberlandesgericht München, Germany, 19 October 2006, *Internationales Handelsrecht*, 2007, 30, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1394.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/061019g1.html>.

¹⁰See, however, Foreign Trade Court of Arbitration at the Serbian Chamber of Commerce, Serbia, 15 July 2008, available in Serbian on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1795.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/080715sb.html> (a commitment made by the buyer, during negotiations conducted by the parties, to pay the price within a time limit of nearly four months contained an additional period of time within the meaning of article 63 (1)); International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 1 December 1995, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/951201r2.html> (an agreement concluded during the contract period was viewed as granting the buyer an additional period of time).

¹¹See, however, Arbitration Court of the International Chamber of Commerce, January 1992 (Arbitral award No. 7585), *ICC International Court of Arbitration Bulletin*, 1995, 60, *Journal du droit international* 1995, 1015, esp. 1017, available in English on the Internet at www.unilex.info/case.cfm?pid=1&do=case&id=134&step=FullText (the arbitrator appears to have inferred the existence of an additional period of time simply from the inaction of the seller when faced with non-payment of the price by the buyer).

¹²See commentary to draft article 59, paragraph 7, Commentary on the draft Convention on Contracts for the International Sale of Goods, prepared by the UNCITRAL secretariat.

¹³See commentary to draft article 59, paragraph 7, Commentary on the draft Convention on Contracts for the International Sale of Goods, prepared by the UNCITRAL secretariat.

¹⁴Oberlandesgericht München, Germany, 19 October 2006, *Internationales Handelsrecht*, 2007, 30, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1394.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/061019g1.html>.

¹⁵See Tribunal de grande instance de Strasbourg, France, 22 December 2006, available in French on the Internet at www.cisg-france.org/decisions/221206.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/061222f1.html> (the judgment referred to the role of usages and practices between the parties).

¹⁶Since the decision was not published in full, it is not possible to establish the precise length of the period which the judges deemed reasonable in CLOUT case No. 47 [Landgericht Aachen, Germany, 14 May 1993], *Recht der Internationalen Wirtschaft*, 1993, 760, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/86.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/930514g1.html>.

¹⁷See Landgericht Bielefeld, Germany, 18 January 1991, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/174.htm.

¹⁸CLOUT case No. 645 [Corte di Appello di Milano, Italy, 11 December 1998], *Rivista di Diritto Internazionale Privato e Processuale*, 1999, 112.

¹⁹Tribunal de grande instance de Strasbourg, France, 22 December 2006, available in French on the Internet at www.cisg-france.org/decisions/221206.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/061222f1.html>.

²⁰Foreign Trade Court of Arbitration at the Serbian Chamber of Commerce, Serbia, 15 July 2008, available in Serbian on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1795.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/080715sb.html>.

²¹Arbitration Court of the International Chamber of Commerce, 2003 (Arbitral award No. 11849), *Yearbook Commercial Arbitration*, vol. 31, 2006, 148, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/031849i1.html>.

²²Oberster Gerichtshof, Austria, 28 April 2000, *Internationales Handelsrecht*, 2001, 208, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/581.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/000428a3.html> (after two payment reminders had been sent and one additional period of time had elapsed without result).

²³CLOUT case No. 261 [Bezirksgericht der Saane, Switzerland, 20 February 1997], [1999], *Schweizerische Zeitschrift für Internationales und Europäisches Recht*, 1999, 195, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/426.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/970220s1.html> (several additional periods of time had previously been fixed).

²⁴Handelsgericht des Kantons St. Gallen, Switzerland, 29 April 2004, *Schweizerische Zeitschrift für Internationales und Europäisches Recht*, 2005, 121, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/962.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/040429s1.html>.

²⁵International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry, Ukraine, 19 September 2005, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/050919u5.html>; Handelsgericht des Kantons St. Gallen, Switzerland, 11 February 2003, *Schweizerische Zeitschrift für Internationales und Europäisches Recht*, 2004, 107, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/900.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/030211s1.html>.

²⁶Oberlandesgericht Graz, Austria, 24 January 2002, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/801.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/020124a3.html>.

²⁷CLOUT case No. 826 [Oberlandesgericht München, Germany, 19 October 2006], *Internationales Handelsrecht*, 2007, 30, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1394.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/061019g1.html>.

²⁸CLOUT case No. 217 [Handelsgericht Aargau, Switzerland, 26 September 1997], *Schweizerische Zeitschrift für Internationales und Europäisches Recht*, 1998, 78, available in German on the Internet at <http://cisgw3.law.pace.edu/cases/970926s1.html>, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/970926s1.html>.

²⁹CLOUT case No. 333 [Handelsgericht Aargau, Switzerland, 11 June 1999], *Schweizerische Zeitschrift für internationales und europäisches Recht*, 2000, 117, available in German on the Internet at www.unilex.info/case.cfm?pid=1&do=case&id=485&step=FullText, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/990611s1.html>.

³⁰Handelsgericht des Kantons St. Gallen, Switzerland, 3 December 2002, *Schweizerische Zeitschrift für Internationales und Europäisches Recht*, 1999, 195, available in German on the Internet at <http://cisgw3.law.pace.edu/cases/050919u5.html>, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/030211s1.html>.

³¹Foreign Trade Court of Arbitration at the Serbian Chamber of Commerce, Serbia, 15 July 2008, available in Serbian on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1795.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/080715sb.html>.

³²Oberlandesgericht Karlsruhe, Germany, 14 February 2008, *Internationales Handelsrecht*, 2008, 53, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1649.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/080214g1.html>.

³³Landgericht Kassel, Germany, 21 September 1995, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/192.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/950921g1.html>.

³⁴Oberlandesgericht Karlsruhe, Germany, 14 February 2008, *Internationales Handelsrecht*, 2008, 53, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1649.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/080214g1.html> (time limit of two weeks in place of seven days).

³⁵See the Digest for articles 11 and 96.

³⁶See China International Economic and Trade Arbitration Commission, People's Republic of China, 28 February 2005, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/050228c1.html> (the Arbitration Commission noted that the seller had failed to send notice in writing to fix an additional period, which was in contravention of the contract, under whose terms any information sent by one party to the other had to be in written form).

³⁷Landgericht Kassel, Germany, 21 September 1995, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/192.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/950921g1.html>.

³⁸Landgericht Bayreuth, Germany, 10 December 2004, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1131.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/041210g1.html>.

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.

OVERVIEW

1. Article 64 defines the conditions under which the seller is entitled to declare the contract avoided. The rules mirror those of article 49 governing the buyer's right to declare the contract avoided for breach by the seller.¹ The effects of avoidance are governed by articles 81 to 84. The seller must declare the contract avoided by means of a notice (article 26). Avoidance under article 64 is available in two cases: first, if the buyer's failure to perform its contractual obligations amounts to a fundamental breach of contract as defined in article 25 (article 64 (1) (a)); and, secondly, if the buyer fails to pay the price or to take delivery of the goods within an additional period of time fixed pursuant to article 63 (article 64 (1) (b)).

2. Avoidance of the contract is a remedy of last resort (*ultima ratio*) that is available when the seller cannot be expected to continue the contract.² Avoidance does not occur automatically but requires notice of avoidance by the seller (article 26). In cases of non-payment of the price, the seller is entitled to avoid the contract at any time after all prerequisites for avoidance have been met. Where the buyer has paid the price, the seller loses the right to avoid the contract if the seller does not exercise it within the time periods specified in article 64 (2).

AVOIDANCE FOR FUNDAMENTAL BREACH
(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 25.³ This requires that the breach of contract cause the seller such detriment as to substantially deprive the seller of what it was entitled to expect under the contract unless the breaching buyer did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result (article 25). One arbitral award noted in this connection 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."⁴ Case law affords many illustrations of fundamental breaches involving three conceivable types of contract violations, namely failure to pay the price, failure to take delivery of the goods, and non-performance of other obligations imposed by the contract on the buyer.

4. Definitive failure to pay the price or a large part of the price generally constitutes a fundamental breach of contract.⁵ Proof of definitive failure to pay the price will often derive from a declaration by the buyer that it will not settle the price⁶ or from the buyer's insolvency situation.⁷ Conversely, a mere delay in payment of the price is not construed as a fundamental breach⁸ unless timely performance of the obligation to pay the price is of the essence of the contract. Failure to open a letter of credit at the time fixed by the contract does not automatically constitute a fundamental breach.⁹ However, it may amount to a fundamental breach according to the circumstances of the case.¹⁰ It was possible to rule, in a case involving the conclusion of several successive contracts, that non-payment of the price of some of the contracts did not constitute a fundamental breach of the other contracts unless the seller and the buyer had concluded a framework agreement.¹¹ Where the buyer

has not paid but the requirements for a fundamental breach do not appear to be met, the seller can benefit from fixing an additional period of time for the buyer to pay, which allows the seller to avoid the contract pursuant to article 64 (1) (b) if the buyer fails to pay the price within that period.¹²

5. A buyer's final failure to take delivery of the goods normally constitutes a fundamental breach of contract.¹³ In general, a delay of a few days in the delivery of the goods is not construed as a fundamental breach.¹⁴ However, such a delay can amount to a fundamental breach where observance of the date for taking delivery is especially important for the seller owing to the structure of the contract, for example if the sale relates to perishable goods or if the seller has to have rapid access to its storage or transport facilities.¹⁵ It has been held, in connection with an installment contract requiring the buyer to take delivery of a specific quantity of goods each year, that the fundamental nature of the breach committed by the buyer in taking insufficient goods one year must be assessed in relation to the quantities under the entire contract, not just those to be supplied annually.¹⁶

6. Non-performance of obligations other than payment of the price or taking delivery of the goods can also amount to a fundamental breach where the criteria set forth in article 25 are met. The existence of a fundamental breach was acknowledged by one court with regard to a re-export prohibition imposed on the buyer.¹⁷ Conversely, one court held, in connection with the buyer's duty to cooperate with the seller in drawing up a delivery schedule for the following year, that the insufficient cooperation of which the seller accused the buyer did not constitute a fundamental breach in light of the criteria in article 25.¹⁸

AVOIDANCE FOR FAILURE TO PAY OR TO TAKE DELIVERY WITHIN AN ADDITIONAL PERIOD OF TIME FIXED (ARTICLE 64 (1) (b))

7. Article 64 (1) (b) provides for a second ground of contract avoidance, applicable only in cases of non-payment of the price or failure to take delivery of the goods:¹⁹ the seller can avoid the contract if the buyer has not paid the price or taken delivery of the goods within the additional period of time fixed by the seller under article 63 (1).²⁰ The seller may also avoid the contract if the buyer declares that it will not pay the price or take delivery of the goods within the period so fixed. Entitlement to avoidance pursuant to article 64 (1) (b) overcomes the difficulties surrounding the question whether the breach committed by the buyer is fundamental on the basis of the criteria set forth in article 25. It can exceptionally happen that decisions hold that the seller is entitled to avoid the contract only if the seller has previously fixed an additional period of time for performance by the buyer, thus disregarding the scope of article 64 (1) (a).²¹

8. The mechanism for avoiding the contract as established in article 64 (1) (b) is inapplicable in cases where the buyer breaches an obligation other than payment of the price or taking delivery of the goods. It is thus important to determine whether the buyer's breach can be construed as a

violation of the obligation to pay the price or to take delivery of the goods. Under article 54, the steps or formalities required to enable payment to be made are part of the obligation to pay the price. Thus, failure to open a letter of credit comes within the sphere of application of article 64 (1) (b).²² The same reasoning applies if the buyer does not perform the acts which could reasonably be expected of the buyer to enable the seller to effect delivery of the goods.

9. Where the seller fixes an additional period of time for the buyer to perform obligations other than the obligation to pay the price or to take delivery of the goods, the buyer's failure to perform the obligation concerned by the end of that period does not permit the seller to avoid under article 64 (1) (b). The contract may be avoided only if the breach is fundamental (article 64 (1) (a)). However, such a time limit is not totally ineffective. On the one hand, the seller may not, during that period, resort to any remedy for breach of contract (article 63 (2)). On the other, refusal to perform an obligation other than payment of the price or taking delivery of the goods could add to the weight of the non-performance and can influence the assessment of the fundamental nature of the breach committed by the buyer.²³

DECLARATION OF AVOIDANCE OF THE CONTRACT

10. Under article 64, avoidance of the contract is effected by means of a declaration by the seller ("The seller may declare the contract avoided").²⁴ By virtue of article 26, a declaration of avoidance of the contract is effective only if made by notice to the buyer.²⁵ In accordance with article 27, a delay or error in the transmission of the communication or its failure to arrive does not deprive the seller of the right to rely on the communication. Pursuant to article 11, the notice need not be in writing and is not subject to any requirement as to form, except where the article 96 reservation applies. The freedom-from-form-requirements principle governing the notice means that the avoidance declaration can be made orally or derive from the seller's action.²⁶ Irrespective of the means of expression chosen by the seller, the notice must clearly indicate that the seller is terminating the contract.²⁷ According to several court decisions, the avoidance declaration may already be contained in the notice by which the seller fixes an additional period of time for performance by the buyer.²⁸ This is the case where a seller, when fixing an additional period, declares that the contract will be avoided forthwith in the event of non-payment of the price within the period fixed.²⁹ On the other hand, a mere threat to avoid the contract is not sufficient.³⁰ Avoidance can also result from the filing of a lawsuit or arbitration proceedings with a view to contract avoidance,³¹ or from an award of damages for the loss caused by non-performance.³²

PERIOD OF TIME FOR DECLARATION OF AVOIDANCE WHEN THE PRICE HAS BEEN PAID (ARTICLE 64 (2))

11. Article 64 (2) specifies the situations in which the seller's right to declare the contract avoided must be

exercised within certain periods. Since the rules in article 64 (2) are applicable only in cases where the buyer has paid the price, the seller's right to declare avoidance is, in contrast, not subject to time limitations as long as the buyer has not paid the total price.³³ If the buyer has paid only part of the price, the seller continues to be entitled to declare avoidance at any time.³⁴ In cases of non-payment of the price, only a waiver by the seller or conduct contrary to the principle of good faith can prevent the seller from declaring the contract avoided.³⁵

12. Where the buyer has paid the price, the seller loses the right to avoid the contract if it does not declare avoidance within the periods stated in article 64 (2). This provision makes a distinction between late performance and breaches other than late performance. In cases of late performance, the seller loses the right to declare the contract avoided unless it does so before becoming aware that performance has been (tardily) rendered.³⁶ The provision is accordingly

more rigorous than article 49 (2), under which, in cases of late delivery by the seller, the buyer is allowed a reasonable time, after becoming aware that delivery has been made, to declare the contract avoided.³⁷ In regard to any breach other than late performance, article 64 (2) (b) makes a distinction according to whether or not the seller has fixed an additional period for performance in accordance with article 63 (1). In the absence of an additional period for performance, the seller loses the right to declare the contract avoided unless it declares avoidance within a reasonable time after the seller knew or ought to have known of the breach (article 64 (2) (b) (i)). Where the seller has fixed an additional period of time for performance by the buyer, the seller loses the right to declare the contract avoided unless it declares avoidance within a reasonable time after the expiration of the additional period fixed by the seller or after the buyer has declared that it will not perform its obligations within such additional period (article 64 (2) (b) (ii)). Article 64 (2) has given rise to very little case law.

Notes

¹Owing to the similarity of the two provisions, courts sometimes refer to article 64 instead of article 49: see *Rechtbank van Koophandel Kortrijk* [Belgium, 4 June 2004], available in Dutch on the Internet at www.law.kuleuven.be/ipr/eng/cases/2004-06-04.html, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/040604b1.html>; *Oberlandesgericht Nürnberg*, Germany, 20 September 1995, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/267.htm (see CLOUT case No. 229 [Bundesgerichtshof, Germany, 4 December 1996], *Neue Juristische Wochenschrift—Rechtsprechungsreport*, 1997, 690, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/260.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/961204g1.html>, in which the error in the judgment of the *Oberlandesgericht Nürnberg* was pointed out).

²See *Oberlandesgericht Brandenburg*, Germany, 18 November 2008, IHR 2009, 105, Cisg-online 1734; for a comparable observation in connection with article 49, see the Digest for article 49.

³See the Digest for article 25.

⁴Arbitration Court of the International Chamber of Commerce, August 1998 (Arbitral award No. 9887), *ICC International Court of Arbitration Bulletin*, 2000, vol. 11, No. 2, 109, available in English on the Internet at www.unilex.info/case.cfm?pid=1&do=case&id=469&step=FullText.

⁵U.S. District Court, Southern District of New York, United States, 29 May 2009 (*Doolim Corp. v. R Doll, LLC et al.*), available in English on the Internet at <http://cisgw3.law.pace.edu/cases/090529u1.html> (in connection with payment of less than 25 per cent of the price); *Tribunal cantonal du Valais*, Switzerland, 2 December 2002, available in French on the Internet at www.cisg-online.ch/cisg/urteile/733.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/021202s1.html>; CLOUT case No. 578 [U.S. District Court, Western District of Michigan, United States, 17 December 2001], 2001 WL 34046276, available in English on the Internet at www.cisg.law.pace.edu/cisg/wais/db/cases2/011217u1.html (non-payment of the price is the most significant form of a fundamental breach by a buyer); CLOUT case No. 468 [International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 5 October 1998]; CLOUT case No. 130 [*Oberlandesgericht Düsseldorf*, Germany, 14 January 1994].

⁶See, for example, *Tribunal cantonal du Valais*, Switzerland, 2 December 2002, available in French on the Internet at www.cisg-online.ch/cisg/urteile/733.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/021202s1.html>; CLOUT case No. 361 [*Oberlandesgericht Braunschweig*, Germany, 28 October 1999], *Transportrecht-Internationales Handelsrecht*, 2000, 4.

⁷CLOUT case No. 308 [Federal Court of Australia, South Australian District, Adelaide, Australia, 28 April 1995], (1995) 57 *Federal Court Reports* (Australia) 216-240 (*Roder Zelt- und Hallenkonstruktionen GmbH v. Rosedown Park Pty Ltd. et al.*).

⁸*Oberlandesgericht Düsseldorf*, Germany, 22 July 2004, *Internationales Handelsrecht*, 2005, 29, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/916.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/040722g1.html>; CLOUT case No. 301 [Arbitration Court of the International Chamber of Commerce, 1992, (Arbitral award No. 7585), *ICC International Court of Arbitration Bulletin*, 1995, vol. 6, No. 2, 60, available in English on the Internet at www.unilex.info/case.cfm?pid=1&do=case&id=134&step=FullText.

⁹China International Economic and Trade Arbitration Commission, People's Republic of China, April 2006 (Arbitral award No. CISG/2006/21), available in English on the Internet at <http://cisgw3.law.pace.edu/cases/060400c2.html>; *Landgericht Kassel*, Germany, 21 September 1995, available in German on the Internet at www.cisg-online.ch/cisg/urteile/192.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/950921g1.html>; China International Economic and Trade Arbitration Commission, People's Republic of China, 23 April 1995, *Zhōngguó guójì jīngjì màoyì zhōngcái cáijúé shū xuānbǎn*, vol. 1995, 2004, 1446, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/950423c1.html>.

¹⁰China International Economic and Trade Arbitration Commission, People's Republic of China, 15 September 2005, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/050915c1.html>; CLOUT case No. 976 [China International Economic and Trade Arbitration Commission, People's Republic of China, 26 June 2003], available in English on the Internet at <http://cisgw3.law.pace.edu/cases/030626c1.html>; *Supreme Court of Queensland*, Court of Appeal, Australia, 12 October 2001, [2001] QCA 433 (*Downs*

Investments v. Perwaja Steel), available in English on the Internet at <http://cisgw3.law.pace.edu/cases/011012a2.html>; CLOUT case No. 631 [Supreme Court of Queensland, Australia, 17 November 2000] (*Downs Investments v. Perwaja Steel*), available in English on the Internet at www.austlii.edu.au/au/cases/qld/QSC/2000/421.html; China International Economic and Trade Arbitration Commission, People's Republic of China, 1 March 1999, *Zhōngguó guójì jīngjì mào yì zhōngcái cáijué shū xuǎnbiān*, vol. 1999, 2004, 1585, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/990301c1.html>; CLOUT case No. 717 [China International Economic and Trade Arbitration Commission, People's Republic of China, 6 January 1999], *Zhōngguó guójì jīngjì mào yì zhōngcái cáijué shū xuǎnbiān*, vol. 1999, 2004, 1417; Arbitration Court of the International Chamber of Commerce, 1999 (Arbitral award No. 10274), *Yearbook Commercial Arbitration*, vol. 29, 2004, 89, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/990274i1.html>; China International Economic and Trade Arbitration Commission, People's Republic of China, 21 July 1997, *Zhōngguó guójì jīngjì mào yì zhōngcái cáijué shū xuǎnbiān*, vol. 1997, 2004, 2215, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/970721c1.html>.

¹¹CLOUT case No. 826 [Oberlandesgericht München, Germany, 19 October 2006], *Internationales Handelsrecht*, 2007, 30, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1394.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/061019g1.html>.

¹²See, for example, China International Economic and Trade Arbitration Commission, People's Republic of China, 15 September 2005, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/050915c1.html>; CLOUT case No. 243 [Cour d'appel de Grenoble, France, 4 February 1999], available in French on the Internet at www.cisg-france.org/decisions/040299.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/990204f1.html> (the court observed that, in the absence of a fundamental breach, the seller should have granted the buyer an additional period of time in which to take delivery); CLOUT case No. 261 [Bezirksgericht der Saane, Switzerland, 20 February 1997], *Schweizerische Zeitschrift für internationales und europäisches Recht*, 1999, 195-197, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/426.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/970220s1.html> (failure to obtain a letter of credit within the additional period of time fixed by the seller under article 63).

¹³See CLOUT case No. 987 [China International Economic and Trade Arbitration Commission, People's Republic of China, 22 March 2001] (refusal to hire a ship to transport the goods under an FOB sale); CLOUT case No. 217 [Handelsgericht des Kantons Aargau, Switzerland, 26 September 1997], *Schweizerische Zeitschrift für Internationales und Europäisches Recht*, 1998, 78, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/329.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/970926s1.html> (refusal to take delivery of the goods) (see full text of the decision); CLOUT case No. 227 [Oberlandesgericht Hamm, Germany, 22 September 1992], *Transportrecht-Internationales Handelsrecht*, 1999, 24, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/57.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/920922g1.html> (refusal to take delivery of more than half of the goods); China International Economic and Trade Arbitration Commission, People's Republic of China, 9 January 1993, *Zhōngguó guójì jīngjì mào yì zhōngcái cáijué shū xuǎnbiān*, vol. 1993, 2004, 187, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/930109c1.html> (refusal to send a ship to transport the goods under an FOB sale).

¹⁴CLOUT case No. 243 [Cour d'appel de Grenoble, France, 4 February 1999], available in French on the Internet at www.cisg-france.org/decisions/040299.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/990204f1.html> (sale of orange juice whose delivery was to be staggered over several months, where the buyer announced a delay of a few days in taking delivery of one instalment); see, however, CLOUT case No. 629 [Kantonsgericht Zug, Switzerland, 12 December 2002], *Internationales Handelsrecht*, 2004, 65 (the court held that the few days' delay constituted a fundamental breach; the significance of this assertion should be qualified, since the seller had previously granted the buyer an additional period of time without result).

¹⁵See, for a similar assertion, Oberlandesgericht Düsseldorf, Germany, 22 July 2004, *Internationales Handelsrecht*, 2005, 29, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/916.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/040722g1.html> (after stating this principle, the court rejected the existence of a fundamental breach in connection with the late delivery of children's fashion shoes).

¹⁶Oberlandesgericht Brandenburg, Germany, 18 November 2008, *Internationales Handelsrecht*, 2009, 105, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1734.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/081118g1.html>.

¹⁷CLOUT case No. 154 [Cour d'appel de Grenoble, France, 22 February 1995], *Journal du droit international*, 1995, 632, available in French on the Internet at www.cisg-france.org/decisions/220295.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/950222f1.html> (a buyer of jeans was required, under the contract, to provide evidence of the final destination of the goods in Africa and South America in order to ensure that a re-export prohibition relating, in particular, to Europe was complied with by the buyer; the court held that the buyer's failure to furnish proof of the final destination of the goods was a fundamental breach).

¹⁸Oberlandesgericht Brandenburg, Germany, 18 November 2008, *Internationales Handelsrecht*, 2009, 105, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1734.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/081118g1.html>.

¹⁹Arbitration Court of the International Chamber of Commerce, September 1996 (Arbitral award No. 8574), *ICC International Court of Arbitration Bulletin*, vol. 11, No. 2, 2000, 57, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/968574i1.html> (the ruling referred to the option available to the seller of avoidance for fundamental breach or avoidance upon the lapse of an additional period of time without receiving performance).

²⁰See, by way of illustration, Oberlandesgericht Karlsruhe, Germany, 14 February 2008, *Internationales Handelsrecht*, 2008, 53, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1649.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/080214g1.html> (payment of the price); CLOUT case No. 886 [Handelsgericht des Kantons St. Gallen, Switzerland, 3 December 2002], *Schweizerische Zeitschrift für Internationales und Europäisches Recht*, 2003, 104; Oberlandesgericht Graz, Austria, 24 January 2002, available in German on the Internet at www.cisg-online.ch/cisg/urteile/801.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/020124a3.html>.

²¹CLOUT case No. 307 [Oberster Gerichtshof, Austria, 11 September 1997], *Juristische Blätter*, 2000, 729, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/340.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/970911a3.html>. See also the Digest for article 63, paragraph 3.

²²See, by way of illustration, CLOUT case No. 261 [Bezirksgericht der Saane, Switzerland, 20 February 1997], *Schweizerische Zeitschrift für Internationales und Europäisches Recht*, 1999, 195, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/426.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/970220s1.html> (failure to obtain a letter of credit within the additional period of time fixed by the seller under article 63).

²³See, for example, CLOUT case No. 154 [Cour d'appel de Grenoble, France, 22 February 1995], *Journal du droit international*, 1995, 632, available in French on the Internet at www.cisg-france.org/decisions/220295.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/950222f1.html> (in connection with the buyer's failure to furnish proof required by the contract of the final destination of the goods, the court stated, in its assessment of the fundamental nature of the breach committed by the buyer, that the seller had granted the buyer a reasonable time in which to fulfil its contractual obligations).

²⁴Foreign Trade Court of Arbitration at the Serbian Chamber of Commerce, Serbia, 15 July 2008, available in Serbian on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1795.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/080715sb.html> ("For avoidance of the contract, a decision by a court or arbitral tribunal is not necessary"); CLOUT case No. 746 [Oberlandesgericht Graz, Austria, 29 July 2004], available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1627.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/040729a3.html> ("The CISG does not know any ipso facto avoidance of the contract").

²⁵See China International Economic and Trade Arbitration Commission, People's Republic of China, April 2006 (Arbitral award No. CISG/2006/21), available in English on the Internet at <http://cisgw3.law.pace.edu/cases/060400c2.html> (the contracts concluded in this case were not avoided since the seller did not inform the buyer of the avoidance); CLOUT case No. 746 [Oberlandesgericht Graz, Austria, 29 July 2004], available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1627.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/040729a3.html>.

²⁶Oberlandesgericht Düsseldorf, Germany, 22 July 2004, *Internationales Handelsrecht*, 2005, 29, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/916.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/040722g1.html> (the conduct of the seller invoking avoidance should have been such as to enable the buyer to conclude that the seller was terminating the contract); Tribunal cantonal du Valais, Switzerland, 2 December 2002, available in French on the Internet at www.cisg-online.ch/cisg/urteile/733.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/021202s1.html> (avoidance of the contract "occurred by way of conclusive deeds"); CLOUT case No. 243 [Cour d'appel de Grenoble, France, 4 February 1999], available in French on the Internet at www.cisg-france.org/decisions/040299.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/990204f1.html>; Landgericht Kassel, Germany, 21 September 1995, available in German on the Internet at www.cisg-online.ch/cisg/urteile/192.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/950921g1.html> ("The statement required to that effect under article 26 CISG can be made impliedly").

²⁷CLOUT case No. 427 [Oberster Gerichtshof, Austria, 28 April 2000], *Österreichische Juristenzeitung*, 2000, 167 (It has to be clearly apparent from the declaration that the seller no longer wishes to be bound by the contract).

²⁸Cf. CLOUT case No. 746 [Oberlandesgericht Graz, Austria, 29 July 2004], available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1627.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/040729a3.html>; Oberlandesgericht Graz, Austria, 24 January 2002, available in German on the Internet at www.cisg-online.ch/cisg/urteile/801.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/020124a3.html>; CLOUT case No. 986 [China International Economic and Trade Arbitration Commission, China, 4 February 2002]; CLOUT case No. 261 [Bezirksgericht der Saane, Switzerland, 20 February 1997], *Schweizerische Zeitschrift für internationales und europäisches Recht*, 1999, 195-197, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/426.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/970220s1.html>. See, however, Arbitration Court of the International Chamber of Commerce, 2003 (Arbitral award No. 11849), *Yearbook Commercial Arbitration*, vol. 31, 2006, 148, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/031849i1.html>, ruling that, when an additional period of time has been fixed, "termination needs a second, specific notification to be sent after the elapsing of such additional period of time."

²⁹Cf., for similar wording, Oberlandesgericht Graz, Austria, 24 January 2002, available in German on the Internet at www.cisg-online.ch/cisg/urteile/801.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/020124a3.html> (the seller had, on fixing an additional period of time, stated that "it would refuse to accept payment ... and ... would ... claim damages for breach of contract"); CLOUT case No. 261 [Bezirksgericht der Saane, Switzerland, 20 February 1997], *Schweizerische Zeitschrift für internationales und europäisches Recht*, 1999, 195-197, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/426.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/970220s1.html> (the seller had stated that it would refuse to accept performance and takeover of the goods by the buyer if the additional period of time lapsed without the buyer performing).

³⁰Cf. CLOUT case No. 746 [Oberlandesgericht Graz, Austria, 29 July 2004], available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1627.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/040729a3.html> (the notice fixing an additional period of time stated, "we will rely on claims for damages because of non-performance or avoid the contract"); CLOUT case No. 83 [Oberlandesgericht München, Germany, 2 March 1994], *Neue Juristische Wochenschrift-Rechtsprechungsreport (NJW-RR)* 1994, 1075, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/108.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/940302g1.html> (a statement containing a reminder of the outstanding obligation to pay the price and referring to the possibility that the seller would withdraw from the contract).

³¹See, by way of example, Tribunal de commerce de Versailles, France, 12 March 2010, available in French on the Internet at www.cisg-france.org/decisions/120310.htm; CLOUT case No. 427 [Oberster Gerichtshof, Austria, 28 April 2000], *Österreichische Juristenzeitung*, 2000, 167.

³²Cf. Landgericht Kassel, Germany, 21 September 1995], available in German on the Internet at www.cisg-online.ch/cisg/urteile/192.htm, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/950921g1.html> (the seller instituted legal proceedings claiming compensation for the loss resulting from the "complete failure" of the transaction).

³³See UNCITRAL Secretariat Commentary to draft article 60.

³⁴See CLOUT case No. 539 [Oberlandesgericht Graz, Austria, 31 May 2002], available in German on the Internet at www.globalsales-law.org/content/api/cisg/urteile/1197.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/020531a3.html>.

³⁵See CLOUT case No. 826 [Oberlandesgericht München, Germany, 19 October 2006], *Internationales Handelsrecht*, 2007, 30, available in German on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/1394.pdf, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/061019g1.html> (the court held that the right of avoidance had not been forfeited even though six months had elapsed between the fixing of the additional period of time by the seller and the declaration of avoidance, since the buyer could not expect that the seller would not utilize its rights).

³⁶See, as an illustration of the provision, Arbitration Court of the International Chamber of Commerce, 2003 (Arbitral award No. 11849), *Yearbook Commercial Arbitration*, vol. 31, 2006, 148, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/031849i1.html> (seller had sent a letter of termination after learning of the (late) opening of the letter of credit by the buyer).

³⁷See the Digest for article 49.

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 addresses those cases where the contract leaves it to the buyer to specify “the form, measurement or other features of the goods” (article 65 (1)). The provision enables the seller to act in the buyer’s stead so that it can itself make the specification required by the contract. Article 65 accordingly grants the seller a further remedy for preserving its rights. Article 65 also clarifies article 14 (1): a proposal for concluding a contract can be sufficiently definite to constitute an offer if the proposed contract requires a specification of the goods after its conclusion.¹ Court decisions or arbitral awards which have implemented or cited article 65 are very rare.²

SELLER’S RIGHT TO MAKE SPECIFICATIONS (ARTICLE 65 (1))

2. The seller’s right to make the specification itself in place of the buyer is subject to various requirements. First, the buyer has to have failed to make the required specification “on the date agreed upon”. If a date is not indicated in the contract, a seller wishing to make the specification must request the buyer beforehand to provide the specification, which has to be made “within a reasonable time after receipt” of the request. Thus, the seller’s request has to reach the buyer in order to be effective, contrary to the general rule set forth in article 27. Secondly, the

specification made by the seller following the buyer’s failure to do so has to meet “the requirements of the buyer that may be known to him”.

3. The seller is not obliged to make the specification required of the buyer. The seller may prefer to resort to the other remedies available for breach of contract by the buyer. Also, a specification provided by the seller does not prejudice any other rights which the seller may have. This means that a seller who has made the specification retains the right to claim damages for the loss caused by the buyer’s failure.

IMPLEMENTATION OF THE RIGHT TO MAKE SPECIFICATIONS (ARTICLE 65 (2))

4. Article 65 (2) regulates the seller’s exercise of its right to make a specification on behalf of the buyer under article 65 (1). The seller is required to inform the buyer of the details of the specification and to fix a reasonable time during which the buyer may make a different specification (first sentence). If the buyer does not take advantage of the right to make a different specification within the reasonable time so fixed, the seller’s specification is binding (second sentence). It has been held that, if a seller makes a specification without taking the preliminary steps laid down in article 65 (2), the seller’s specification is not binding on the buyer, who remains free to make a different specification.³

Notes

¹See, in connection with the relationship between CISG article 65 and contract formation, China International Economic and Trade Arbitration Commission, People’s Republic of China, 23 April 1997 (Arbitral award No. CISG/1997/08), *Zhōngguó guóji jīngjì mào yì zhōngcái cáijúé shū xuǎnbiān*, vol. 1997, 2004, 1740, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/970423c2.html> (whereas the buyer alleged that the contract was not formed, invoking, inter alia, articles 14 (1) and 65, the arbitration tribunal pointed out that article 65 “does not stipulate that, if the parties do not describe the details of the goods, the contract is not established”); CLOUT case No. 133 [Oberlandesgericht München, Germany, 8 February 1995] (article 65 cannot make up for non-acceptance of a proposed modification of a contract involving, inter alia, a necessary specification of the goods).

²Efeteio Athinon, Greece, 2006 (docket No. 4861/2006), *Episkópisi Emporikou Dikaíou*, 2005, 841, available in Greek on the Internet at <http://cisgw3.law.pace.edu/cisg/text/060000greek.pdf>, English abstract available on the Internet at <http://cisgw3.law.pace.edu/cases/060000gr.html> (the decision merely cites article 65 among the remedies available to the seller); China International Economic and Trade Arbitration Commission, People’s Republic of China, 29 September 2000, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/000929cn.html>.

law.pace.edu/cases/000929c1.html (article 65 is cited only by the buyer); China International Economic and Trade Arbitration Commission, People's Republic of China, 23 April 1997 (Arbitral award No. CISG/1997/08), *Zhōngguó guójì jīngjì mào yì zhòngcái cáijué shū xuǎnbǎn*, vol. 1997, 2004, 1740, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/970423c2.html>; Landgericht Aachen, Germany, 19 April 1996, available in German on the Internet at www.cisg-online.ch/cisg/urteile/165.htm; CLOUT case No. 133 [Oberlandesgericht München, Germany, 8 February 1995].

³Landgericht Aachen, Germany, 19 April 1996, available in German on the Internet at 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. Articles 67-69 are also applied in conjunction with article 36 which provides that the seller is liable for any non-conformity existing at the time of passing of risk.¹

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 67.²

3. The rules in chapter IV apply without regard to whether the seller or the buyer owns the goods.³ Chapter IV therefore replaces 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.⁴ One court held that it is an established international practice that property rights to goods are transferred at the time of passing of risk of loss unless the contract provides otherwise.⁵ The contracts in that case included “CIF” and “CPT” (“Carriage Paid To”) terms, which provide that the risk passes at the time the goods are handed over to the first carrier. Therefore, the result in that case was that property rights passed at the time of handing the goods over to the carrier.

4. The passing of risk requires a valid contract.⁶

NATURE OF RISK

5. 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,⁷ have been stolen, or have been transferred to another person.⁸ Damage to the goods includes total destruction, physical damage,⁹ deterioration,¹⁰ and shrinkage of the goods during carriage or storage.

6. Several courts deal with risks other than the risk of loss of or damage to the goods. One decision held that the unseaworthiness of the ship for carriage, or a delay in carriage, does not constitute a risk governed by the rules of Chapter IV.¹¹ On the other hand, 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,¹² the risk that the attribution of a painting is incorrect,¹³ and the risk that governmental regulations will prohibit trading in the goods.¹⁴

PARTIES’ AGREEMENT ON PASSING OF RISK

7. The seller and buyer may agree on when the risk of loss or damage passes to the buyer. In accordance with article 6, the parties’ agreement will govern even if it derogates from the provisions of Chapter IV that would otherwise apply. Parties will frequently contract concerning the passage of risk by expressly incorporating into their agreement trade terms, such as the International Chamber of Commerce’s Incoterms.¹⁵ Parties may agree to vary a standard trade term,¹⁶ adopt a trade term that is local,¹⁷ or use a trade term in connection with the price rather than delivery.¹⁸ The parties may also agree to the allocation of risk by incorporating the standard terms or general business conditions of the seller or buyer.¹⁹ A careful interpretation of the contract may reveal an agreement on when the risk passes. In one case involving a contract for the sale of a horse, the validity of which was conditioned on the successful onward sale after three months training by the buyer, the court found that an independent unconditional agreement of down payment constituted an agreement that the risk of loss (with regard to the down payment) of the horse passed when buyer received or took delivery of the horse. The court stated that given the constant danger of the horse being injured during training, and of a decrease in value, the down payment was meant to constitute a just balancing of the interests of the parties, which ameliorated the seller’s risk of both losing the horse and not obtaining a claim for the payment of the purchase price, while permitting the buyer an opportunity to improve the horse in order to achieve as high a price in the onward sale as possible.²⁰ Notwithstanding article 6, however, a German court interpreted a trade term (“*frei Haus*”) 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.²¹

8. 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, making article 69 rather than article 67 applicable.²²

OTHER BINDING RULES ON PASSING OF RISK

9. 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.²³ 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.²⁴

10. 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 use trade terms in their contract and expressly provide that the Incoterms apply, article 9 (1) makes the definition of the trade terms by the International Chamber of Commerce binding, but since Incoterms are so widely used in international sale of goods, courts often apply the ICC's definitions of trade terms, even absent express incorporation of those definitions, under article 9 (2).²⁵

BURDEN OF ESTABLISHING THE PASSING OF RISK

11. 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.²⁶ In considering the burden of proof related to the passing of risk, two issues must be distinguished: the proof of whether the risk has passed, and the proof of whether the goods conformed to the contract at the time of passing of the risk (cf. article 36).

Proof of passing of risk

12. The cases place the burden upon a seller that brings an action to recover the price in accordance with article 62.²⁷ 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 which did not indicate the name of the buyer as the recipient was insufficient proof.²⁸ 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.²⁹

Proof of conformity at the time of passing of risk

13. Where the buyer receives damaged goods and there is a dispute over whether the damage occurred before or after the risk of loss passed to the buyer, most cases hold that the buyer has the burden of establishing that the damage occurred before risk passed to it.³⁰ Some courts hold, however, that the burden of proof shifts in certain cases: one court held that if the buyer notified the seller of non-conformity in compliance with article 39 or if the buyer immediately rejected the goods upon delivery, the seller bears the burden to prove conformity at the time of passing of the risk, whereas the burden shifts to the buyer after the buyer accepts the goods without complaint;³¹ another court held that where a governmental order to confiscate food products for suspicion of dioxin contamination is in place, it is assumed that the delivered goods were non-conforming at the time of passing of the risk, and therefore the burden to prove that the suspicion was unfounded shifts to the seller.³² On the other hand, one court held that the seller bears the burden to prove that the goods (phenol) were without defects at the time the risk of loss passed to the buyer.³³ In that particular case, the FOB seller was held liable since the buyer provided proof that the goods were affected by a substance that caused the deterioration prior to the handing over of the goods to the carrier, whereas the seller provided no proof to the contrary.

14. The following cases provide examples of the proof that is required to establish conformity or non-conformity at the time of passing of the risk. 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.³⁴ Likewise, where there was evidence that the goods (ribs) were processed and stored in acceptable conditions and temperatures from the time they were processed until they were transferred to the buyer, and where nothing in the evidence suggested that the processor or storage facility did anything improper with respect to the goods or that the ribs were spoiled prior to being transferred to the buyer, the buyer bore the risk.³⁵ On the other hand, another court held that where there was evidence that the cooling system of the carrier's truck had been running continuously during transport, and stickiness and breakage of frozen pepper slices were discovered at the destination, a court found that the lack of conformity was already present at the time of the passing of the risk, i.e., the time the goods were handed over to the carrier.³⁶ However, note that it is not totally clear if placement of the burden of proof was the decisive factor in reaching these results.

RISK OF LOSS OR DAMAGE FOLLOWING TERMINATION OR AVOIDANCE

15. If the parties avoid the contract or 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, override the general risk provisions of Chapter IV.³⁷ When

the goods are returned following termination of the contract, one court held that 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” and the buyer bore the transportation risk in the initial contract, then when goods are returned following termination, the risk passes back to the seller when the buyer hands over the goods to a carrier at the buyer’s place of business.³⁸ It has also been held that, where the contract was avoided due to non-conformity of the goods, the buyer’s restitution obligation was only to

place the goods at the seller’s disposal at the buyer’s place of business, just as article 31 (c) obliged the seller to place goods at the disposal of the buyer at the seller’s place of business; 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.³⁹ Both of these cases, in which it was held that the seller bore the risk of loss during transportation of goods being returned to the seller, were cases involving breach by the seller. No case involving a breach by the buyer has been reported on this issue.

Notes

¹See e.g., Polimeles Protodikio Athinon, Greece, 2009 (docket No. 4505/2009) (Bullet-proof vest case), English editorial analysis available on the Internet at <http://cisgw3.law.pace.edu/cases/094505gr.html>; Monomeles Protodikio Thessalonikis, Greece, 2008 (docket No. 43945/2007) (Clothes case), English editorial analysis available on the Internet at <http://cisgw3.law.pace.edu/cases/080002gr.html>; CLOUT case No. 802 [Tribunal Supremo, sección 1ª sala de lo Civil, Spain, 17 January 2008]; CLOUT case No. 724 [Oberlandesgericht Koblenz, Germany, 14 December 2006]; Landgericht München, Germany, 29 November 2005 (Frozen vegetable case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051129g1.html> (though without explicit citation to Article 36); CLOUT case No. 774 [Bundesgerichtshof, Germany, 2 March 2005] (contaminated frozen pork), *reversing on different grounds* CLOUT case No. 820 [Oberlandesgericht Frankfurt, Germany, 29 January 2004] and *amending* Landgericht Giessen, Germany, 18 March 2003, available on the Internet at www.cisg-online.ch/cisg/urteile/951.pdf; Landgericht Saarbrücken, Germany, 26 October 2004 (Fuses and fuse brackets case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/041026g1.html> (though without explicit citation to Article 36); Landgericht Köln, Germany, 25 March 2003 (Racing carts case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030325g1.html>; Foreign Trade Court of Arbitration attached to the Yugoslav Chamber of Commerce, Serbia, 12 July 1994, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/940712sb.html> (without explicitly citing article 36).

²CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000] (see full text of the decision).

³Oberlandesgericht Schleswig-Holstein, Germany, 29 October 2002 (the Stallion case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021029g1.html> (deriving the conclusion from the third sentence of article 67 (1)); Wuhan Maritime Court, Hubei, China, 10 September 2002 (Nanjing Resources Group v. Tian An Insurance Co. Ltd., Nanjing Branch), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020910c1.html>; CLOUT case No. 447 [U.S. District Court, Southern District of New York, United States, 26 March 2002] (St. Paul Guardian Ins. Co. v. Neuromed Medical Systems & Support GmbH).

⁴CLOUT case No. 163 [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).

⁵Federal Arbitration Court for the Northwestern Circuit, Russian Federation, 3 June 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030603r1.html>.

⁶Oberlandesgericht Schleswig-Holstein, Germany, 29 October 2002 (The Stallion case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021029g1.html> (CISG provisions on passing of risk do not apply where the validity of the contract is denied due to domestic law).

⁷See, e.g., CLOUT case No. 338 [Oberlandesgericht Hamm, Germany, 23 June 1998] (goods could not be found at insolvent warehouse).

⁸See, e.g., CLOUT case No. 340 [Oberlandesgericht Oldenburg, Germany, 22 September 1998] (insolvent processor of raw salmon transferred processed salmon to other customers).

⁹See, e.g., CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000] (physical damage).

¹⁰See, 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).

¹¹China International Economic and Trade Arbitration Commission, People’s Republic of China, 1 April 1997 (Fishmeal case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/970401c1.html>.

¹²Tribunal Cantonal Valais, Switzerland, 19 August 2003 (Clothing, household linen case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030819s1.html>; CLOUT case No. 219 [Tribunal Cantonal Valais, Switzerland, 28 October 1997] (buyer bears risk of subsequent delay) (see full text of the decision).

¹³Arrondissementsrechtbank Arnhem, the Netherlands, 17 July 1997 (Kunsthaus Math. Lempertz OHG v. Wilhelmina van der Geld), Unilex, *affirmed on other grounds*, Hof Arnhem, the Netherlands, 9 February 1999 (CISG not applicable).

¹⁴Hof van Beroep Ghent, Belgium, 16 June 2004 (Mermark Fleischhandelsgesellschaft mbH v. Cvba Lokerse Vleesveiling), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040616b1.html>.

¹⁵Not 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).

¹⁶See, e.g., CLOUT case No. 191 [Cámara Nacional de Apelaciones en lo Comercial, Argentina, 31 October 1995] (varying “C & F”) (see full text of the decision).

¹⁷See, e.g., CLOUT case No. 317 [Oberlandesgericht Karlsruhe, Germany, 20 November 1992] (“frei Haus”).

¹⁸See, e.g., CLOUT case No. 283 [Oberlandesgericht Köln, Germany, 9 July 1997] (“list price ex works”).

¹⁹See, 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.

²⁰Oberlandesgericht Schleswig-Holstein, Germany, 29 October 2002 (The Stallion case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021029g1.html>.

²¹CLOUT case No. 317 [Oberlandesgericht Karlsruhe, Germany, 20 November 1992].

²²CLOUT case No. 317 [Oberlandesgericht Karlsruhe, Germany, 20 November 1992].

²³CLOUT case No. 317 [Oberlandesgericht Karlsruhe, Germany, 20 November 1992] (seller’s practice of delivering in its own trucks used to interpret parties’ agreement).

²⁴CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000] (practice permitting buyer to offset value of physical damage).

²⁵See, e.g., CLOUT case No. 575 [U.S. Court of Appeals for the Fifth Circuit, United States, 11 June 2003] (BP Oil International v. Empresa Estatal Petroleos de Ecuador); CLOUT case No. 447 [U.S. District Court, Southern District of New York, United States, 26 March 2002] (St. Paul Guardian Ins. Co. v. Neuromed Medical Systems & Support GmbH) (“CIF”); 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”).

²⁶CLOUT 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).

²⁷Landgericht Bamberg, Germany, 23 October 2006 (Plants case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061023g1.html>; CLOUT case No. 338 [Oberlandesgericht Hamm, Germany, 23 June 1998].

²⁸CLOUT case No. 283 [Oberlandesgericht Köln, Germany, 9 July 1997].

²⁹CLOUT case No. 317 [Oberlandesgericht Karlsruhe, Germany, 20 November 1992].

³⁰E.g., U.S. Court of Appeals for the Seventh Circuit, United States, 23 May 2005 (Chicago Prime Packers, Inc. v. Northam Food Trading Co.), available on the Internet at <http://cisgw3.law.pace.edu/cases/050523u1.html>; CLOUT case No. 377 [Landgericht Flensburg, Germany, 24 March 1999].

³¹Appelationshof Bern, Switzerland, 11 February 2004 (Wire and cable case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040211s1.html>.

³²CLOUT case No. 820 [Oberlandesgericht Frankfurt, Germany, 29 January 2004] (contaminated frozen pork) English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040129g1.html>.

³³Hovioikeus / hovrätt Helsinki, Finland, 31 May 2004 (Crudex Chemicals Oy v. Landmark Chemicals S.A.), English editorial analysis available on the Internet at <http://cisgw3.law.pace.edu/cases/040531f5.html>.

³⁴CLOUT case No. 247 [Audiencia Provincial de Córdoba, Spain, 31 October 1997].

³⁵U.S. Court of Appeals for the Seventh Circuit, United States, 23 May 2005 (Chicago Prime Packers, Inc. v. Northam Food Trading Co.), available on the Internet at <http://cisgw3.law.pace.edu/cases/050523u1.html>.

³⁶Landgericht München, Germany, 29 November 2005 (Frozen vegetable case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051129g1.html>.

³⁷CLOUT case No. 422 [Oberster Gerichtshof, Austria, 29 June 1999].

³⁸CLOUT case No. 422 [Oberster Gerichtshof, Austria, 29 June 1999].

³⁹CLOUT 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. Many cases also apply article 66 to contracts in which parties agree on the use of trade terms such as "CIF", "CFR", "FOB", and "FCA" that provide for when the risk passes.¹

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.² Most, but not all, of these decisions cite both article 53 and article 66.³

3. If the goods are lost or damaged before the risk has passed, non-delivery or delivery of the damaged goods is a breach of the seller's obligation to deliver conforming goods (articles 30, 35, and 36). In that case, the buyer's obligation to pay the price may be discharged if the buyer avoids the contract (articles 49 and 81), or the price may be reduced (article 50). On the other hand, several decisions cite article 66 for the proposition that a buyer is not obligated to pay the price for lost or damaged goods it did not receive.⁴

4. In a case where the goods were taken over by the buyer at the seller's warehouse, but where the contract included a "Delivered at Frontier" clause according to which the risk passes at the border, an arbitral tribunal held that the time for examining the goods under article 38 is the moment of

the passing of the risk because the seller is only liable for non-conformities that existed at the time of the passing of the risk.⁵

EXCEPTION WHEN LOSS OR DAMAGE DUE TO SELLER'S ACTS OR OMISSIONS

5. 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 "unless" clause of article 66 provides an exception to this rule. If it is established that the loss or damage was due to an act or omission of the seller, the buyer's obligation to pay may be discharged. Some arbitral tribunals, addressing CIF sales of a chemical substance, 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 seller was held liable for the loss or damage.⁶ Another decision found that the seller was liable for damage to the goods that occurred due to improper packaging prior to the passing of the risk to the buyer or carrier.⁷ Another decision suggested, without citing article 66, that the seller would be liable for deterioration of the goods (live sheep) during shipment if the seller's instruction to the carrier caused the overloading of the truck, and thus caused the bad physical condition of the sheep.⁸ According to several cases, the buyer bears the burden of proving that a loss or damage was due to the act or omission of the seller; in none of these cases has the buyer carried this burden.⁹

6. This exception to the buyer's obligation to pay is distinct from the seller's continuing liability under article 36 (1) for non-conformities that exist at the time the risk of loss passes even if they do not become apparent until a later time; the exception in the "unless" clause of article 66 is also distinct from the seller's liability under article 36 (2) for non-conformities that arise subsequent to passage of risk if the seller has guaranteed the goods against these non-conformities.

Notes

¹Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 17 May 1999, (Arbitral award No. 342/1998), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/990517r1.html> ("FCA"); CLOUT case No. 683 [China International Economic and Trade Arbitration Commission, People's Republic of China, 1999] ("CIF"), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/990000c1.html>; China International Economic and Trade Arbitration Commission, People's Republic of China, 23 February 1995, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/950223c1.html> ("CIF").

²District Court in Komarno, Slovakia, 12 March 2009 (Frozen peas case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090312k1.html> (citing article 66 without explicit mention of its consequences); Hof van Beroep Ghent, Belgium, 16 June 2004 (Mermark Fleischhandelsgesellschaft mbH v. Cvba Lokerse Vleesveiling), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040616b1.html>; CLOUT case No. 552 [Audiencia Provincial de Valencia, Sección 6, Spain, 15 February 2003 (Cerámicas S.L. v. Hanjin Shipping Co. Ltd)]; 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 article 69 (2)); CLOUT case No. 864 [China International Economic and Trade Arbitration Commission, People's Republic of China, 25 June 1997, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/970625c1.html>] (in a contract on "CNF" ("Cost and Freight") basis, buyer not obliged to pay for good that sank with the ship); CLOUT case No. 163 [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), upholding Juzgado Nacional de Primera Instancia en lo Comercial No. 11 (Buenos Aires), Argentina, 18 March 1994.

³The 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 Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 10 December 1996] (see full text of the decision).

⁴CLOUT 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).

⁵Foreign Trade Court of Arbitration attached to the Yugoslav Chamber of Commerce, Serbia, 12 July 1994, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/940712sb.html>.

⁶CLOUT case No. 683 [China International Economic and Trade Arbitration Commission, People's Republic of China, 1999 (Piperonal aldehyde)] English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/990000c1.html>; China International Economic and Trade Arbitration Commission, People's Republic of China, 23 February 1995, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/950223c1.html> (Jasmine aldehyde).

⁷CLOUT case No. 724 [Oberlandesgericht Koblenz, Germany, 14 December 2006].

⁸Oberlandesgericht Schleswig, Germany, 22 August 2002 (Live sheep case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020822g2.html> (denying seller's liability).

⁹Federal Arbitration Court for the Western Siberia Circuit, Russian Federation, 6 August 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020806r1.html>; Tribunal Cantonal Vaud, Switzerland, 26 May 2000, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/1840.pdf>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 17 May 1999 (Arbitral award No. 342/1998), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/990517r1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 30 December 1998 (Arbitral award No. 62/1998), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/981230r1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 11 March 1998 (Arbitral award No. 487/1996), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/980311r1.html>; CLOUT case No. 163 [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 first 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 of seller's fundamental breach on the passing of risk 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. Under article 9, they may also be bound by usages of trade or a course of dealing that derogate from article 67. 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 (which was replaced by "CFR" in Incoterms 1990), "FOB"⁷, "FOT"⁸ (which was replaced by "FCA" in Incoterms 1990), and "list price ex works"⁹ 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.¹⁰

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.¹¹

5. Article 68 sets out special rules for passage of risk when goods are sold in transit. Therefore, article 67 does not apply when goods are sold in transit.

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 transported via carrier 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", "FOB"), which spell out which party's obligation it is to arrange for a contract of carriage. Other terms of the contract may also 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" (Kladovo being the seller's address).¹² Some cases apply article 67 without reciting facts which show that carriage was involved.¹³ A decision held that a contract which provided for delivery "free of charge" was still a contract involving carriage where the buyer engaged the carrier and the seller was charged for the transport.¹⁴ However, where the seller was to deliver the goods free at the buyer's address, customs duties unpaid, the court held that the risk passed at the time of unloading at the place of performance.¹⁵

7. For the purpose of deciding whether a contract of sale involves carriage or not, it is irrelevant whether the contract of carriage is to be arranged by the seller or the buyer.¹⁶ There is no question that the sale involves carriage if it is the obligation of the seller to arrange the carriage. Cases in which the buyer arranged the carriage also apply article 67.¹⁷ Some cases apply article 67 without specifying which party was to arrange the carriage.¹⁸

8. Carriers for the purpose of article 67 may be a courier service¹⁹ or postal service.²⁰ Article 67 refers to “carriage of the goods” and does not expressly require that the goods be carried by a third-party carrier. Some decisions treat delivery to a freight forwarder as the equivalent of delivery to the “first carrier”.²¹

ALLOCATION OF RISK

9. 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

10. 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.²²

If the seller is bound to hand over goods to the carrier at a 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 part of the provision.

Notes

¹See CLOUT case No. 447 [U.S. District Court, 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).

²Oberlandesgericht Schleswig-Holstein, Germany, 29 October 2002 (the Stallion case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021029g1.html> (the passing of risk at the time of handing over is independent of the passing of ownership); Wuhan Maritime Court, Hubei, People’s Republic of China, 10 September 2002 (Nanjing Resources Group v. Tian An Insurance Co. Ltd., Nanjing Branch), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020910c1.html> (the principle of separation of ownership and risk is adopted under the Incoterms and the CISG); CLOUT case No. 447 [U.S. District Court, 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).

The meaning of “hand over” to a carrier

12. The handing over of the goods is complete when the goods are in the physical custody of the carrier. One court held that “handing over” requires that the carrier take custody of the goods, which implies an actual surrender of the goods to the carrier; and that it is necessary for the seller to load the goods onto or into the respective means of transport; and that the risk only passes when loading is completed.²³ In that case, the damage was caused by improper loading by the seller onto a truck arranged by the buyer. Another court found that the risk had not passed when the goods (a machine) fell on the ground from a fork lift and became unsalable before the machine was loaded on a truck that arrived to pick up the goods.²⁴

13. However, one court held that the risk does not pass even when the goods are handed over to the carrier, if the seller fails to present a bill of lading to the issuing bank of the letter of credit for payment within the time limit stipulated in the sales contract (with the consequence that the bill of lading did not reach the buyer); without referring to article 67, the court held that the seller still bore the risk because of its breach of contract.²⁵

RETENTION OF DOCUMENTS BY SELLER

14. 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 part of the provision.

IDENTIFICATION OF GOODS

15. Paragraph (2) of article 67 conditions the passage of risk on clear identification of the goods to the contract of sale.²⁶ This rule is designed to protect against the possibility that a seller will identify to the contract goods that have already suffered casualty. Some decisions have found that the requirement that the goods be clearly identified is satisfied by the description of the goods in the shipping documents.²⁷ 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.²⁸

³CLOUT case No. 247 [Audiencia Provincial de Córdoba, Spain, 31 October 1997] (risk passes without regard to who must arrange for transport or insurance).

⁴CLOUT case No. 91 [Corte Costituzionale, Italy, 19 November 1992].

⁵CLOUT case No. 253 [Cantone del Ticino Tribunale d'appello, Switzerland, 15 January 1998] (see full text of the decision).

⁶CLOUT case No. 864 [China International Economic and Trade Arbitration Commission, People's Republic of China, 25 June 1997], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/970625c1.html>; CLOUT case No. 191 [Cámara Nacional de Apelaciones en lo Comercial, Argentina, 31 October 1995], upholding Juzgado Nacional de Primera Instancia en lo Comercial No. 11 (Buenos Aires), Argentina, 18 March 1994.

⁷Shanghai No. 2 Intermediate People's Court, People's Republic of China, 25 December 2006 (Cabinets and accessories case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061225c1.html>; High People's Court, Ningxia Hui Autonomous Region, People's Republic of China, 27 November 2002, (Xinsheng Trade Company v. Shougang Nihong Metallurgic Products), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021127c1.html> (explicit cumulative application of article 67 (1) CISG and Incoterms 2000); China International Economic and Trade Arbitration Commission, People's Republic of China, 6 September 1996 (Engines case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/960906c1.html>.

⁸Arbitration Court of the International Chamber of Commerce, 2000 (Arbitral award No. 8790) (Processed food product case), available on the Internet at <http://cisgw3.law.pace.edu/cases/008790i1.html>.

⁹CLOUT case No. 283 [Oberlandesgericht Köln, Germany, 9 July 1997].

¹⁰CLOUT case No. 317 [Oberlandesgericht Karlsruhe, Germany, 20 November 1992], overturning Landgericht Baden-Baden, Germany, 13 January 1992, available on the Internet at www.cisg-online.ch/cisg/urteile/167.htm.

¹¹See, e.g., CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000] (the word "carrier" means the same in both articles 31 and 67).

¹²CLOUT case No. 163 [Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 10 December 1996].

¹³Landgericht Köln, Germany, 25 March 2003 (Racing carts case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030325g1.html>.

¹⁴Landgericht Bamberg, Germany, 23 October 2006 (Plants case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061023g1.html>.

¹⁵Appellationshof Bern, Switzerland, 11 February 2004 (Wire and cable case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040211s1.html> (perhaps applying article 69 (2) though without explicit citation).

¹⁶CLOUT case No. 247 [Audiencia Provincial de Córdoba, Spain, 31 October 1997] (risk passes without regard to who must arrange for transport or insurance).

¹⁷U.S. Court of Appeals for the Seventh Circuit, United States, 23 May 2005, (Chicago Prime Packers, Inc. v. Northam Food Trading Co.), available on the Internet at <http://cisgw3.law.pace.edu/cases/050523u1.html>; CLOUT case No. 774 [Bundesgerichtshof, Germany, 2 March 2005] (contaminated pork), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050302g1.html> *reversing on different grounds* CLOUT case No. 820 [Oberlandesgericht Frankfurt, Germany, 29 January 2004] (contaminated frozen pork), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040129g1.html>, and *amending* Landgericht Giessen, Germany, 18 March 2003, original text available on the Internet at www.cisg-online.ch/cisg/urteile/951.pdf.

¹⁸Oberlandesgericht Schleswig, Germany, 22 August 2002 (Live sheep case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020822g2.html>.

¹⁹Landgericht Saarbrücken, Germany, 26 October 2004 (Fuses and fuse brackets case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/041026g1.html>.

²⁰Tribunal Cantonal Valais, Switzerland, 19 August 2003 (Clothing, household linen case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030819s1.html>.

²¹Landgericht Saarbrücken, Germany, 26 October 2004 (Fuses and fuse brackets case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/041026g1.html>; CLOUT case No. 283 [Oberlandesgericht Köln, Germany, 9 July 1997].

²²CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000].

²³Landgericht Bamberg, Germany, 23 October 2006 (Plants case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061023g1.html>.

²⁴Bundesgericht, Switzerland, 16 December 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081216s1.html> (the disputing parties are the seller and the employer of the operator of the fork lift).

²⁵Wuhan Maritime Court, Hubei, People's Republic of China, 10 September 2002 (Nanjing Resources Group v. Tian An Insurance Co. Ltd., Nanjing Branch), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020910c1.html>.

²⁶Article 32 (1) requires the seller to notify the buyer of the consignment of the goods if they are not otherwise clearly identified.

²⁷CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000]; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 30 December 1998 (Arbitral award No. 62/1998), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/981230r1.html>.

²⁸CLOUT 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 for goods sold in transit is that the risk passes from the time the contract of sale is concluded.¹ If, however, the circumstances so indicate, the risk is deemed to have passed when the goods were handed over to the carrier.² 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. Some courts cite article 68 without interpreting its contents.³ The consequence of the passing of the risk on the buyer's obligation to pay is dealt with in article 66. The effect of seller's fundamental breach on the passing of risk is addressed in article 70.

2. One arbitral tribunal cited article 68, together with article 32, to support the proposition that parties may buy and sell goods which are in any state, phase or process.⁴

DISCREPANCY IN AUTHENTIC TEXT

3. The authentic Russian text of Article 68 adopted when the text of the Convention was originally approved did not contain the first sentence of Article 68. One court interpreted that text and held that the risk in respect of goods sold in transit passes from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage.⁵ The authentic Russian text of article 68 has been corrected.⁶

Notes

¹China International Economic and Trade Arbitration Commission, People's Republic of China, 1 April 1997 (Fishmeal case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/970401c1.html>.

²Landgericht Paderborn, Germany, 10 June 1997 (Furniture case), available on the Internet at <http://cisgw3.law.pace.edu/cases/970610g1.html> (affirmed in CLOUT case No. 338 [Oberlandesgericht Hamm, Germany 23 June 1998] which applied Article 69 instead).

³Schiedsgericht der Börse für landwirtschaftliche Produkte in Wien, Austria, 10 December 1997, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/971210a3.html>.

⁴China International Economic and Trade Arbitration Commission, People's Republic of China, 10 March 1995, (Polyethylene film case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/950310c2.html>.

⁵Federal Arbitration Court for the Northwestern Circuit, Russian Federation, 3 June 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030603r1.html>.

⁶See Depositary notification C.N.233.2000.TREATIES-2 of 27 April 2000 (rectification of the Russian authentic text).

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. The consequence of the passing of the risk on the buyer's obligation to pay is dealt with in article 66. The effect of seller's fundamental breach on the passing of risk 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 the case even if the buyer arranges for subsequent transportation of the goods by a third-party carrier. Which article applies in a particular case often turns on the 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" (Kladovo being the seller's address).³ On the other hand, with respect to a contract where the seller agreed to deliver the goods under the "DAF" ("Delivered at Frontier") term in accordance with Incoterms 1990 (under Incoterms 2010, "DAF" is subsumed under "DAP" ("Delivered at Place")), an arbitral tribunal found that article 69 rather than article 67 (or the DAF term itself) governed the issue of when the risk passes.⁴ For more cases, see the digest to article 67.

3. Article 69 (1) covers cases where delivery is to take place at the seller's place of business, while article 69 (2) addresses all other cases.⁵ If the loss or damage occurred after the buyer took over the goods, some decisions apply Article 69 without specifying whether they are applying paragraph (1) or (2).⁶

TAKING OVER GOODS AT SELLER'S PLACE OF BUSINESS

4. When goods are to be delivered at the seller's place of business, article 69 (1) provides that the risk passes to the buyer when it takes over the goods. The buyer's use of a carrier to take over the goods does not prevent the passing of risk even when it was agreed that the goods were to be taken over by the buyer.⁷ A court has applied article 69 (1) to a contract between an individual and an auctioneer where the individual ordered the auctioneer to sell by auction a painting.⁸

5. If the buyer fails to take over the goods, paragraph (1) provides that the risk passes at the point when two requirements have been satisfied: 1) the goods have been placed at the buyer's disposal, and 2) the buyer's failure to take them over constitutes a breach of contract. One court found that the goods had not been placed at the buyer's disposal when they were stored in the manufacturer's warehouse, rather than in the seller's warehouse where the delivery to the buyer was to be made.⁹

TAKING OVER GOODS AT OTHER LOCATIONS

6. 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.

7. 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.¹⁰ 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.¹¹ 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.¹² 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" ("Delivered at Frontier") as agreed, nor had the seller placed the goods at the buyer's disposal.¹³

IDENTIFICATION OF THE GOODS

8. For the same reasons that justify paragraph (2) of article 67, paragraph (3) of article 69 provides that, in case of a sale of goods not identified when the contract is concluded, the goods are considered not to have been placed at the disposal of the buyer until they are clearly identified to the contract. Consequently, the risk of loss does not pass under either paragraphs (1) or (2) of article 69 until that time. One court applying article 69 (2) held that the requirement that the goods be clearly identified was satisfied by storing the goods in a warehouse separately from other goods.¹⁴

Notes

¹CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000] (article 69 (1) applies only if preceding two articles do not apply) (see full text of the decision).

²CLOUT case No. 283 [Oberlandesgericht Köln, Germany, 9 July 1997].

³CLOUT case No. 163 [Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 10 December 1996].

⁴CLOUT case No. 104 [Arbitration Court of the International Chamber of Commerce, 1992 (Arbitral award No. 7197)].

⁵See U.S. District Court, District of Colorado, 6 July 2010 (Alpha Prime Development Corporation, Plaintiff, v. Holland Loader), available on the Internet at <http://cisgw3.law.pace.edu/cases/100706u1.html>.

⁶Oberlandesgericht Linz, Austria, 23 January 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060123a3.html> (article 69 referred to during application of article 36; however, applicability of the CISG denied upon appeal in Oberster Gerichtshof, Austria, 4 July 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070704a3.html>); CLOUT case No. 995 [Randers Byret, Denmark 8, July 2004] (agricultural machine to be delivered in Buyer's country, a few kilometers from the field where it was intended to be used).

⁷Oberlandesgericht Schleswig-Holstein, Germany, 29 October 2002 (Stallion case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021029g1.html>.

⁸Arrondissementsrechtbank Arnhem, the Netherlands, 17 July 1997 (Kunsthaus Math. Lempertz OHG v. Wilhelmina van der Geld), Unilex, affirmed on other grounds, Hof Arnhem, the Netherlands, 9 February 1999, Unilex (Convention not applicable).

⁹Landgericht Paderborn, Germany, 10 June 1997 (Furniture case), available on the Internet at www.cisg-online.ch/cisg/urteile/523.htm (although the upper court in CLOUT case No. 338 [Oberlandesgericht Hamm, Germany, 23 June 1998], applied paragraph (2) of Article 69).

¹⁰Cour de Justice de Geneve, Switzerland, 20 January 2006 (Paper products case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060120s1.html> (delivery at buyer's President's private residence—obiter dictum); Appellationshof Bern, Switzerland, 11 February 2004 (Wire and cable case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040211s1.html> (delivery at buyer's address although there is no explicit citation of article 69 (2)); Rechtbank van Koophandel Ieper, Belgium, 18 February 2002 (L. v. SA C.), Unilex, full text available on the Internet at www.law.kuleuven.ac.be/ipr/eng/cases/2002-02-18.html (delivery at buyer's place); CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000] (paragraph (2) covers cases where buyer takes over goods at a place other than seller's place of business; in this particular case, the place of delivery was buyer's place of business).

¹¹CLOUT case No. 338 [Oberlandesgericht Hamm, Germany, 23 June 1998].

¹²CLOUT case No. 340 [Oberlandesgericht Oldenburg, Germany, 22 September 1998].

¹³CLOUT case No. 104 [Arbitration Court of the International Chamber of Commerce, 1993 (Arbitral award No. 7197)] (see full text of the decision).

¹⁴Oberlandesgericht Hamburg, Germany, 14 December 1994 (Cobalt sulphate case), available on the Internet at www.cisg-online.ch/cisg/urteile/216.htm (affirmed in CLOUT case No. 171 [Bundesgerichtshof, Germany, 3 April 1996] without explicit mention of this issue).

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 Its 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

¹Part IV of the Convention, the sole subsequent remaining division, contains "Final provisions" addressing such matters as the depositary 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, which 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 fashion 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 Other courts have, however, held that there is a gap in the Convention, and that a general right to withhold performance in order to enforce proper performance may be founded on the general principles contained in articles 71, 81, 85 and 86.⁴ Under article 71, the right continues until the conditions for suspension no longer exist,⁵ there is a right to avoid the contract, or the other party gives adequate assurance of performance in accordance with article 71 (3).⁶ The Convention's rules on the right to suspend displace domestic sales law rules that permit the suspension of a party's obligation.⁷

2. The right to suspend under article 71 is to be distinguished from the right to avoid the contract under article 72.⁸ 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).⁹ If a party chooses to suspend performance with respect to future instalments it must give a notice in accordance with article 71 (3).¹⁰

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.¹¹

PRECONDITIONS OF SUSPENSION

5. A party is entitled to suspend its obligations under paragraph (1) of article 71¹² if it becomes apparent that the other party will not perform a substantial part of its obligations¹³ and if the non-performance is the result of the causes set out in subparagraphs (a)¹⁴ or (b).¹⁵ It is not necessary that the failure amount to a fundamental breach.¹⁶ A declaration that a party will not perform its duty to take delivery entitles the other party to withhold performance.¹⁷ Usually the performances in question must arise from the same contract, but if non-performance is threatened under a different contract that is linked closely enough to the contract in question, a party is entitled to suspend performance.¹⁸

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;¹⁹ seller's inability to deliver goods free of restrictions imposed by seller's supplier;²⁰ seller's delivery of

non-conforming goods under an instalment contract;²¹ buyer's failure to pay for the goods;²² buyer's non-payment or delayed payment of the price under one or more earlier sales contracts;²³ buyer's failure to open an effective bank guarantee.²⁴ 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 72.²⁵ A party was held entitled to delay payment where the seller's preparation for performance clearly indicated that it would not be able to perform in time after payment.²⁶ Where a party has breached the contract, the other party is entitled to withhold performance until such time as the breach is remedied. This right is not found in article 71, but is based on the general principles of reciprocity found in articles 71, 58 and 86 of the Convention.²⁷

7. A buyer was found not to be entitled to suspend its obligations in the face of the following circumstances: seller's non-conforming delivery of only 420 kg out of 22,400 kg;²⁸ partial delivery by the seller;²⁹ prior non-conforming deliveries where buyer sought to suspend payment for current conforming deliveries.³⁰ 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.³¹ Where a party relies on a serious deficiency in the creditworthiness of the other party, it must prove that fact as well as the fact that the serious deficiency did not exist at the time of contracting, i.e., that the other party's creditworthiness deteriorated after the conclusion of the contract.³² The right to suspend is aimed at enforcing the contract. In one case a court held that where a buyer had lost interest in enforcing the contract, as demonstrated by the fact that the buyer had made cover purchases, that party was not entitled to invoke article 71.³³

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.³⁴ 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.³⁵

Notes

¹CLOUT case No. 432 [Landgericht Stendal, Germany, 12 October 2000] (stating that suspension under article 71 is not a breach, but the exercise of a unilateral right to modify time for performance) (see full text of the decision).

²CLOUT 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); CLOUT Case No. 936 [Bundesgericht, Switzerland, 17 July 2007], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070717s1.html> (seller failed to substantiate its claims of the failing creditworthiness of the buyer).

³CLOUT 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).

⁴Oberster Gerichtshof, Austria, 8 November 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051108a3.html> (the principle of simultaneous performance justifies the suspension by a party of its performance in the case of breach); Supreme Court, Poland, 11 May 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070511p1.html> (purchaser who is entitled to and is insisting on delivery of substitute goods, is entitled to suspend performance).

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. In two cases, reliance on article 71 to justify a stoppage in transit was rejected, because the sellers had either failed to give the requisite notice or failed to prove that there was a well-grounded fear of non performance.³⁶

NOTICE OF SUSPENSION

10. Paragraph (3) of article 71 requires a suspending party to give notice of the suspension immediately³⁷ to the other party.³⁸ 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;³⁹ a letter in which the buyer refused to accept non-conforming items and offered to return them.⁴⁰ The following circumstances have been found not to constitute sufficient notice: buyer's failure to pay the price;⁴¹ 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.⁴²

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.⁴³ 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.⁴⁴

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.⁴⁵

⁵Supreme Court of British Columbia, Canada, 21 August 2003 (*Mansonville v. Kurtz*), available on the Internet at <http://cisgw3.law.pace.edu/cases/030821c4.html> (seller suspended performance due to failure of buyer to open letter of credit, but failed to perform when the failure was corrected).

⁶CLOUT 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 is not breach but the exercise of a right to modify time for performance).

⁷CLOUT case No. 238 [Oberster Gerichtshof, Austria, 12 February 1998] (see full text of the decision).

⁸Arbitration Court of the International Chamber of Commerce, January 1997 (Arbitral award No. 8786), Unilex (buyer did not suspend obligations but avoided contract under article 72 (1)); Arbitration Court of the International Chamber of Commerce, September 1996 (Arbitral award No. 8574), Unilex (buyer's purchase of substitute goods not a suspension of its obligations).

⁹CLOUT case No. 238 [Oberster Gerichtshof, Austria, 12 February 1998].

¹⁰Tribunal of International Commercial Arbitration at the Federation Chamber of Commerce and Industry, Russian Federation, 27 July 1999 (Arbitral award No. 302/1996), *Rozenberg, Praktika of Mejdunarodnogo Commercheskogo Arbitrajnogo Syda: Haychno-Prakticheskij Kommentarij* 1999-2000, No. 27 [141-147].

¹¹CLOUT case No. 311 [Oberlandesgericht Köln, Germany, 8 January 1997] (see full text of the decision).

¹²The following decision recognizes the applicability of the Convention and the right to suspend but fails to cite article 71: Tribunal Commercial de Bruxelles, Belgium, 13 November 1992 (*Maglificio Dalmine v. Coveres*), Unilex (seller entitled to suspend delivery because buyer failed to pay price under prior contract).

¹³Oberlandesgericht Dresden, Germany, 27 December 1999, Unilex (noting that there must be a mutual, reciprocal relationship between the obligation suspended and the counter-performance).

¹⁴The 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); Zürich Handelskammer, Switzerland, 31 May 1996 (Arbitration award No. 273/95), Unilex; Kantonsgericht, Appenzell Ausserrhoden, Switzerland, 10 March 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030310s1.html> (preparations for performance by the seller clearly showed that it would not be able to perform within the 14 day period after payment).

¹⁵The following cases cite subparagraph (b): *Rb Arrondissementsrechtbank 's-Hertogenbosch*, the Netherlands, 2 October 1998 (*Malaysia Dairy Industries v. Dairex Holland*), Unilex; CLOUT case No. 164 [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.

¹⁶Landgericht Berlin, Germany, 15 September 1994, Unilex. But see CLOUT case no. 578 [U.S. District Court, Western District of Michigan, United States, 17 December 2001 (*Shuttle Packaging Systems v. Tsonakis*)], 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); Netherlands Arbitration Institute, the Netherlands, 15 October 2002 (Arbitral award No. 2319), Unilex (suspension of future deliveries under the contract due to non-conformity of first consignments).

¹⁷Bundesgerichtshof, Germany, 27 November 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071127g1.html> (party insisting on payment of supplemental consulting fees to which it was not entitled gave an indication that it would not perform).

¹⁸Rechtbank Arnhem, the Netherlands, 29 July 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090729n1.html> (party suspending delivery of bus where payment on contracts for previous buses still outstanding); U.S. District Court, Southern District of New York, United States, 29 May 2009 (*Doolim Corp. v. R Doll, LLC*), available at 2009 WL 1514913 and available on the Internet at <http://cisgw3.law.pace.edu/cases/090529u1.html> (well-grounded fears that buyer would not pay for garments due to defaults on earlier consignments). See, however, the decision of the Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 13 April 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060413r1.html> (a party may not withhold payment where it anticipates the future failure to perform of the other party).

¹⁹Landgericht Berlin, Germany, 15 September 1994, Unilex (citing article 71 (1) (b)).

²⁰CLOUT case No. 338 [Oberlandesgericht Hamm, Germany, 23 June 1998] (citing article 71 (1) (a)); Oberlandesgericht Linz, Austria, 23 May 1995, English translation 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].

²¹Netherlands Arbitration Institute, the Netherlands, 15 October 2002 (Arbitral award No. 2319), Unilex (suspension of future deliveries under the contract due to non-conformity of first consignments).

²²CLOUT case No. 164 [Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 5 December 1995] (citing article 71 (1) (b), court found seller justified in suspending its obligation to repair non-conforming goods) (see full text of the decision). See also Arbitration Court of the International Chamber of Commerce, 23 January 1997 (Arbitral award No. 8611), Unilex (noting that seller's failure to perform occurred before it would have been entitled to suspend performance under article 71 (1) (b) because of buyer's non-payment).

²³Rechtbank van Koophandel Hasselt, Belgium, 1 March 1995 (*J.P.S. BVBA v. Kabri Mode BV*), Unilex (seven-month delay in payment); Tribunal Commercial de Bruxelles, Belgium, 13 November 1992 (*Maglificio Dalmine v. Coveres*), Unilex (without citing article 71); Rechtbank Arnhem, the Netherlands, 29 July 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090729n1.html> (party suspending delivery of bus where payment on contracts for previous buses still outstanding); U.S. District Court, Southern District of New York, United States, 29 May 2009 (*Doolim Corp. v. R Doll, LLC*), available at 2009 WL 1514913 and available on the Internet at <http://cisgw3.law.pace.edu/cases/090529u1.html> (well-grounded fears that buyer would not pay for garments due to defaults on earlier consignments).

²⁴Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 17 November 1995 (Arbitral award No. VB/94124), Unilex (bank guarantee opened with a date that had already expired).

²⁵CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (see full text of the decision); but see Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 17 November 1995 (Arbitral award No. VB/94124), Unilex (right to suspend under article 71 when ineffective bank guarantee opened).

²⁶Kantonsgericht, Appenzell Ausserrhoden, Switzerland, 10 March 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030310s1.html> (preparations for performance by the seller clearly showed that it would not be able to perform within the 14 day period after payment).

²⁷Oberster Gerichtshof, Austria, 8 November 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051108a3.html> (the principle of simultaneous performance justifies the suspension by a party of its performance in the case of breach); Poland, 11 May 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070511p1.html>, (purchaser who is entitled to and is insisting on delivery of substitute goods, is entitled to suspend performance).

²⁸CLOUT case No. 227 [Oberlandesgericht Hamm, Germany, 22 September 1992] (see full text of the decision).

²⁹CLOUT case No. 630 [Arbitration Court of the International Chamber of Commerce, July 1999 (Arbitral award No. 9448)], 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 full 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).

³⁰Hof van Beroep Gent, Belgium, 26 April 2000 (BV BA. J.P. v. S. Ltd.), available on the Internet at www.law.kuleuven.ac.be/int/tradelaw/WK/2000-04-28.htm.

³¹Oberlandesgericht Dresden, Germany, 27 December 1999, Unilex; Zurich Handelskammer, Switzerland, 31 May 1996 (Arbitration award No. 273/95), Unilex, Arbitration Court of the International Chamber of Commerce, 2003 (Arbitration award No. 11849), available on the Internet at <http://cisgw3.law.pace.edu/cases/031849i1.html>; also available in Unilex, (buyer had no particular reason to believe that seller would not perform on time).

³²CLOUT Case No. 936 [Bundesgericht, Switzerland, 17 July 2007], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070717s1.html> (seller failed to substantiate its claims of the failing creditworthiness of the buyer).

³³Oberlandesgericht; Köln, Germany, 19 May 2008 English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080519g1.html> (cover purchases destroys the synallagmatic relationship between performance and counter-performance).

³⁴CLOUT case No. 238 [Oberster Gerichtshof, Austria, 12 February 1998] (article 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).

³⁵Arrondissementsrechtbank's-Hertogenbosch, the Netherlands, 2 October 1998 (Malaysia Dairy Industries v. Dairex Holland), Unilex (buyer offered to take delivery of the goods in Free Trade zone).

³⁶CLOUT 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 required notice); CLOUT Case No. 936 [Bundesgericht, Switzerland, 17 July 2007], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070717s1.html> (seller failed to substantiate its claims of the failing creditworthiness of the buyer).

³⁷Hof van Beroep Gent, Belgium, 26 April 2000 (BV BA. J.P. v. S. Ltd.), available on the Internet at 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); Landgericht Darmstadt, Germany, 29 May 2001, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/010529g1.html> (buyer sent a notice of complaint, but failed to give notice of suspension of performance); Netherlands Arbitration Institute, the Netherlands, 15 October 2002 (Arbitral award No. 2319), Unilex (suspension of future deliveries under the contract due to non-conformity of first consignments); China International Economic and Trade Arbitration Commission, People's Republic of China, 1989 (Arbitral award No. CISG/1989/02), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/890000c1.html> (buyer failed to give notice of suspension of performance and only delivered the goods after two months had elapsed).

³⁸See Arbitration Court of the International Chamber of Commerce, 23 January 1997 (Arbitral award No. 8611), Unilex (notice not necessary under circumstances of case); Arbitration Court of the International Chamber of Commerce, 2003 (Arbitral award No. 11849), available on the Internet at <http://cisgw3.law.pace.edu/cases/031849i1.html> and in Unilex (buyer had no particular reason to believe that seller would not perform on time and failed to give notice); Netherlands Arbitration Institute, the Netherlands, 15 October 2002 (Arbitral award No. 2319), available on the Internet at <http://cisgw3.law.pace.edu/cases/021015n1.html> (suspension of future deliveries under the contract due to non-conformity of first consignments).

³⁹CLOUT case No. 338 [Oberlandesgericht Hamm, Germany, 23 June 1998].

⁴⁰Landgericht Berlin, Germany, 15 September 1994, Unilex; Landgericht, Darmstadt, Germany, 29 May 2001, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/010529g1.html> (buyer sent a notice of complaint, but failed to give notice of suspension of performance).

⁴¹CLOUT 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 a breach but rather a unilateral right to modify time for performance).

⁴²Hof van Beroep Gent, Belgium, 26 April 2000 (BV BA. J.P. v. S. Ltd.), available on the Internet at www.law.kuleuven.ac.be/int/tradelaw/WK/2000-04-28.htm (citing article 73 (1) for implicit affirmation of this point).

⁴³CLOUT 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 paragraph (1)); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 27 July 1999 (Arbitral award No. 302/1996), *Rozenberg, Praktika of Mejdunarodnogo Commercheskogo Arbitrajnogo Syda: Haychno-Practicheskiy Commentariy* 1999–2000, No. 27 [141–147], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/990727r1.html>; 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 paragraph (2)).

⁴⁴CLOUT case No. 51 [Amtsgericht Frankfurt a.M., Germany, 31 January 1991].

⁴⁵A similar reference to adequate assurance is made in article 72 (2), and cases construing that phrase under article 72 may be found relevant under article 71. Arbitration Court of the International Chamber of Commerce, January 1997 (Arbitral award No. 8786), 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 non-conforming 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 In some instances a number of facts together may provide a clear indication that there will be a fundamental breach.⁶ 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".⁷

5. A party that declares that it will not perform its obligations satisfies this precondition.⁸ 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.⁹ Conditioning delivery on new demands beyond those agreed upon is an anticipatory repudiation of the contract.¹⁰

6. The preconditions of paragraph (1) were also found to have been satisfied in the following circumstances in regard to the buyer: the buyer failed to pay for prior shipments;¹¹ the buyer failed to open a letter of credit;¹² the buyer failed to open a conforming letter of credit;¹³ the buyer had failed to pay for a consignment and failed to provide an adequate assurance of performance.¹⁴ In one case a lower court held in an instalment sale that the seller was entitled to avoid the contract under Article 72 due to the unwarranted attempt by the buyer to cancel the contract; on appeal it was held that Article 73 was more appropriate, but with the same result.¹⁵

7. The preconditions of paragraph (1) were also found to have been satisfied in the following circumstances in regard to the seller: the seller failed to reduce the price and to commit to deliver fashion goods on time;¹⁶ the seller deliberately terminated delivery of the goods,¹⁷ the seller refused to give effect to a requirement that a whole ship be chartered exclusively for the transport of the goods,¹⁸ the seller refused to commit to a date for delivery and advised the buyer to purchase substitute goods,¹⁹ the seller declared that it was impossible to find the goods and the possibility of finding replacement goods was low,²⁰ the seller provided flawed sketches for the manufacturing of the goods and provided no adequate assurance of improving them in time.²¹

8. The preconditions were found not satisfied in the following circumstances: the seller held back the goods because of a dispute between the parties;²² the seller expressed an interest in stopping deliveries but also agreed to continue negotiations;²³ the buyer failed to pay one instalment.²⁴

NOTICE OF INTENT TO AVOID

9. 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.²⁵ 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.²⁶ 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.²⁷ Where a party fails to give notice of its intention to avoid the contract due to anticipatory breach, it loses the right to do so.²⁸

ADEQUATE ASSURANCE OF PERFORMANCE

10. 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.²⁹ The Convention does not prescribe the form assurance must take. There is no requirement that the aggrieved party post a bond.³⁰ In one case the failure of the buyer to provide an adequate assurance upon request was held to satisfy the requirements of Article 72.³¹

Notes

¹CLOUT case No. 171 [Bundesgerichtshof, Germany, 3 April 1996]; CLOUT case No. 124 [Bundesgerichtshof, Germany, 15 February 1995].

²Arbitration Court of the International Chamber of Commerce, January 1997 (Arbitral award No. 8786), Unilex (buyer did not suspend obligations but avoided contract under article 72 (1)); Arbitration Court of the International Chamber of Commerce, September 1996 (Arbitral award No. 8574), Unilex (buyer’s purchase of substitute goods not a suspension of its obligations).

³Arbitration Court of the International Chamber of Commerce, September 1996, (Arbitral award No. 8574), Unilex (noting differences as to notice).

⁴Helsinki Court of Appeal, Finland, 30 June 1998 (EP S.A.v FP Oy), 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)); Zürich Handelskammer, Switzerland, 31 May 1996 (Arbitration award No. 273/95), Unilex (fundamental breach as to future instalments is covered by both articles 72 and 73).

⁵Landgericht Berlin, Germany, 30 September 1992, Unilex (very high probability rather than complete certainty required). See also Schiedsgericht der Börse für Landwirtschaftliche Produkte—Wien, Austria, 10 December 1997 (Arbitration award No. S2/97), Unilex (“good grounds” under article 73 means high probability, a less severe test than that found in article 72 (1)).

⁶China International Economic and Trade Arbitration Commission, People’s Republic of China, (CD-R and DVD-R production systems case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071000c1.html>; CLOUT Case No.993 [Denmark 17 October 2007, Højesteret [Supreme Court] (Zweirad Technik v. C. Reinhardt A/S)].

⁷CLOUT case No. 417 [U.S. District Court, Northern District of Illinois, United States, 7 December 1999] (citing articles 25 and 72) (see full text of the decision).

⁸See article 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”). See also China International Economic and Trade Arbitration Commission, People’s Republic of China, October 2007 (CD-R and DVD-R production systems case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071000c1.html>; Court of Appeals of Lamia, Greece. 2006 (docket No. 63/2006) (Sunflower seed case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060001gr.html> (seller refusing to deliver sunflower seeds due to changes in the market).

⁹CLOUT case No. 417 [U.S. District Court, Northern District of Illinois, United States, 7 December 1999].

¹⁰CLOUT case No. 293 [Schiedsgericht der Hamburger freundschaftlichen Arbitrage, Germany, 29 December 1998] (see full text of the decision).

¹¹CLOUT 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; U.S. District Court, Southern District of New York, United States, 29 May 2009 (Doolim Corp. v. R Doll, LLC), available at 2009 WL 1514913 and available on the Internet at <http://cisgw3.law.pace.edu/cases/090529u1.html> (continued failure to pay for previous consignments of garments and opening of letter of credit).

¹²CLOUT case No. 631 [Supreme Court of Queensland, Australia, 17 November 2000]; China International Economic and Trade Arbitration Commission, People’s Republic of China, October 2007 (CD-R and DVD-R production systems case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071000c1.html>; Australia 12 October 2001 Supreme Court of Queensland, Court of Appeal (Downs Investments v. Perwaja Steel) available on the Internet at <http://cisgw3.law.pace.edu/cases/011012a2.html>.

¹³CLOUT Case No. 716 [China International Economic and Trade Arbitration Commission, People’s Republic of China, 16 December 1997].

¹⁴U.S. District Court, Southern District of New York, United States, 29 May 2009 (Doolim Corp. v. R Doll, LLC), available at 2009 WL 1514913 and available on the Internet at <http://cisgw3.law.pace.edu/cases/090529u1.html>.

¹⁵CLOUT Case No. 993 [Højesteret [Supreme Court], Denmark, 17 October 2007, (Zweirad Technik v. C. Reinhardt A/S)].

¹⁶Arbitration Court of the International Chamber of Commerce, January 1997 (Arbitral award No. 8786), Unilex; U.S. District Court, Southern District of New York, United States, 29 May 2009 (Doolim Corp. v. R Doll, LLC), available at 2009 WL 1514913 and available on the Internet at <http://cisgw3.law.pace.edu/cases/090529u1.html> (continued failure to pay for previous consignments of garments and opening of letter of credit).

¹⁷Zürich Handelskammer, Switzerland, 31 May 1996 (Arbitration award No. 273/95), Unilex.

¹⁸CLOUT Case No. 473 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 7 June 1999 (Arbitral award No. 238/1998)] (seller refused to satisfy the condition to find a conforming vessel for the exclusive transport of foodstuffs).

¹⁹China International Economic and Trade Arbitration Commission, People's Republic of China, 29 March 1996 (caffeine case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/960329c1.html>.

²⁰China International Economic and Trade Arbitration Commission, People's Republic of China, 30 January 1996 (compound fertilizer case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/960130c1.html>.

²¹Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 25 April 1995 (Arbitral award No. 161/1994) (computer equipment case) available on the Internet at <http://cisgw3.law.pace.edu/cases/950425r3.html>.

²²CLOUT case No. 261 [Bezirksgericht der Sanne, Switzerland, 20 February 1997].

²³Arbitration Court of the International Chamber of Commerce, September 1996 (Arbitral award No. 8574), Unilex.

²⁴Zürich Handelskammer, Switzerland, 31 May 1996 (Arbitration award No. 273/95), Unilex.

²⁵Helsinki Court of Appeal, Finland, 30 June 1998 (EP S.A.v FP Oy), Unilex (timing and content of fax gave prior notice); China International Economic and Trade Arbitration Commission, People's Republic of China, 1989 (Thai-made emulsion case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/890000c1.html>.

²⁶Arbitration Court of the International Chamber of Commerce, September 1996 (Arbitral award No. 8574), Unilex (noting difference between article 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).

²⁷CLOUT case No. 124 [Bundesgerichtshof, Germany, 15 February 1995].

²⁸China International Economic and Trade Arbitration Commission, People's Republic of China, 1989 (Thai-made emulsion case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/890000c1.html>.

²⁹CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994] (buyer failed to respond to demand for adequate assurance) (see full text of the decision).

³⁰Arbitration Court of the International Chamber of Commerce, January 1997, (Arbitral award No. 8786), Unilex.

³¹U.S. District Court, Southern District of New York, United States, 29 May 2009 (Doolim Corp. v. R Doll, LLC), available at 2009 WL 1514913 and available on the Internet at <http://cisgw3.law.pace.edu/cases/090529u1.html> (continued failure to pay for previous consignments of garments and opening of letter of credit).

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 73⁹ or have concluded that the aggrieved party might act under either article 73 or another article, such as article 71¹⁰ 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 where the goods of that specific instalment were found to be fundamentally defective;¹⁶ where the buyer failed to open a letter of credit for a specific instalment.¹⁷ 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.¹⁸ It was held that an agreement may not be terminated where the buyer had fully performed its obligations before the termination.¹⁹ A buyer was also not entitled to avoid the contract where the mistakes in delivery and invoicing were not regarded as a fundamental breach.²⁰

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.²¹

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;²² where the seller failed to deliver first instalment;²³ where the seller declared that he would not make further deliveries;²⁴ where the seller refused to make further delivery of cherries because of a dramatic increase in the market price for cherries;²⁵ where seller's late delivery of three instalments caused disruption of buyer's production;²⁶ where the seller delivered poor quality goods;²⁷ where the buyer had good grounds to believe that the seller would be unable to deliver peppers that satisfied food safety regulations.²⁸ Where a buyer accepts defective instalments, it does not lose the right to avoid the contract as a whole if the seller again delivers defective goods, constituting a fundamental breach; in the particular instance, the buyer expressly declared its intent to require conforming goods.²⁹ Where a buyer fails to open a letter of credit for a specific instalment, but clearly expresses its intentions to open future letters of credit, the seller was held not entitled to avoid the contract in respect of the future instalments.³⁰

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;³¹ where the buyer continued to breach a contract term that prohibited the buyer from reselling the goods in specified markets;³² where the buyer stated that it would not accept future deliveries within the contract period, although it was obliged to do so.³³

TIME OF AVOIDANCE

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.³⁴ 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.³⁵

10. It was held that, where a party has failed to perform an instalment, the period within which the aggrieved party may declare the whole contract avoided begins to run from the time that the party obtains knowledge of the breach; the court held that declaring the contract avoided three months after such a breach in a contract for annual instalments was too long.³⁶ A party may be precluded from avoiding the contract in respect of a specific instalment if it fails to give timely notice, but may still be entitled to avoid the contract in respect of future instalments where the breach provides the aggrieved party with good grounds to conclude that a fundamental breach will take place in respect to the future instalments.³⁷

AVOIDANCE OF CONTRACT AS TO INTERDEPENDENT INSTALMENT

11. 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 is no reason to consider the instalments in a contract for a commodity such as oil as interdependent.³⁸ Both parties must be aware of the interdependence of the different instalments in order to invoke article 73 (3).³⁹

Notes

¹See Arbitration Court of the International Chamber of Commerce, 1996 (Arbitral award No. 8740), Unilex (buyer duly avoided as to last instalment when total delivery of coal was less than contract amount).

²Schiedsgericht 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]; Zürich Handelskammer, Switzerland, 31 May 1996 (Arbitration award No. 273/95), 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).

³CLOUT case No. 630 [Arbitration Court of the International Chamber of Commerce, Zurich, Switzerland, July 1999 (Arbitral award No. 9448)] (both articles 51 and 73 applicable but buyer did not establish right to withhold payments); Arbitration Court of the International Chamber of Commerce, 1995 (Arbitral award No. 8128), Unilex.

⁴See CLOUT case No. 578 [U.S. District Court, Western District of Michigan, United States, 17 December 2001 (Shuttle Packaging Systems v. Tsonakis)] (citing articles 71–73 for remedies available in instalment transaction); CLOUT case No. 630 [Arbitration Court of the International Chamber of Commerce, Zurich, Switzerland, July 1999 (Arbitral award No. 9448)] (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 article 73, seller had right to suspend under article 71 (1), but seller failed to establish its right in this case), CLOUT case No. 993 [Højesteret [Supreme Court], Denmark, 17 October 2007 (Zweirad Technik v. C. Reinhardt A/S)]; Oberlandesgericht Brandenburg, Germany 18 November 2008 Bbeer case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081118g1.html>.

⁵Helsinki Court of Appeal, Finland, 30 June 1998 (EP S.A. v FP Oy), 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)); Zürich Handelskammer, Switzerland, 31 May 1996 (Arbitration award No. 273/95), Unilex (fundamental breach as to future instalments is covered by both articles 72 and 73).

⁶Arbitration Court of the International Chamber of Commerce, August 1999 (Arbitral award No. 9887), Unilex (Chemical substance); CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998] (lambskin coats); CLOUT case No. 293 [Schiedsgericht der Hamburger freundschaftlichen Arbitrage, Germany, 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); Chamber of Commerce and Industry of Budapest, Hungary, 17 November 1995 (Arbitration award No. Vb 94124), Unilex (mushrooms); Chansha Intermediate Peoples' Court Economic Chamber, People's Republic of China, 18 September 1995 (case No. 89), Unilex (molybdenum iron alloy), English translation also available on the Internet at www.cisg.law.pace.edu/cisg/wais/db/cases2/950918c1.html; Landgericht Ellwangen, Germany, 21 August 1995, Unilex (peppers); Arbitration Court of the International Chamber of Commerce, 1995 (Arbitral award No. 8128), Unilex (chemical fertilizer), CLOUT case No. 720 [Netherlands Arbitration Institute, the Netherlands, 15 October 2002 (Arbitral award No. 2319) (Condensate crude oil mix case)].

⁷CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998] (see full text of the decision).

⁸CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996] (see full text of the decision).

⁹Schiedsgericht 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 article 73), CLOUT case No. 796 [Juzgado de Primera Instancia Badalona, Spain, 22 May 2006] (Bermuda shorts case)].

¹⁰CLOUT case No. 238 [Oberster Gerichtshof, Austria, 12 February 1998] (attempted suspension under article 73 rather than article 71).

¹¹Helsinki Court of Appeal, Finland, 30 June 1998 (EP S.A. v. FP Oy), 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)); Zürich Handelskammer, Switzerland, 31 May 1996 (Arbitration award No. 273/95), Unilex (fundamental breach as to future instalments is covered by both articles 72 and 73); CLOUT case No. 993 [Højesteret [Supreme Court], Denmark 17, October 2007 (Zweirad Technik v. C. Reinhardt A/S)].

¹²Zürich Handelskammer, Switzerland, 31 May 1996 (Arbitration award No. 273/95), Unilex (fundamental breach as to future instalments is covered by both articles 72 and 73).

¹³CLOUT case No. 166 [Schiedsgericht der Handelskammer, Hamburg, Germany, 21 March, 21 June 1996] (leaving open whether contract in case before the court was an instalment contract) (see full text of the decision).

¹⁴CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997].

¹⁵CLOUT case No. 293 [Schiedsgericht der Hamburger freundschaftlichen Arbitrage, Germany, 29 December 1998].

¹⁶China International Economic and Trade Arbitration Commission, People's Republic of China, 5 April 1999 (Air conditioner equipment case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/990405c1.html>.

¹⁷China International Economic and Trade Arbitration Commission, People's Republic of China, 18 September 1996 (Lanthanide compound case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/960918c1.html>.

¹⁸Zürich Handelskammer, Switzerland, 31 May 1996 (Arbitration award No. 273/95), Unilex.

¹⁹Arbitration Court of the International Chamber of Commerce, 2003 (Arbitral award No. 11849) (Fashion products case), available on the Internet at <http://cisgw3.law.pace.edu/cases/031849i1.html>.

²⁰CLOUT case No. 880 [Tribunal Cantonal [Appellate Court] Vaud, Switzerland, 11 April 2002] (Clothing case), available in English on the Internet at <http://cisgw3.law.pace.edu/cases/020411s1.html>.

²¹Arbitration Court of the International Chamber of Commerce, 1999 (Arbitral award No. 10274) (Poultry feed case), available on the Internet at <http://cisgw3.law.pace.edu/cases/990274i1.html>.

²²CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997].

²³Zürich Handelskammer, Switzerland, 31 May 1996 (Arbitration award No. 273/95), Unilex (failure to deliver first instalment gave the buyer good grounds for concluding that later instalments would not be delivered).

²⁴CLOUT case No. 293 [Schiedsgericht der Hamburger freundschaftlichen Arbitrage, Germany, 29 December 1998].

²⁵CLOUT case No. 265 [Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 25 May 1999].

²⁶CLOUT case No. 246 [Audiencia Provincial de Barcelona, Spain, 3 November 1997].

²⁷Arbitration Court of the International Chamber of Commerce, August 1999 (Arbitral award No. 9887), Unilex; China International Economic and Trade Arbitration Commission, People's Republic of China, August 2006 (Chilling press case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060800c1.html> (delivery of an instalment of steel containing severe defects and failure to deliver subsequent instalments).

²⁸Landgericht Ellwangen, Germany, 21 August 1995, Unilex.

²⁹Oberster Gerichtshof, Austria 17 December 2003 (Tantalum powder case), available on the Internet at <http://cisgw3.law.pace.edu/cases/031217a3.html>.

³⁰China International Economic and Trade Arbitration Commission, People's Republic of China, 18 September 1996 (Lanthanide compound case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/960918c1.html>.

³¹Chamber of Commerce and Industry of Budapest, Hungary, 17 November 1995 (Arbitration award No. Vb 94124), Unilex; Arbitration Court of the International Chamber of Commerce, 1999 (Arbitral award No. 10274) (Poultry feed case), available on the Internet at <http://cisgw3.law.pace.edu/cases/990274i1.html>.

³²CLOUT case No. 154 [Cour d'appel, Grenoble, France, 22 February 1995] (resale of jeans in Africa and South America; also citing article 64 (1)).

³³Arbitration Court of the International Chamber of Commerce, 1999 (Arbitral award No. 10274) (Poultry feed case), available on the Internet at <http://cisgw3.law.pace.edu/cases/990274i1.html>.

³⁴Landgericht Darmstadt, Germany 29 May 2001 (Furniture case), available on the Internet at <http://cisgw3.law.pace.edu/cases/010529g1.html> (declaring the contract avoided two months after becoming aware of the breach was deemed too late).

³⁵CLOUT case No. 246 [Audiencia Provincial de Barcelona, Spain, 3 November 1997].

³⁶Oberlandesgericht [Appellate Court] Brandenburg, Germany, 18 November 2008 (Beer case), available on the Internet at <http://cisgw3.law.pace.edu/cases/081118g1.html>; CLOUT case No.720 [Netherlands Arbitration Institute, the Netherlands, 15 October 2002 (Arbitral award No. 2319)] (buyer failed to give timely notice of the avoidance in respect of a particular instalment).

³⁷CLOUT case No.720 [Netherlands Arbitration Institute, the Netherlands, 15 October 2002 (Arbitral award No. 2319)] (crude oil delivered did not meet the reasonable quality norm, and there was no indication that the seller would be able to meet that norm in future).

³⁸CLOUT case No.720 [Netherlands Arbitration Institute, the Netherlands, 15 October 2002 (Arbitral award No. 2319)] (Condensate crude oil mix case).

³⁹CLOUT case No. 880 [Tribunal Cantonal Vaud, Switzerland, 11 April 2002] (mistakes in delivery and invoicing in a clothing contract).

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 limiting⁸ or liquidating⁹ 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 non-performing 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

¹CLOUT case No. 345 [Landgericht Heilbronn, Germany, 15 September 1997] (recourse to national law on damages excluded).

²CLOUT 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).

³See Arbitration Court of the International Chamber of Commerce, September 1996 (Arbitral award No. 8574), 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).

⁴CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994]. See also Arbitration Court of the International Chamber of Commerce, October 1996, (Arbitral award No. 8740) 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 China International Economic and Trade Arbitration Commission, People's Republic of China, 30 October 1991, English translation 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).

⁵CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002] (see full text of the decision); CLOUT case No. 93 [Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft-Wien, Austria, 15 June 1994] (citing article 74 for general principle within meaning of article 7 (2)).

⁶CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 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).

⁷CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002] (see full text of the decision).

⁸Hovioikeus [Court of Appeal] Turku, Finland, 12 April 2002, available in English on the Internet at <http://cisgw3.law.pace.edu/cases/020412f5.html> (warranty term limiting recovery of damages enforceable).

⁹Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 27 July 1999 (Arbitral award No. 302/96 of 27 July 1999), in Rozenberg, *Praktika of Mejdunarodnogo Commercheskogo Arbitrajnogo Syda: Haychno-Practicheskij Commentarij 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, 23 November 1994 (Arbitral award No. 251/1993, Unilex (damages for delay granted only to extent of contract clause stipulating penalty for delay).

¹⁰CLOUT case No. 301 [International Chamber of Commerce, 1992, (Arbitral award No. 7585)].

¹¹China International Economic and Trade Arbitration Commission, People's Republic of China, 1 April 1993 (Arbitral award No. 750, Unilex, also available on the INTERNET at www.cisg.law.pace.edu/cgi-bin/isearch).

¹²CLOUT case No. 474 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 24 January 2000 (Arbitral award No. 54/1999)].

¹³CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 21 March, 21 June 1996] (damage provisions prevail over consequences of avoidance under articles 81-84).

¹⁴China International Economic and Trade Arbitration Commission, People's Republic of China, 6 June 1991, English translation available on the Internet at 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).

¹⁵See, e.g., CLOUT case No. 304 [International Chamber of Commerce, 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 [International Chamber of Commerce (Arbitral award No. 7197, 1993] (awarding damages for expenses incurred in preserving perishable goods, even though such expenses were not required by articles 85 to 88) (see full text of the decision).

¹⁶Bundesgericht, Switzerland, 15 September 2000, available on the Internet at 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 the existence and the amount of damages caused by the other party's breach). 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).

¹⁷Article 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.

¹⁸Bundesgericht, Switzerland, 15 September 2000 (FCF S.A. v. Adriafl Commerciale S.r.l.), available on the Internet at 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).

¹⁹CLOUT 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).

²⁰CLOUT 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).

²¹CLOUT 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's 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 [Arbitration Court 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).

²²CLOUT 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 the 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 38 below). Domestic substantive law may also govern issues relevant to the determination of the amount of damages, such as the weighing of evidence.³ Domestic law may also apply to issues such as punitive damages. In one case a court seemingly accepted the validity of a claim for punitive damages in the context of a CISG damages claim, although the determination of the amount of damages was left open.⁴

3. A general principle of full compensation has been derived from the damage formula in article 74.⁵ Pursuant to article 7 (2), a 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.⁶

4. In accordance with article 6 a seller and buyer may agree to derogate from or vary article 74. Several decisions enforce contract terms limiting⁷ or liquidating⁸ damages. The validity of these contract terms is, by virtue of article 4 (a), governed by applicable domestic law rather than the Convention.⁹ Whether a party can claim damages as well as a penalty will be determined by domestic law.¹⁰

RELATION TO OTHER ARTICLES

5. An aggrieved party may choose to claim under article 74 even if entitled to claim under articles 75 and 76.¹¹

The latter provisions explicitly provide that an aggrieved party may recover additional damages under article 74.

6. Under article 50, a buyer may claim a reduction in the purchase price due to non-conforming goods, but may also claim damages under article 74 for further losses it may have suffered.¹²

7. Damages recoverable under articles 74 are reduced if it is established that the aggrieved party failed to mitigate these damages as required by article 77.¹³ The reduction is the amount by which the loss should have been mitigated. See the Digest for article 77.

8. 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 74.¹⁴ 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.¹⁵

9. 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 74.¹⁶

RIGHT TO DAMAGES

10. 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.¹⁷

11. 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".¹⁸

12. Under articles 45 and 61 an aggrieved party is entitled to recover damages without regard to the “fault” of the breaching party.¹⁹ 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.²⁰ 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.²¹

13. When an aggrieved buyer fails, without excuse,²² 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.²³ 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.²⁴

14. 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.

15. 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

16. 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.²⁵ 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.²⁶

Losses arising from death or personal injury

17. 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.²⁷

Losses arising from damage to other property

18. Article 5 does not exclude losses for damage to property other than the goods purchased.²⁸

Losses arising from damage to non-material interests

19. 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,²⁹ but at least one decision has denied such recovery under the Convention.³⁰ One court found claims for both loss of turnover and loss of reputation to be inconsistent.³¹

Losses arising from change in value of money

20. 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 devaluation³² or changes in the cost of living.³³ 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.³⁴ 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.³⁵

EXPENDITURES BY AGGRIEVED PARTY

21. 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 33-35 below). Although the Convention does not expressly require that expenditures be reasonable several decisions have refused to award damages when the expenditures were unreasonable.³⁶

22. Decisions have awarded incidental damages to an aggrieved buyer who had made reasonable expenditures for the following purposes: inspection of non-conforming goods;³⁷ handling and storing non-conforming goods;³⁸ preserving goods;³⁹ shipping and customs costs incurred when returning the goods;⁴⁰ expediting shipment of substitute goods under an existing contract with a third party;⁴¹

installing substitute goods;⁴² sales and marketing costs;⁴³ commissions;⁴⁴ banking fees for retransfer of payments;⁴⁵ wasted payment of value added tax;⁴⁶ hiring a third party to process goods;⁴⁷ obtaining credit;⁴⁸ delivering and taking back the non-conforming goods to and from a sub-buyer;⁴⁹ reimbursing sub-buyers on account of non-conforming goods;⁵⁰ moving replacement coal from stockpiles;⁵¹ loss incurred in sub-chartering a ship that had been chartered to transport goods under a contract that the seller properly avoided;⁵² additional shipping charges incurred by the buyer due to the seller delivering in instalments instead of one shipment;⁵³ installation and de-installation costs of defective goods;⁵⁴ travel and subsistence expenses incurred by the buyer in travelling to the seller's place of business in order to try and salvage the contract.⁵⁵ Several decisions have awarded buyers who took delivery of non-conforming goods the reasonable costs of repair as damages.⁵⁶ 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.⁵⁷ 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.⁵⁸ One court refused damages for the cost of retransferring a car and other incidental expenses relating to avoidance where the buyer was not entitled to avoid the contract.⁵⁹ One arbitral tribunal awarded the cost of acquiring equipment that subsequently became superfluous due to the avoidance of the contract, but ordered that ownership of those goods be transferred to the seller upon payment of the damages.⁶⁰

23. 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.⁶¹ 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.⁶²

24. Aggrieved sellers have recovered damages for the following incidental expenses: storage of goods at the port of shipment following the buyer's anticipatory breach;⁶³ storage and preservation of undelivered machinery;⁶⁴ the cost of modifying a machine in order to resell it;⁶⁵ costs related to the dishonour of the buyer's cheques.⁶⁶ A seller who has delivered non-conforming goods and subsequently cures the non-conformity is not entitled to recover the cost of cure.⁶⁷ A counter-claim by the seller for the value of the buyer's use of a defective machine was refused, because the buyer had used the machine in order to mitigate its damages.⁶⁸

Expenditures for debt collection; attorney's fees

25. Decisions are split on whether the cost of using a debt collection agency other than a lawyer may be recovered as damages. Several decisions have awarded the seller the

cost,⁶⁹ 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.⁷⁰ One case required such costs be incurred reasonably.⁷¹

26. 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.⁷² 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.⁷³

27. Decisions are split as to whether attorney's fees for litigation may be awarded as damages under article 74.⁷⁴ Citing article 74, several arbitral tribunals have awarded recovery of attorney's fees for the arbitration proceedings.⁷⁵ 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.⁷⁶ Another court stated that, in principle, legal costs could be recovered, although the court denied them in the particular case.⁷⁷ 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.⁷⁸ 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 unforeseeable⁷⁹ or that the aggrieved party had failed to mitigate these expenses as required by article 77.⁸⁰ 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.⁸¹

LOST PROFITS

28. The first sentence of article 74 expressly states that damages for losses include lost profits. Many decisions have awarded the aggrieved party lost profits.⁸² 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.⁸³ 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.⁸⁴ The common profit margins of the buyer provide a basis for determining the buyer's claim for damages according to one case.⁸⁵ Another court awarded the buyer the difference between its unit costs for producing products using the defective production machine delivered by the seller, and the buyer's unit costs if the production machine had not been defective.⁸⁶ An arbitral tribunal awarded the commission the buyer would have earned as damages for lost profit where the seller was aware of the commission.⁸⁷ One court calculated the damages for lost profits on the basis of the value of the goods in the

intended market. Loss of profit will not be awarded where the loss could easily have been avoided by cover purchases of raw materials in accordance with article 77.⁸⁸

29. 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.⁸⁹ 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.⁹⁰ An arbitral tribunal held that a profit margin of 10 per cent was foreseeable in the specific trade based on the use of an Incoterm.⁹¹ One court held that it was foreseeable in the steel trade that goods were purchased for resale at a profit.⁹² Another court held that it was not foreseeable that a breach would cause the buyer to acquire a new warehousing facility.⁹³

30. Damages for lost profits will often require predictions of future prices for the goods or otherwise involve some uncertainty as to actual future losses.⁹⁴ 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.⁹⁵

31. 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.⁹⁶

Damages for "lost volume" sales

32. 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.⁹⁷ Another court, however, rejected a claim for a "lost sale" because it did not appear that the seller had been planning to make a second sale at the time the breached contract was negotiated.⁹⁸ 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.⁹⁹

FORESEEABILITY

33. 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.¹⁰⁰ 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.¹⁰¹

34. Decisions have found that the breaching party could not have foreseen the following losses: rental of machinery by buyer's sub-buyer;¹⁰² processing goods in a different country following late delivery;¹⁰³ an exceptionally large payment to freight forwarder;¹⁰⁴ attorney's fees in dispute with freight forwarder;¹⁰⁵ the cost of resurfacing a grinding machine where that cost exceeded price of wire to be ground;¹⁰⁶ lost profits where breaching seller did not know terms of contract with sub-buyer;¹⁰⁷ the cost of inspecting the goods in the importing country rather than exporting country;¹⁰⁸ necessary preparation costs incurred by the buyer.¹⁰⁹ One court held that loss of reputation and loss of clientele is not generally foreseeable.

35. 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,¹¹⁰ 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.¹¹¹ 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.¹¹² A majority of another court awarded 10 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.¹¹³ 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 74.¹¹⁴ An arbitral tribunal held that it was foreseeable that a buyer would finance its purchases and would have to pay interest on such financing.¹¹⁵

BURDEN AND STANDARD OF PROOF

36. 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.¹¹⁶ 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.¹¹⁷ Another decision expressly placed the burden of establishing damages on the claimant.¹¹⁸

37. 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.¹¹⁹ In one case a court awarded damages on a basis of fairness (*ex aequo et bono*) where the seller could not establish its damages with certainty.¹²⁰

SET OFF

38. Although the Convention does not address the issue of whether a counterclaim may be set off against a claim

under the Convention,¹²¹ the Convention does determine whether a counterclaim arising from a sales contract exists¹²² and, if it does, the counterclaim may then be subject to set off against a claim arising under the Convention.¹²³

JURISDICTION; PLACE OF PAYMENT OF DAMAGES

39. 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.¹²⁴

Notes

¹Articles 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.

²Helsingin hovioikeus, Finland, 26 October 2000, English translation available 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 [U.S. District Court, Northern District of New York, United States, 9 September 1994] (referring to "sufficient evidence [under the common law and the law of New York] to estimate the amount of damages with reasonable certainty"), affirmed in part by CLOUT case No. 138 [U.S. Court of Appeals for the Second Circuit, United States, 6 December 1993, 3 March 1995]; U.S. District Court, Eastern District of Pennsylvania, United States, 29 January 2010 (ECEM European Chemical Marketing B.V. v. The Puralite Company), available on the Internet at <http://cisgw3.law.pace.edu/cases/100129u1.html>.

³See, 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).

⁴U.S. District Court, Southern District of New York, United States, 30 March 2010 (Guangxi Nanning Baiyang Food Co. Ltd. v. Long River International, Inc.), available on the Internet at <http://cisgw3.law.pace.edu/cases/100330u1.html>.

⁵CLOUT case No. 93 [Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft—Wien, Austria, 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 [U.S. Court of Appeals for the Second Circuit, United States, 6 December 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). For further discussion of a general principle of full compensation, see the Digest for article 7.

⁶CLOUT case No. 93 [Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft—Wien, Austria, 15 June 1994].

⁷Hovioikeus Turku, Finland, 12 April 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020412f5.html> (contract term limiting recovery of damages is enforceable).

⁸Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 27 July 1999 (Arbitral award No. 302/1996), Rozenberg, *Praktika of Mejdunarodnogo Commercheskogo Arbitrajnogo Syda: Haychno-Practicheskiy Commentariy Moscow* (1999–2000) No. 27 [141–147], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/990727r1.html> (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, Russian Federation, 23 November 1994 (Arbitral award No. 251/93), Unilex (damages for delay granted only to extent of contract penalty for delay clause); Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, 30 October 2006 (Trolleybus case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061030sb.html> (penalties for delay awarded); Tribunal of International Commercial Arbitration at the Ukraine Chamber of Commerce and Trade, Ukraine, 18 November 2004 (Manufactured articles), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/041118u5.html> (penalties for late performance sustained); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 19 March 2004 (Arbitral award No. 135/2003), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040319r1.html>.

⁹See 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).

¹⁰Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, 30 October 2006 (Trolleybus case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061030sb.html> (where penalty exceeds the actual damages, the buyer was entitled to claim penalty amount reduced according to domestic law).

¹¹CLOUT 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, Russian Federation, 16 March 1995 (Arbitral award No. 155/1994) (citing article 74, the tribunal awarded buyer the difference between contract price and price in substitute purchase); CLOUT case No. 93 [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); China International Economic and Trade Arbitration Commission, People's Republic of China, 26 December 2005 (Heating system device case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051226c1.html>; Efetio Lamias, Greece, 2006 (docket No. 63/2006) (Sunflower seed case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060001gr.html>.

¹²Amtsgericht Luzern-Land, Switzerland, 21 September 2004 (watches case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040921s1.html> (buyer failed to provide sufficient evidence to sustain such claims however); Hof van Beroep Gent, Belgium, 10 May 2004 (N.V. Maes Roger v. N.V. Kapa Reynolds), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040510b1.html>.

¹³CLOUT case No. 1029 [Cour d'appel Rennes, France, 27 May 2008 (Brassiere cups case)] (buyer failed to notify seller of defects in the goods in a timely manner where the goods were being specifically manufactured).

¹⁴See, e.g., *Van Gerechtshof 's Hertogenbosch*, the Netherlands, 20 October 1997 (Dongen Waalwijk Leder BV v. Conceria Adige S.p.A.), 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), English available on the Internet at 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, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/961112g1.html> (bank certificate established that aggrieved seller was paying higher interest rate than official rate under applicable law); Kärjääoikeus of Kuopio, Finland, 5 November 1996, available on the Internet at 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 Court of the International Chamber of Commerce, 1993 (Arbitral award No. 7197)] (interest awarded at commercial bank rate in Austria); Landgericht Berlin, Germany, 6 October 1992, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/921006g1.html> (assignee of aggrieved party's claim entitled to recover 23 per cent 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); Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, 1 October 2007 (Timber case). English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071001sb.html>.

¹⁵See, e.g., Stockholm Chamber of Commerce, Sweden, 1998, Unilex (aggrieved buyer entitled to recover interest on reimbursable costs it incurred following sub-buyer's rightful rejection of goods).

¹⁶Arbitration Court of the International Chamber of Commerce, February 1997 (Arbitral award No. 8716), (Fall 2000) *ICC International Court of Arbitration Bulletin*, vol. 11, No. 2, pp. 61-63 (damages awarded in amount of price).

¹⁷See, 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).

¹⁸Arbitration Court of the International Chamber of Commerce, February 1997 (Arbitral award No. 8716), (Fall 2000) *ICC International Court of Arbitration Bulletin*, vol. 11, No. 2, pp. 61-63.

¹⁹Oberlandesgericht Munich, Germany, 5 March 2008 (Stolen car case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080305g1.html>.

²⁰Bulgarian Chamber of Commerce and Industry, Bulgaria, 24 April 1996 (No. 56/1995), Unilex (setting a 50/50 division of the 10 per cent of price held back by buyer because of non-conformity of goods).

²¹U.S. District Court, Southern District of New York, United States, 10 May 2002 (Geneva Pharmaceuticals Tech. Corp. v. Barr Laboratories, Inc.), available on the Internet at <http://cisgw3.law.pace.edu/cases/020510u1.html> (domestic law "tort" claim of negligent misrepresentation not preempted by Convention). See also CLOUT case No. 420 [U.S. District Court, Eastern District of Pennsylvania, United States, 29 August 2000] (Convention does not govern non-contractual claims); Kantonsgericht St. Gallen, Switzerland, 13 May 2008 (skid chains and adaptors case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080513s1.html> (pre-contractual misrepresentations by the seller caused reliance damage to the buyer when reselling the goods).

²²See CISG articles 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 specified 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 [Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft—Wien, Austria, 15 June 1994] (seller estopped from asserting buyer's failure to give timely notice).

²³See, 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 tort 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).

²⁴CLOUT case No. 474 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 24 January 2000 (Arbitral award No. 54/1999)].

²⁵See, 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 [U.S. Court of Appeals for the Second Circuit United States 6 December 1995] ("incidental and consequential" damages) (see full text of the decision) affirming in part CLOUT case No. 85 [U.S. District Court, Northern District of New York, United States, 9 September 1994].

²⁶CLOUT case No. 596 [Oberlandesgericht Zweibrücken, Germany, 2 February 2004] (see full text of the decision).

²⁷CLOUT case No. 49 [Oberlandesgericht Düsseldorf, Germany, 2 July 1993].

²⁸See CLOUT case No. 196 [Handelsgericht des Kantons Zürich, Switzerland, 26 April 1995] (recovery for damage to house in which a container for “weightless floating” had been installed).

²⁹Helsingin hovioikeus, Finland, 26 October 2000, English translation available 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 [Audiencia 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).

³⁰Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russian Federation, 3 March 1995 (Arbitral award No. 304/93) (“moral harm” not compensable under CISG).

³¹CLOUT 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).

³²Arrondissementsrechtbank Roermond, the Netherlands, 6 May 1993 (Gruppo IMAR S.p.A. v. Protech Horst BV), Unilex (damages in amount of devaluation because payment not made when due); Tribunal cantonal Valais, Switzerland, 28 January 2009 (Fiberglass composite materials case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090128s1.html>.

³³See, e.g., Tribunal commercial de Bruxelles, Belgium, 13 November 1992 (Maglificio Dalmine s.l.r. v. S.C. Covires), Unilex (failure to pay price; court allowed reevaluation of receivable under Italian law to reflect change in cost of living in seller’s country).

³⁴CLOUT 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). See also Tribunal cantonal Valais, Switzerland, 28 January 2009 (Fiberglass composite materials case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090128s1.html>.

³⁵CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997] (citing general principle of tort law).

³⁶CLOUT 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, Russian Federation, 9 September 1994 (Arbitral award No. 375/93) (recovery of storage expenses shown to be in amounts normally charged).

³⁷Stockholm Chamber of Commerce, Sweden, 1998, Unilex (examination).

³⁸Stockholm Chamber of Commerce, Sweden, 1998, Unilex (storage); CLOUT case No. 138 [U.S. Court of Appeals for the Second Circuit, United States, 6 December 1995] (reversing in part CLOUT case No. 85 [U.S. District Court, Northern District of New York, United States, 9 September 1994], which had denied recovery of storage costs).

³⁹CLOUT case No. 304 [Arbitration Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7531)].

⁴⁰CLOUT case No. 138 [U.S. Court of Appeals for the Second Circuit, United States, 6 December 1995] (reversing in part CLOUT case No. 85 [U.S. District Court, Northern District of New York, United States, 9 September 1994], which had denied recovery of shipping costs and customs duties); Pretore del Distretto di Lugano, Switzerland, 19 April 2007 (children’s play structure case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070419s1.html> (cost of storage not proven); China International Economic and Trade Arbitration Commission, People’s Republic of China, December 2006 (Automobile case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061200c1.html>.

⁴¹CLOUT case No. 138 [U.S. Court of Appeals for the Second Circuit, United States, 6 December 1995] (affirming in part CLOUT case No. 85 [U.S. District Court, Northern District of New York, United States, 9 September 1994], which had awarded costs of expediting shipment of goods under existing contract); China International Economic and Trade Arbitration Commission, People’s Republic of China, 25 July 2006 (Bleached softwood Kraft pulp case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060725c1.html>.

⁴²CLOUT case No. 125 [Oberlandesgericht Hamm, Germany, 9 June 1995]; CLOUT case No. 732 [Audiencia Provincial de Palencia, Spain, 26 September 2005 (Printing machine case)].

⁴³Helsingin hovioikeus, Finland, 26 October 2000, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/001026f5.html> (damages recovered for sales and marketing expenses of aggrieved buyer).

⁴⁴CLOUT case No. 253 [Cantone del Ticino Tribunale d’appello, Switzerland, 15 January 1998] (commissions) (see full text of the decision).

⁴⁵Zivilgericht Basel-Stadt, Switzerland, 8 November 2006 (packaging machine case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061108s1.html>.

⁴⁶Landgericht Berlin, Germany, 13 September 2006 (Aston Martin automobile case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060913g1.html>.

⁴⁷CLOUT case No. 311 [Oberlandesgericht Köln, Germany, 8 January 1997]; CLOUT case No. 732 [Audiencia Provincial de Palencia, Spain, 26 September 2005 (Printing machine case)].

⁴⁸CLOUT case No. 304 [Arbitration Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7531)].

⁴⁹CLOUT 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, 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).

⁵⁰CLOUT 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 Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7660)] (no indemnity awarded because third party's pending claim against buyer was not yet resolved); China International Economic and Trade Arbitration Commission, People's Republic of China, December 2006 (rabbit skin case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061200c2.html>; Hovioikeus hovrätt Turku Finland, 24 May 2005 (irradiated spice case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050524f5.html>.

⁵¹Arbitration Court of the International Chamber of Commerce, October 1996 (Arbitral award No. 8740), Unilex (cost of moving replacement coal from stockpiles recoverable).

⁵²CLOUT case No. 631 [Supreme Court of Queensland, Australia, 17 November 2000].

⁵³China International Economic and Trade Arbitration Commission, People's Republic of China, 9 November 2005 (DVD machines case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051109c1.html>.

⁵⁴Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 15 November (Arbitral award No. 2006 98/2005) (Feedstock equipment case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061115r1.html>; Zivilgericht Basel-Stadt, Switzerland, 8 November 2006 (Packaging machine case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061108s1.html>.

⁵⁵Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, 1 October 2007 (Timber case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071001sb.html>. See, however, Oberlandesgericht Dresden, Germany, 21 March 2007 (Stolen automobile case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070321g1.html>, where recovery of such costs was refused because the buyer could not establish the necessity of incurring them.

⁵⁶CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002]; CLOUT case No. 138 [U.S. 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 in part CLOUT case No. 85 [U.S. District Court, Northern District of New York, United States, 9 September 1994]; Ontario Court-General Division, Canada, 16 December 1998 (Nova Tool and Mold Inc. v. London Industries Inc.), 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); Landgericht Stuttgart, Germany, 29 October 2009 District Court (artificial turf case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/091029g1.html> (cutting out white lines in turf delivered for a golf course); China International Economic and Trade Arbitration Commission, People's Republic of China, 21 May 2006 (Diesel generator case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060521c1.html>.

⁵⁷CLOUT case No. 318 [Oberlandesgericht Celle, Germany, 2 September 1998] (advertising costs not sufficiently particularized) (see full text of the decision). See also Pretore del Distretto di Lugano, Switzerland, 19 April 2007 (Children's play structure case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070419s1.html> (cost of storage not proven).

⁵⁸CLOUT 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).

⁵⁹Oberlandesgericht Stuttgart, Germany, 31 March 2008 (Automobile case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080331g1.html>.

⁶⁰China International Economic and Trade Arbitration Commission, People's Republic of China, 3 August 2006 (Water pump case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060803c1.html>.

⁶¹CLOUT case No. 318 [Oberlandesgericht Celle, Germany, 2 September 1998] (advertising costs not sufficiently particularized) (see full text of the decision). See also CLOUT case No. 935 [Handelsgericht Zürich, Switzerland, 25 June 2007] (Printed materials case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070625s1.html>.

⁶²CLOUT case No. 49 [Oberlandesgericht Düsseldorf, Germany, 2 July 1993].

⁶³CLOUT case No. 93 [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, Russian Federation, 9 September 1994 (Arbitral award No. 375/93) (recovery of storage expenses in amounts normally charged for storage); CLOUT case No. 104 [Arbitration Court of the International Chamber of Commerce, 1993 (Arbitral award No. 7197)] (recovery of cost of storage but not for damage to goods because of prolonged storage) (see full text of the decision).

⁶⁴CLOUT case No. 301 [Arbitration Court of the International Chamber of Commerce, 1992 (Arbitral award No. 7585)] (storage and preservation of undelivered machinery). See also CISG article 85 (seller must take steps to preserve goods when buyer fails to take over the goods).

⁶⁵CLOUT case No. 301 [Arbitration Court of the International Chamber of Commerce, 1992 (Arbitral award No. 7585)] (cost of modifying machine in order to resell) (see full text of the decision).

⁶⁶CLOUT 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).

⁶⁷CLOUT case No. 125 [Oberlandesgericht Hamm, Germany, 9 June 1995] (citing articles 45 and 48 but not article 74, court concluded that breaching seller must bear cost of repair or delivery of replacement goods).

⁶⁸Zivilgericht Basel-Stadt, Switzerland, 8 November 2006 (Packaging machine case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061108s1.html>.

⁶⁹CLOUT case No. 327 [Kantonsgericht des Kantons Zug, Switzerland, 25 February 1999] (recovery of debt collection costs allowed); Rechtbank Breda, the Netherlands, 16 January 2009 (Watermelon case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090116n1.html>; CLOUT case No. 930 [Tribunal cantonal Valais, Switzerland, 23 May 2006] (Suits case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060523s1.html>.

⁷⁰CLOUT 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).

⁷¹ Rechtbank Rotterdam, Netherlands, 15 October 2008 (Eyroflam S.A. v. P.C.C. Rotterdam B.V.), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081015n2.html>.

⁷²CLOUT 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, 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 article 74, they were not recoverable in this case because the fees were recovered in special proceedings); Gerechtshof 's-Hertogenbosch, the Netherlands, 27 November 1991 (De Vos en Zonen v. Reto Recycling), Unilex (construing ULIS article 82, predecessor of article 74, court allowed extrajudicial costs). See also U.S. Court of Appeals for the Seventh Circuit, United States, 19 November 2002 (Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc.), available on the Internet at <http://cisgw3.law.pace.edu/cases/021119u1.html> (leaving open whether certain prelitigation expenditures might be recovered as damages when, e.g., expenditures were designed to mitigate the aggrieved party's losses); CLOUT case No. 796, [Juzgado de Primera Instancia, No. 3 de Badelona, Spain, 22 May 2006 (Bermuda shorts case)].

⁷³CLOUT 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).

⁷⁴Many decisions award attorneys' fees but support the award by citation to domestic law on the allocation of litigation costs. See, for instance, Landgericht Potsdam, Germany, 7 April 2009 (Pharmaceutical implements), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090407g1.html>; China International Economic and Trade Arbitration Commission, People's Republic of China, 21 May 2006 (Diesel generator case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060521c1.html>.

⁷⁵CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 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 Court of the International Chamber of Commerce, 1992 (Arbitral award No. 7585)] (damages for expenses for attorneys and arbitration).

⁷⁶CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 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).

⁷⁷CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994] (legal costs incurred in actions to enforce claims under two different contracts).

⁷⁸See, e.g., Hovioikeus Turku [Court of Appeals], Finland, 12 April 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020412f5.html> (without citing article 74, court provides for recovery of attorneys' fees); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 15 November 2006 (Arbitral award No. 2006 98/2005) (Feedstock equipment case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061115r1.html>.

⁷⁹Stockholm Chamber of Commerce, Sweden, 1998, Unilex (attorney's fees in dispute with freight forwarder about storage not recoverable because unforeseeable).

⁸⁰CLOUT 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).

⁸¹U.S. Court of Appeals for the Seventh Circuit, United States, 19 November 2002 (Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc.), available on the Internet at <http://cisgw3.law.pace.edu/cases/021119u1.html> (leaving open whether certain prelitigation expenditures might be recovered as damages). (The United States Supreme Court denied certiorari for this case on 1 December 2003.) See also U.S. District Court, New Jersey, United States 15 April 2009 (San Lucio, S.r.l. et al. v. Import & Storage Services, LLC), available on the Internet at <http://cisgw3.law.pace.edu/cases/090415u1.html>.

⁸²Helsingin hovioikeus, Finland, 26 October 2000, English translation available 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 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 6 June 2000 (Arbitral award No. 406/1998)] (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 [U.S. Court of Appeals for the Second Circuit, United States, 6 December 1995] (buyer's lost profits), affirming in part CLOUT case No. 85 [U.S. District Court, Northern District of New York, United States, 9 September 1994]; CLOUT case No. 301 [Arbitration Court of the International Chamber of Commerce, 1992 (Arbitral award No. 7585)] (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); Bundesgericht, Switzerland, 17 December 2009 (Watches case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/091217s1.html>; Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, 30 October 2006 (Trolleybus case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061030sb.html> (penalties for delay awarded); Rechtbank Arnhem, the Netherlands, 1 March 2006 (Skoda Kovarny v. B. van Dijk Jr. Staalhandelmaatschappij B.V.), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060301n1.html>.

⁸³CLOUT 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 [U.S. 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). See also U.S. District Court, Southern District of New York, United States, 23 August 2006 (TeeVee Tunes, Inc. et al v. Gerhard Schubert GmbH), available on the Internet at <http://cisgw3.law.pace.edu/cases/060823u1.html>.

⁸⁴CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994].

⁸⁵Bundesgericht, Switzerland, 17 December 2009 (Watches case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/091217s1.html>.

⁸⁶Zivilgericht Basel-Stadt, Switzerland, 8 November 2006 (Packaging machine case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061108s1.html>.

⁸⁷Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, 30 October 2006 (Trolleybus case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061030sb.html> (penalties for delay awarded).

⁸⁸Tribunal of International Commercial Arbitration at the Ukraine Chamber of Commerce and Trade, Ukraine, 2005 (Arbitral award No. 48), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050000u5.html>.

⁸⁹China International Economic and Trade Arbitration Commission, People's Republic of China, December 2006 (Rabbit skin case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061200c2.html> (seller was aware of the resale contract and ought to have foreseen the profit margin).

⁹⁰CLOUT case No. 476 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 6 June 2000 (Arbitral award No. 406/1998)] (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).

⁹¹Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 13 April 2006 (Arbitral award No. 105/2005), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060413r1.html>. In another case a tribunal awarded 30 per cent as the margin of lost profit: China International Economic and Trade Arbitration Commission, People's Republic of China, 22 August 2005 (Valve case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050822c1.html>.

⁹²Rechtbank Arnhem, the Netherlands, 1 March 2006 (Skoda Kovarny v. B. van Dijk Jr. Staalhandelmaatschappij B.V.), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060301n1.html>.

⁹³U.S. District Court, Southern District of New York, United States, 23 August 2006 (TeeVee Tunes, Inc. et al v. Gerhard Schubert GmbH.), available on the Internet at <http://cisgw3.law.pace.edu/cases/060823u1.html>.

⁹⁴Oberlandesgericht Brandenburg, Germany, 18 November 2008 (Beer case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081118g1.html> (cancellation of a beer contract where buyer had to buy certain amounts of beer over the contractual period).

⁹⁵CLOUT case No. 85 [U.S. 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 in part by CLOUT case No. 138 [U.S. Court of Appeals for the Second Circuit, United States, 6 December 1993, 3 March 1995]. See also U.S. District Court, Southern District of New York, United States, 23 August 2006 (TeeVee Tunes, Inc. et al v. Gerhard Schubert GmbH.), available on the Internet at <http://cisgw3.law.pace.edu/cases/060823u1.html> (damages must be determined with sufficient certainty).

⁹⁶CLOUT case No. 210 [Audiencia 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).

⁹⁷CLOUT 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, 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 questioned whether there was sufficient proof of damages); Xiamen Intermediate People's Court, People's Republic of China, 31 December 1992, Unilex (aggrieved seller's lost profits calculated as difference between contract price and price in contract with its supplier).

⁹⁸Tribunale di Milano, Italy, 26 January 1995 (Bielloni Castello v. EGO), Unilex (noting that claim of lost sale conflicted with claim for damages under article 75).

⁹⁹CLOUT case No. 85 [U.S. 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 in part by CLOUT case No. 138 [U.S. Court of Appeals for the Second Circuit, United States, 6 December 1993, 3 March 1995].

¹⁰⁰Polimeles Protodikio Athinon, Greece, 2009 (docket No. 4505/2009) (Bullet-proof vest case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/094505gr.html>.

¹⁰¹CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002] (see full text of the decision). See also Polimeles Protodikio Athinon, Greece, 2009 (docket No. 4505/2009) (Bullet-proof vest case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/094505gr.html>.

¹⁰²China International Economic and Trade Arbitration Commission, People's Republic of China, 20 June 1991, *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).

¹⁰³CLOUT 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).

¹⁰⁴Stockholm Chamber of Commerce, Sweden, 1998, Unilex (aggrieved buyer's payments to freight forwarder exceptionally large and therefore reduced by 50 per cent).

¹⁰⁵Stockholm Chamber of Commerce, Sweden, 1998, Unilex (aggrieved buyer's attorney's fees for dispute with freight forwarder).

¹⁰⁶CLOUT 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).

¹⁰⁷CLOUT case No. 476 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 6 June 2000 (Arbitral award No. 406/1998)] (buyer's damages for lost profit reduced to 10 per cent of price because breaching seller did not know terms of sub-sale).

¹⁰⁸CLOUT case No. 474 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 24 January 2000 (Arbitral award No. 54/1999)] (seller could not foresee inspection abroad which was alleged to lead to a loss of reputation of the goods sold).

¹⁰⁹Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, 30 October 2006 (Trolleybus case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061030sb.html> (penalties for delay awarded).

¹¹⁰CLOUT 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).

¹¹¹CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 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).

¹¹²CLOUT 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).

¹¹³CLOUT case No. 217 [Handelsgericht des Kantons Aargau, Switzerland, 26 September 1997] (dissent argues that seller had not sufficiently proven the amount of its damages).

¹¹⁴CLOUT case No. 631 [Supreme Court of Queensland, Australia, 17 November 2000] (see full text of the decision).

¹¹⁵Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, 1 October 2007 (Timber case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071001sb.html>.

¹¹⁶See CLOUT case No. 476 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 6 June 2000 (Arbitral award No. 406/1998)] (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, Russian Federation, 11 September 1998 (Arbitral award No. 407/1996)] (aggrieved buyer established amount of loss) (see full text of the decision); City of Moscow Arbitration Court, Russian Federation, 3 April 1995 (case No. 18-40), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/950403r1.html> (aggrieved buyer "substantiated" relevant current price and currency conversion rate); Oberlandesgericht Brandenburg, Germany, 18 November 2008 (Beer case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081118g1.html>; CLOUT case No. 1021 [Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, 15 July 2008] (Milk packaging equipment case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080715sb.html>; CLOUT case No. 935 [Handelsgericht Zürich, Switzerland, 25 June 2007] (printed materials case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070625s1.html>; Hovioikeus hovrätt Helsinki, Finland, 31 May 2004 (Crudex Chemicals Oy v. Landmark Chemicals S.A.), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040531f5.html>. For further discussion of the burden of proof with respect to damage claims, see the Digest for Part III, Section II, Chapter V.

¹¹⁷Bundesgerichtshof, Germany, 9 January 2002, available on the Internet at www.rws-verlag.de/bgh-free/volltex5/vo82717.htm, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020109g1.html> (breaching seller failed to show conformity at time risk shifted to buyer).

¹¹⁸CLOUT case No. 294 [Oberlandesgericht Bamberg, Germany, 13 January 1999] (aggrieved buyer had burden of establishing damages).

¹¹⁹Helsingin hovioikeus [Helsinki Court of Appeals], Finland, 26 October 2000, English translation available 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 [U.S. 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 in part by CLOUT case No. 138 [U.S. Court of Appeals for the Second Circuit, United States, 6 December 1993, 3 March 1995]; Hovioikeus hovrätt Helsinki, Finland, 31 May 2004 (Crudex Chemicals Oy v. Landmark Chemicals S.A.), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040531f5.html>.

¹²⁰Rechtbank van Koophandel Hasselt, Belgium, 20 September 2005 (M. Smithuis Pre Pain v. Bakkershuis), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050920b1.html>.

¹²¹CLOUT 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); CLOUT case No. 908 [Handelsgericht Zürich, Switzerland, 22 December 2005] (Retail fashion clothes case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051222s1.html>. For further discussion of set off, see the Digest for Part III, Section II, Chapter V.

¹²²CLOUT 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).

¹²³CLOUT 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, 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); Landgericht Stuttgart, Germany, 29 October 2009 (Artificial turf case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/091029g1.html> ("A set-off is at least admissible in the field of application of the CISG without an express provision as long as the counterclaim is based on the same legal relationship").

¹²⁴CLOUT 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 Where a party failed to prove that certain similar sales conducted at the same time constituted cover sales, it was allowed to calculate its damages under article 76.⁷

3. The final clause of article 75 provides that an aggrieved party may recover further damages under article 74.⁸ 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 74.⁹ 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.¹⁰ Some decisions indicate that damages recovered under article 74 may be calculated in much the same way they would be calculated under article 75,¹¹ but this

approach has been rejected in another case.¹² In one case a court refused a claim under article 74 because the buyer had failed to avoid the contract before making a cover sale.¹³

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 75.¹⁴ 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.¹⁵

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.¹⁶

Avoidance of contract

7. Recovery of damages under article 75 is available only if the contract has been effectively avoided¹⁷ by the aggrieved party.¹⁸ Substitute transactions concluded before avoidance do not fall within the coverage of article 75.¹⁹ 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.²⁰ In another case it was held that a refusal to perform entitled a party to avoid the contract without notice and then conduct cover sales.²¹ 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.²²

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.²³ An aggrieved buyer concludes a substitute transaction when it buys goods to replace those promised in the avoided contract.²⁴ Where a party fails to establish a clear connection between a purported cover sale and the original contract that has been avoided, it cannot rely on article 75 to calculate its damages.²⁵

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 75.²⁶ In another case the court held that where an aggrieved buyer paid a cover price that was almost double the original purchase price, it did not constitute a reasonable substitute transaction.²⁷ 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.²⁸ The duty to mitigate is also important in determining whether a seller acted reasonably in concluding substitute sales almost immediately.²⁹ A court held that where a seller allowed an unreasonable period to elapse before starting to make the substitute sales, it failed to comply with its duty to mitigate damages under article 77.³⁰

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.³¹ A sale at market value on approximately the same freight terms was found to be a reasonable substitute sale.³² One court held that, where the seller’s failure to deliver caused the buyer to default on contracts with its own customers, the cover purchases concluded by the buyer’s customers could form the basis for the buyer’s claim under article 75.³³ Another decision, however, rejected this reasoning, holding that since the cover purchases were not made by the buyer, they did not fulfil the requirements of article 75.³⁴ One court held that an aggrieved seller who resold the goods for the same price as the price at which the seller acquired

them had acted reasonably for purposes of article 75, even though the seller suffered a loss of profit which was recoverable under article 74.³⁵ Where a seller attempted to sell the goods on two occasions, but failed, it provided evidence that the third sale was conducted in a reasonable manner.³⁶ Selling the goods in a limited market where a bigger market is readily available has been held not to constitute selling in a reasonable manner.³⁷

Substitute transaction—reasonable time

11. An aggrieved party must conclude the substitute transaction within a reasonable time after avoidance of the breached contract.³⁸ What time is reasonable will depend on the nature of the goods and the circumstances.³⁹ 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.⁴⁰ Resale of scrap steel within two months of the time the seller avoided the contract has also been found reasonable.⁴¹ 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.⁴² In one case a lower court held that the resale of motor cycles over a five-year period had been conducted within a reasonable time taking into account the nature of the goods and the market, but on appeal the court held that the time period of the resales was not reasonable, and the court reduced the amount of damages.⁴³ Where a seller waited more than six months without apparent reason to conduct a resale, it was held to be unreasonable.⁴⁴ 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.⁴⁵

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, including loss of profit,⁴⁶ 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 75.⁴⁷

13. Several decisions have awarded additional damages under article 74 to compensate for incidental damages arising from the breach.⁴⁸ There will, of course, be no additional recovery if further damages are not established.⁴⁹

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.⁵⁰ Similarly, where a buyer bought replacement goods at almost double the new price proposed by the seller, the court held that it did not constitute a transaction in a reasonable manner.⁵¹ There is no reduction if there is no failure to mitigate.⁵² 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 77.⁵³

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.⁵⁴ 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.⁵⁵

Notes

¹Articles 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.

²See paragraph 13 below.

³See, e.g., CLOUT case No. 102 [Arbitration Court of the International Chamber of Commerce, 1989 (Arbitral award No. 6281)] (applying Yugoslav law but also analysing article 75).

⁴See Arbitration Court of the International Chamber of Commerce, September 1996 (Arbitral award No. 8574), Unilex (no recovery under article 76 because the aggrieved party had entered into substitute transactions within the meaning of article 75); see however, U.S. District Court, Southern District of New York, United States, 29 May 2009 (Doolim Corp. v. R Doll, LLC, et al.), available on the Internet at <http://cisgw3.law.pace.edu/cases/090529u1.html>; Oberlandesgericht Graz, Austria, 29 July 2004 (Construction equipment case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040729a3.html>.

⁵CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994]. See also Arbitration Court of the International Chamber of Commerce, October 1996 (Arbitral award No. 8740), 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 China International Economic and Trade Arbitration Commission, People's Republic of China, 30 October 1991, English translation 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 unit contract price and the unit price in the substitute transaction).

⁶CLOUT 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); see also Efetio Lamias, Greece, 2006 (docket No. 63/2006) (Sunflower seed case) available on the Internet at <http://cisgw3.law.pace.edu/cases/060001gr.html>.

⁷China International Economic and Trade Arbitration Commission, People's Republic of China, 11 February 2000 (Silicon metal case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/000211c1.html>.

⁸CLOUT case No. 539 [Oberlandesgericht Graz, Austria, 31 May 2002] (Timber case); Oberlandesgericht Graz, Austria, 24 January 2002 (Excavator case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020124a3.html>. See also paragraph 13 below.

⁹Arbitration Court of the International Chamber of Commerce, September 1996 (Arbitral award No. 8574), 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). See, however, Audiencia Provincial de Valencia, Spain, 31 March 2005, (Frischaff Produktions v. Guillem Export), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050331s4.html>.

¹⁰CLOUT 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 articles 75 or 76).

¹¹CLOUT 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 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 16 March 1995 (Arbitral award No. 155/1994)] (citing article 74 but determining damages as difference between contract price and price in substitute transaction). See also CLOUT case No. 304 [Arbitration Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7531)] (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); Efetio Lamias, Greece, 2006, (docket No. 63/2006) (Sunflower seed case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060001gr.html>. See Supreme Court, Poland, 27 January 2006 (Metallurgical sand case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060127p1.html>, where the lower court awarded damages on this basis, but the court on appeal rejected that reasoning.

¹²Supreme Court, Poland, 27 January 2006 (Metallurgical sand case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060127p1.html>.

¹³Audiencia Provincial de Valencia, Spain, 31 March 2005 (Frischaff Produktions v. Guillem Export), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050331s4.html>.

¹⁴CLOUT case No. 301 [Arbitration Court of the International Chamber of Commerce, 1992 (Arbitral award No. 7585)].

¹⁵China International Economic and Trade Arbitration Commission, People's Republic of China, 1 April 1993 (Arbitral award No. 75), Unilex, English translation available on the Internet at www.cisgw3.law.pace.edu/cgi-bin/isearch.

¹⁶U.S. District Court, Southern District of New York, United States, 29 May 2009 (Doolim Corp. v. R Doll, LLC), available on the Internet at <http://cisgw3.law.pace.edu/cases/090529u1.html>.

¹⁷CLOUT 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, 24 January 2000 (Arbitral award No. 54/1999)] (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); Efetio Lamias, Greece, 2006 (docket No. 63/2006) (Sunflower seed case) English editorial analysis available on the Internet at <http://cisgw3.law.pace.edu/cases/060001gr.html>; Audiencia Provincial de Valencia, Spain, 31 March 2005 (Frischaff Produktions v. Guillem Export), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050331s4.html>; Supreme Court, Poland, 27 January 2006 (Metallurgical sand case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060127p1.html>; Oberlandesgericht Düsseldorf, Germany, 22 July 2004 (Shoes case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040722g1.html>; CLOUT Case 544 [Audiencia Provincial de Barcelona, Spain, 2 February 2004] (Soy oil case); Landgericht Hamburg, Germany, 21 December 2001 (Stones case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/011221g1.html>; China International Economic and Trade Arbitration Commission, People's Republic of China, 25 December 1998 (Pig iron case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/981225c1.html>.

¹⁸See 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); China International Economic and Trade Arbitration Commission, People's Republic of China, 28 February 2005 (Wool case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050228c1.html> (seller failed to send a notice as required by the contract).

¹⁹Arbitration Court of the International Chamber of Commerce, September 1996 (Arbitral award No. 8574), Unilex (purchases by aggrieved buyer before it had avoided contract did not constitute substitute transactions under article 75); CLOUT case No. 85 [U.S. District Court, Northern District of New York, United States, 9 September 1994], affirmed in part by CLOUT case No. 138 [U.S. Court of Appeals for the Second Circuit, United States, 6 December 1995] (substitute compressors had been ordered before breach).

²⁰CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997]. See also Oberlandesgericht Graz, Austria, 29 July 2004 (Construction equipment case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040729a3.html>.

²¹Landgericht Hamburg, Germany, 26 November 2003 (Phtalic anhydride case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/031126g1.html>.

²²CLOUT case No. 540 [Oberlandesgericht Graz, Austria, 16 September 2002]. See also Supreme Court, Poland, 27 January 2006 (Metallurgical sand case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060127p1.html> (calculation of damages in terms of article 74 based on the cover sales, although the contract has not been avoided prior to the cover sales).

²³CLOUT case No. 631 [Supreme Court of Queensland, Australia, 17 November 2000] (see full text of the decision); China International Economic and Trade Arbitration Commission, People's Republic of China, 30 November 1997 (Canned oranges case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/971130c1.html>.

²⁴CLOUT case No. 85 [U.S. District Court, Northern District of New York, United States, 9 September 1994], affirmed in part by CLOUT case No. 138 [U.S. 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); China International Economic and Trade Arbitration Commission, People's Republic of China, 7 May 1997 (Horsebean case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/970507c1.html>.

²⁵China International Economic and Trade Arbitration Commission, People's Republic of China, 30 November 1997 (Canned oranges case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/971130c1.html> (the quantity and quality of the purported cover sale for oranges from Spain, differed substantially from the original contract).

²⁶CLOUT case No. 227 [Oberlandesgericht Hamm, Germany, 22 September 1992].

²⁷CLOUT case No. 1029 [Cour d'appel de Rennes, France, 27 May 2008] (Brassiere cups case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080527f1.html>.

²⁸Arbitration Court of the International Chamber of Commerce, 1995 (Arbitral award No. 8128), Unilex (higher price paid by aggrieved buyer in substitute transaction justified because of buyer's obligation to deliver goods promptly to sub-buyer).

²⁹Hof van Beroep Antwerp, Belgium, 22 January 2007 (N.V. Secremo v. Helmut Papst), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070122b1.html>.

³⁰Hof van Beroep Antwerp, Belgium, 24 April 2006 (GmbH Lothringer Gunther Grosshandelsgesellschaft für Baelemente und Holzwerkstoffe v. NV Fepeco International), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060424b1.html>.

³¹Arbitration Court of the International Chamber of Commerce, 1995 (Arbitral award No. 8128) Unilex.

³²CLOUT case No. 631 [Supreme Court of Queensland, Australia, 17 November 2000]; Supreme Court of Queensland, Court of Appeal, Australia, 12 October 2001 (Downs Investments v Perwaja Steel), available on the Internet at <http://cisgw3.law.pace.edu/cases/011012a2.html>; China International Economic and Trade Arbitration Commission, People's Republic of China, 25 July 2006 (Bleached softwood Kraft pulp case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060725c1.html>; China International Economic and Trade Arbitration Commission, People's Republic of China, 4 February 2002 (Styrene monomer case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020204c1.html>; China International Economic and Trade Arbitration Commission, People's Republic of China, 10 August 2000 (Silicon metal case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/000810c1.html>.

³³Rechtbank Arnhem, the Netherlands, 19 July 2006 (*Skoda Kovarny v. B. van Dijk Jr. Staalhandelmaatschappij B.V.*), Unilex (buyer's customers had to reorder steel from different suppliers due to the seller refusing to deliver the goods at the originally agreed prices). See however, Arbitration Court of the International Chamber of Commerce, 20 December 1999 (Copper cable case), available on the Internet at <http://cisgw3.law.pace.edu/cases/991220i1.html>.

³⁴Arbitration Court of the International Chamber of Commerce, 20 December 1999 (Copper cable case), available on the Internet at <http://cisgw3.law.pace.edu/cases/991220i1.html>.

³⁵Oberlandesgericht Graz, Austria, 24 January 2002 (Excavator case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020124a3.html>.

³⁶Arbitration Court of the International Chamber of Commerce, 2000 (Arbitral award No. 10329) (Industrial product case), available on the Internet at <http://cisgw3.law.pace.edu/cases/000329i1.html>.

³⁷Højesteret, Denmark, 17 October 2007 (*Zweirad Technik v. C. Reinhardt A/S*), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071017d1.html>.

³⁸But see CLOUT case No. 308 [Federal Court of Australia, 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); CLOUT case No. 629 [Kantonsgericht Zug, Switzerland, 12 December 2002] (party waited to make sure that buyer would refuse the goods before concluding the cover sale).

³⁹Højesteret, Denmark, 17 October 2007 (*Zweirad Technik v. C. Reinhardt A/S*), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071017d1.html>; Hof van Beroep Antwerp, Belgium, 22 January 2007 (*N.V. Secremo v. Helmut Papst*), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070122b1.html>; China International Economic and Trade Arbitration Commission, People's Republic of China, 25 July 2006 (Bleached softwood Kraft pulp case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060725c1.html>.

⁴⁰CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994] (avoidance on 7 August; resale on 6 and 15 October). See also CLOUT case No. 629 [Kantonsgericht Zug, Switzerland, 12 December 2002] (party waited to make sure that buyer would refuse the goods before concluding the cover sale and then concluded cover sale within two days).

⁴¹CLOUT case No. 631 [Supreme Court of Queensland, Australia, 17 November 2000] (see full text of the decision); Supreme Court of Queensland, Court of Appeal, Australia, 12 October 2001 (*Downs Investments v Perwaja Steel*), available on the Internet at <http://cisgw3.law.pace.edu/cases/011012a2.html>.

⁴²CLOUT case No. 645 [Corte di Appello di Milano, Italy, 11 December 1998 (*Bielloni Castello S.p.A. v. EGO S.A.*)], also in Unilex.

⁴³Højesteret, Denmark, 17 October 2007 (*Zweirad Technik v. C. Reinhardt A/S*), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071017d1.html>.

⁴⁴Hof van Beroep Antwerp, Belgium, 24 April 2006 (*GmbH Lothringer Gunther Grosshandelsgesellschaft für Bauelemente und Holzwerkstoffe v. NV Fepco International*), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060424b1.html>; Hof van Beroep Gent, Belgium, 20 October 2004 (*NV Van Heygen Staal v. GmbH Stahl- und Metalhandel Klockner*), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/041020b1.html> (seller waited more than two months without apparent reason before starting to conduct cover sales).

⁴⁵Arbitration Court of the International Chamber of Commerce, September 1996 (Arbitral award No. 8574), Unilex (reasonable time must pass after avoidance before an aggrieved buyer may purchase substitute goods). But see Bundesgericht, Switzerland, 15 September 2000 (*FCF S.A. v. Adriafil Commerciale S.r.l.*), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/000915s2.html> (aggrieved buyer made reasonable substitute purchase even though it concluded the purchase promptly after avoidance).

⁴⁶Oberlandesgericht Graz, Austria, 24 January 2002 (Excavator case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020124a3.html>; CLOUT case No. 539 [Oberlandesgericht Graz, Austria, 31 May 2002 (Timber case)] (recovery of lost profit); CLOUT case No. 980 [China International Economic and Trade Arbitration Commission, People's Republic of China, 12 February 1999] (Chrome plating production line equipment case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/990212c1.html> (loss of profit).

⁴⁷See, e.g., CLOUT case No. 631 [Supreme Court of Queensland, Australia, 17 November 2000] (see full text of the decision); CLOUT case No. 140 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 16 March 1995 (Arbitral award No. 155/1994)]; CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994]; CLOUT case No. 301 [Arbitration Court of the International Chamber of Commerce, 1992 (Arbitral award No. 7585)]. But see CLOUT case No. 217 [Handelsgericht des Kantons Aargau, Switzerland, 26 September 1997] (majority of judges awarded seller of custom-made cutlery 10 per cent of purchase price as damages, a sum which included losses incurred on the resale of the cutlery); Landgericht Braunschweig, Germany, 30 July 2001 (Metal case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/010730g1.html>.

⁴⁸CLOUT 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); CLOUT case No. 539 [Oberlandesgericht Graz, Austria, 31 May 2002 (Timber case)] (recovery of lost profit).

⁴⁹CLOUT case No. 294 [Oberlandesgericht Bamberg, Germany, 13 January 1999] (aggrieved buyer failed to prove additional costs were foreseeable under article 74).

⁵⁰CLOUT case No. 395 [Tribunal Supremo, Spain, 28 January 2000].

⁵¹CLOUT case No. 1029 [Cour d'appel de Rennes, France, 27 May 2008] (*Brassiere cups case*), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080527f1.html>.

⁵²CLOUT 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]; Arbitration Court of the International Chamber of Commerce, 2000 (Arbitral award No. 10329) (Industrial product case), available on the Internet at <http://cisgw3.law.pace.edu/cases/000329i1.html>.

⁵³CLOUT case No. 427 [Oberster Gerichtshof, Austria, 28 April 2000] (damages recovered under article 74). See also CLOUT case No. 645 [Corte di Appello di Milano Italy, 11 December 1998 (Bielloni Castello S.p.A. v. EGO S.A.)], also in Unilex (evidence did not establish that aggrieved seller had lost a sale by its resale to a third party).

⁵⁴Bundesgericht, Switzerland, 15 September 2000 (FCF S.A. v. Adriafile Commerciale S.r.l.), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/000915s2.html> (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); Arbitration Court of the International Chamber of Commerce, March 1995 (Arbitral award No. 7645), 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).

⁵⁵Bundesgericht, Switzerland, 15 September 2000 (FCF S.A. v. Adriafile Commerciale S.r.l.), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/000915s2.html> (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). For practical application of these rules, see Landgericht Hamburg, Germany, 26 November 2003 (Phthalic anhydride case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/031126g1.html>; Landgericht Braunschweig, Germany, 30 July 2001 District Court (Metal case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/010730g1.html>.

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 If there is an insufficient link between the contract and an alleged cover purchase, the buyer may claim damages based on article 76.⁷

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 76.⁸ If the conditions for recovery under article 76 are not satisfied, damages may nevertheless be recovered under article 74.⁹ One arbitral tribunal awarded the loss of profit under article 74 as damages where no evidence was available on the market price.¹⁰ Where compensation for loss of profit fully compensates the aggrieved party, it is not entitled to additional damages under article 76.¹¹

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 77.¹² 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.¹³

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).¹⁴

7. Article 76 is not applicable if the contract has not been avoided.¹⁵ Thus, the article will not apply if the aggrieved party has not declared the contract avoided when entitled to do so¹⁶ or if the aggrieved party has not made an effective declaration of avoidance.¹⁷

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.¹⁸ 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.¹⁹ The same tribunal accepted as the current price a price negotiated by the aggrieved seller in a substitute contract that was not ultimately concluded.²⁰ 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.²¹ 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 76.²² 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.²³ 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.²⁴

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 76.²⁵

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 76.²⁶ The time at which the current price is to be determined is the date of effective

avoidance of the contract;²⁷ if the aggrieved party has taken over the goods before avoidance, however, the relevant time is this earlier date.²⁸ 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.²⁹ For cases determining what constitutes evidence of a current price, see paragraph 8 above. One arbitral tribunal awarded a reasonable amount of damages where the parties failed to establish the market price.³⁰ Where the current market price is lower than the contract price, the buyer suffers no damages if the claim is based on article 76.³¹ One arbitral tribunal used the contract price as the basis for determining the current price where no other evidence was available.³² Another arbitral tribunal refused to use the prices in similar contracts of the buyer, and instead used the international price of the commodity.³³ Where the parties have made provision for the calculation of the current price in their contract, that price will be deemed to be the current price.³⁴

11. Paragraph (2) of article 76 indicates the relevant place for determining the current price. Applying this provision, one arbitral tribunal held that the relevant place for determining the current price was the port of delivery.³⁵ Under a CIF (“cost, insurance, freight”) contract, the place of delivery is the port of departure.³⁶ In another case the court determined the place of delivery to be the final port of destination under a CFR contract.³⁷

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.³⁸

Notes

¹Articles 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.

²Arbitration Court of the International Chamber of Commerce, November 1996 (Arbitral award No. 8502), Unilex (reference to both article 76 of the Convention and article 7.4.6 of Unidroit Principles of International Commercial Contracts); China International Economic and Trade Arbitration Commission, People’s Republic of China, September 2004 (Steel products case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040900c1.html>.

³CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 21 March, 21 June 1996] (Convention favours concrete calculation of damages) (see full text of the decision).

⁴See Arbitration Court of the International Chamber of Commerce, September 1996 (Arbitral award No. 8574), 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 article 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); Tallinna Ringkonnakohus, Estonia, 19 February 2004 (Novia Handelsgesellschaft mbH v. AS Maseko), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040219e3.html> (no substitute transaction had been concluded to sell tomato paste that buyer refused to order); Oberlandesgericht Graz, Austria 24 January 2002 (Excavator case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020124a3.html> (buyer resold machinery at the same price that it acquired it and claimed a loss of profit).

⁵CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994] (see full text of the decision). See also Arbitration Court of the International Chamber of Commerce, October 1996 (Arbitral award No. 8740), 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 China International Economic and Trade Arbitration Commission, People’s Republic of China, 30 October 1991, English translation 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).

⁶CLOUT case No. 227 [Oberlandesgericht Hamm, Germany, 22 September 1992].

⁷China International Economic and Trade Arbitration Commission, People's Republic of China, 11 February 2000 (Silicon metal case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/000211c1.html>; CLOUT case No. 981 [China International Economic and Trade Arbitration Commission, People's Republic of China, 25 December 1998 (Basic pig iron case)] (alleged cover purchase was concluded before avoidance of the contract).

⁸CLOUT 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, 16 March 1995 (Arbitral award No. 155/1994)] (citing article 74 but determining damages as difference between contract price and price in substitute transaction).

⁹China International Economic and Trade Arbitration Commission, People's Republic of China, October 2007 (CD-R and DVD-R production systems case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071000c1.html> (no evidence to prove the market price, but evidence of loss of profit); Landgericht München, Germany, 20 February 2002 (Shoes case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020220g1.html> (buyer did not afford the seller an additional period of time (*Nachfrist*) where the seller was late in delivery, and was therefore not entitled to avoid the contract); CLOUT case No. 866 [China International Economic and Trade Arbitration Commission, People's Republic of China, 24 April 1997 (Oxidized aluminum case)] (contract was not avoided and no substitute transaction had been made).

¹⁰China International Economic and Trade Arbitration Commission, People's Republic of China, October 2007 (CD-R and DVD-R production systems case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071000c1.html> (no evidence to prove the market price, but evidence of loss of profit).

¹¹Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 5 March 1998 (Arbitral award No. 160/1997), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/980305r2.html>.

¹²Oberlandesgericht Graz, Austria 24 January 2002 (Excavator case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020124a3.html> (seller alleged that the buyer sold under the market price, but failed to prove this allegation).

¹³China International Economic and Trade Arbitration Commission, People's Republic of China, 1 April 1993 (Arbitral award No. 75), Unilex, English translation available on the Internet at www.cisg.law.pace.edu/cgi-bin/isearch.

¹⁴Tallinna Ringkonnakohus, Estonia, 19 February 2004 (Novia Handelsgesellschaft mbH v. AS Maseko), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040219e3.html>; China International Economic and Trade Arbitration Commission, People's Republic of China, 30 November 1997 (Canned oranges case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/971130c1.html> (buyer had concluded two cover purchases).

¹⁵CLOUT case No. 474 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 24 January 2000 (Arbitral award No. 54/1999)] (article 76 not applicable when the contract had not been avoided); Tallinna Ringkonnakohus, Estonia, 19 February 2004 (Novia Handelsgesellschaft mbH v. AS Maseko), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040219e3.html> (buyer refused to place orders for tomato paste and contract was avoided by seller); Landgericht München, Germany, 20 February 2002 (Shoes case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020220g1.html> (buyer did not afford the seller an additional period of time (*Nachfrist*) where the seller was late in delivery).

¹⁶CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (no avoidance) (see full text of the decision).

¹⁷CLOUT case No. 238 [Oberster Gerichtshof, Austria, 12 February 1998] (declaration of avoidance too early) (see full text of the decision).

¹⁸CLOUT 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).

¹⁹China International Economic and Trade Arbitration Commission, People's Republic of China, 18 April 1991, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/910418c1.html> (evidence did not reflect contract delivery terms); China International Economic and Trade Arbitration Commission, People's Republic of China, 20 January 1993 (Ferrosilicon case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/930120c1.html> (delivery at port of shipment under an FOB contract).

²⁰China International Economic and Trade Arbitration Commission, People's Republic of China, 20 January 1993 (Ferrosilicon case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/930120c1.html> (delivery at port of shipment under an FOB contract).

²¹Arbitration Court of the International Chamber of Commerce, October 1996 (Arbitral award No. 8740), 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).

²²CLOUT case No. 308 [Federal Court of Australia, Australia, 28 April 1995] (valuation arranged by insolvency administrator) (see full text of the decision).

²³Oberlandesgericht Braunschweig, Germany, 28 October 1999, Unilex.

²⁴CLOUT case No. 595 [Oberlandesgericht München, Germany, 15 September 2004].

²⁵CLOUT case No. 328 [Kantonsgericht des Kantons Zug, Switzerland, 21 October 1999].

²⁶Oberlandesgericht Hamburg, Germany, 4 July 1997, Unilex; China International Economic and Trade Arbitration Commission, People's Republic of China, September 2004 (Steel products case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040900c1.html>.

²⁷China International Economic and Trade Arbitration Commission, People's Republic of China, September 2004 (Steel products case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040900c1.html>; China International Economic and Trade Arbitration Commission, People's Republic of China, 20 February 1994 (Cysteine case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/940220c1.html>; Oberlandesgericht Graz, Austria, 9 November 1995, (Marble slabs case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/951109a3.html>.

²⁸China International Economic and Trade Arbitration Commission, People's Republic of China, 18 April 1991, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/910418c1.html> (disagreeing with date claimed by aggrieved party).

²⁹CLOUT case No. 595 [Oberlandesgericht München, Germany, 15 September 2004]; China International Economic and Trade Arbitration Commission, People's Republic of China, 11 February 2000 (Silicon metal case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/000211c1.html>; China International Economic and Trade Arbitration Commission, People's Republic of China, 1 February 2000 (Silicon and manganese alloy case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/000201c1.html> (delivery at port of shipment under a CFR contract).

³⁰CLOUT case No. 976 [China International Economic and Trade Arbitration Commission, People's Republic of China, 26 June 2003] (Alumina case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030626c1.html>.

³¹China International Economic and Trade Arbitration Commission, People's Republic of China, 1 February 2000 (Silicon and manganese alloy case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/000201c1.html> (delivery at port of shipment under a CFR contract).

³²CLOUT case No. 807 [China International Economic and Trade Arbitration Commission, People's Republic of China, 30 June 1999 (Peppermint oil case)] (partial delivery of the goods by the seller).

³³CLOUT case No. 981 [China International Economic and Trade Arbitration Commission, People's Republic of China, 25 December 1998 (Basic pig iron case)] (alleged cover purchase was concluded before avoidance of the contract).

³⁴Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 19 December 1995 (Arbitral award No. 133/1994), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/951219r1.html>.

³⁵China International Economic and Trade Arbitration Commission, People's Republic of China, 9 January 2008 (Metallic silicon case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080109c1.html>. See also China International Economic and Trade Arbitration Commission, People's Republic of China, 29 September 2004 (India rapeseed meal case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040929c1.html>.

³⁶Tallinna Ringkonnakohus, Estonia, 19 February 2004 (Novia Handelsgesellschaft mbH v. AS Maseko), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040219e3.html> (buyer refused to take up tomato paste as required under the contract); China International Economic and Trade Arbitration Commission, People's Republic of China, 1 February 2000 (Silicon and manganese alloy case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/000201c1.html> (delivery at port of shipment under a CFR contract); China International Economic and Trade Arbitration Commission, People's Republic of China, 20 January 1993 (Ferrosilicon case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/930120c1.html> (delivery at port of shipment under an FOB contract).

³⁷China International Economic and Trade Arbitration Commission, People's Republic of China, 1 February 2000 (Silicon and manganese alloy case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/000201c1.html> (delivery at port of shipment under a CFR contract).

³⁸See, e.g., CLOUT case No. 318 [Oberlandesgericht Celle, Germany, 2 September 1998] (aggrieved buyer failed to establish current price); China International Economic and Trade Arbitration Commission, People's Republic of China, 5 February 1996 (Peanut case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/960205c1.html>; but see CLOUT case No. 976 [China International Economic and Trade Arbitration Commission, People's Republic of China, 26 June 2003] (Alumina case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030626c1.html>.

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. The cost of taking reasonable steps to mitigate damages may be claimed as part of the aggrieved party's damages claim under article 74.²

3. One decision states that the mitigation rule compels the buyer to purchase replacement goods if reasonably possible.³ The buyer is then entitled to damages calculated with reference to article 75.

4. 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.⁴ An arbitral tribunal referred to article 88 in deciding whether a seller acted reasonably in relation to perishable goods.⁵

5. 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.⁶

6. 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.⁷

MEASURES TO MITIGATE

7. 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.⁸ 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.⁹ In some circumstances the aggrieved party may be excused from taking such measures (see paragraphs 11 and 14 below).

8. 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).¹⁰ 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.¹¹ 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.¹²

Measures by aggrieved buyers

9. Decisions have found the following measures by aggrieved buyers to be reasonable: concluding cover sales within a reasonable time and at reasonable prices to replace goods that were not delivered;¹³ paying another supplier to expedite delivery of already-ordered compressors that could be substituted for defective compressors;¹⁴ contracting with a third-party supplier because of the inability of the breaching party to deliver moulds in time;¹⁵ 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;¹⁶ continuing to print on purchased fabric notwithstanding the discovery of problems with the fabric;¹⁷ requesting special permission from a Government authority to permit re-exportation if the goods proved non-conforming, and proposing to test milk powder in the Free Trade Zone prior to import;¹⁸ using the buyer's own buffer stocks of coal when the seller made late deliveries;¹⁹ proposing to a sub-buyer that the goods the seller delivered late should be accepted with a 10 per cent reduction in price;²⁰

selling perishable goods even though not required to do so by articles 85 to 88;²¹ taking reasonable steps to have a stolen car released from an insurance company;²² accepting a reduction in the purchase price instead of sending the goods back;²³ requesting permission from the buyer to re-sell goods marked with the buyer's trademark, which permission was not given;²⁴ disassembling a unique machine and selling the parts where the machine could not be used or readily resold.²⁵

10. The aggrieved buyer was found to have failed to mitigate damages in the following circumstances: buyer failed to conclude reasonable cover purchases;²⁶ buyer failed to inspect goods properly and to give documents setting out its claims of non-conformity;²⁷ buyer failed to examine shipments of aluminium hydroxide before mixing the shipments together;²⁸ buyer failed to stop the use of vine wax after discovering the wax to be defective;²⁹ buyer failed to look for replacement goods in markets other than the local region;³⁰ buyer failed to cancel its contract of sale with sub-buyer or to conclude a substitute purchase;³¹ buyer failed to provide evidence of the price it received on its sale of non-conforming goods to a sub-buyer;³² buyer failed to provide evidence as to whether the buyer could buy the same product from the wholesaler newly-designated by the seller;³³ buyer failed to stop the processing of swimming suits for three days after becoming aware of a faulty manufacturing process;³⁴ buyer chartered a vessel despite repeated notices that shipment would not take place on time;³⁵ buyer failed to sell goods due to packing deficiencies until after their expiration date.³⁶

11. 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.³⁷ 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.³⁸ A few decisions have denied the aggrieved party's claim for the cost of enforcing its claim through a collection agent or lawyer.³⁹ One arbitral tribunal held that the buyer failed to mitigate its loss by failing to avoid the contract and conclude cover sales after it became clear that the seller would not perform.⁴⁰

12. 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.⁴¹ 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.⁴² One court held that the buyer's refusal to accept the goods at much worse terms from the seller did not result in a failure to mitigate damages.⁴³ The buyer also did not fail to mitigate by refusing to supply its customers from its own stocks, as

those stocks were earmarked for other customers.⁴⁴ A court held that where the steps suggested by the seller were merely speculative, it was insufficient to prove that the buyer failed to mitigate its damages.⁴⁵

Measures by aggrieved sellers

13. Decisions have found the following measures by aggrieved sellers to be reasonable: incurring expenses to transport, store, and maintain the undelivered machinery;⁴⁶ reselling goods to a third party;⁴⁷ reselling the goods to a third party within a short period of time;⁴⁸ concluding a substitute sale at the same price at which it obtained the goods, despite evidence that the price was below market price.⁴⁹

14. An aggrieved seller was found to have failed to mitigate damages in the following circumstances: seller drew on a guaranty before avoiding the contract;⁵⁰ seller resold the goods at a price below the price offered by the breaching buyer when the latter sought unsuccessfully to amend the contract;⁵¹ seller failed to conclude a substitute sale for more than six months;⁵² seller failed to make substitute sales of perishable goods before the goods perished;⁵³ seller failed to take administrative steps to avoid penalties on foreign currency earnings;⁵⁴ seller refused to have goods that were incorrectly packed remeasured, which would have solved the problem;⁵⁵ seller bought further raw materials for production despite knowing that buyer would not fulfil the contract;⁵⁶ seller caused delays in disposing of the goods.⁵⁷ 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.⁵⁸

15. 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 made it impossible for the seller to perform the contract;⁵⁹ the seller did not resell stockings made to the buyer's particular specifications.⁶⁰

16. 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.⁶¹

COST OF REASONABLE STEPS

17. The cost of taking reasonable steps to mitigate damages may be claimed as part of an aggrieved party's damages claim under article 74. One court awarded the cost of disassembling a machine (in order to resell the parts) as damages to the buyer.⁶²

REDUCTION OF DAMAGES

18. 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. In one case the court reduced the damages by the extra costs incurred due to the seller waiting for more than six months to conclude a cover sale.⁶³ In another case the arbitral tribunal reduced the claim for loss of profit by an amount calculated with reference to possible cover purchases.⁶⁴ An arbitral tribunal reduced the claim for damages to the cost of the steps that could have been taken to avoid damages.⁶⁵ 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 non-conforming goods to its customers.⁶⁶ 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.⁶⁷ One arbitral tribunal reduced the claim for loss of profit by 25 per cent due to the buyer's failure to take reasonable steps.⁶⁸

NOTICE OF STEPS TO MITIGATE

19. 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.⁶⁹

PLEADING; BURDEN OF PROOF

20. 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.⁷⁰ 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.⁷¹ 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.⁷² One arbitral tribunal required the aggrieved party to prove that it took reasonable steps to mitigate the loss.⁷³

21. 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.⁷⁴

Notes

¹CLOUT case No. 424 [Oberster Gerichtshof, Austria, 9 March 2000] (see full text of the decision).

²Handelsgericht St. Gallen, Switzerland, 3 December 2002, (Sizing machine case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021203s1.html>.

³Bundesgericht, Switzerland, 17 December 2009 (Watches case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/091217s1.html>.

⁴China International Economic and Trade Arbitration Commission, People's Republic of China, 6 June 1991, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/910606c1.html> (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).

⁵Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 10 February 2000 (Arbitral award No. 340/1999), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/000210r1.html>.

⁶Hof Arnhem, the Netherlands, 22 August 1995, Unilex (validity of penalty clause determined under national law); Hovioikeus hovrätt Helsinki, Finland, 31 May 2004 (Crudex Chemicals Oy v. Landmark Chemicals S.A.), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040531f5.html>.

⁷CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999] (applying German law).

⁸CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (see full text of the decision).

⁹Landgericht Berlin, Germany, 15 September 1994, Unilex.

¹⁰CLOUT 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]; China International Economic and Trade Arbitration Commission, People's Republic of China, 18 August 1997 (Vitamin C case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/970818c1.html>.

¹¹CLOUT 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).

¹²CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997] (transaction characterized as highly speculative).

¹³Efeto Lamias, Greece, 2006 (docket No. 63/2006) (Sunflower seed case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060001gr.html> (concluding a cover sale for sunflower seed needed in the buyer's oil production business); Hof van Beroep Gent, Belgium, 10 May 2004 (N.V. Maes Roger v. N.V. Kapa Reynolds), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040510b1.html>; CLOUT case No. 681 [China International Economic and Trade Arbitration Commission, People's Republic of China, 18 August 1997] (Vitamin C case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/970818c1.html>; China International Economic and Trade Arbitration Commission, People's Republic of China, 15 November 1996 (Oxytetracycline case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/961115c1.html>.

¹⁴CLOUT case No. 85 [U.S. District Court, Northern District of New York, United States, 9 September 1994], affirmed in part by CLOUT case No. 138 [U.S. Court of Appeals for the Second Circuit, United States, 6 December 1993, 3 March 1995].

¹⁵Ontario Court of Appeal, Canada, 26 January 2000 (Nova Tool & Mold Inc. v. London Industries Inc.), available on the Internet at <http://is.dal.ca/~cisg/cases/nova2.htm>.

¹⁶CLOUT case No. 311 [Oberlandesgericht Köln, Germany, 8 January 1997].

¹⁷U.S. Court of Appeals for the Fourth Circuit, United States, 21 June 2002 (Schmitz-Werke v. Rockland), 2002 US App. LEXIS 12336, 2002 WL 1357095, available on the Internet at <http://cisgw3.law.pace.edu/cases/020621u1.html> (buyer continued to attempt to print on the fabric both at the urging of seller and to mitigate damages; article 77 not cited).

¹⁸Rechtbank 's-Hertogenbosch, Netherlands, 2 October 1998 (Malaysia Dairy Industries v. Dairex Holland) Unilex.

¹⁹Arbitration Court of the International Chamber of Commerce, October 1996 (Arbitral award No. 8740), Unilex (seller bore risk that buyer's buffers were insufficient in light of the unreliability of suppliers).

²⁰Arbitration Court of the International Chamber of Commerce, January 1997 (Arbitral award No. 8786) Unilex.

²¹CLOUT case No. 104 [Arbitration Court of the International Chamber of Commerce, 1993 (Arbitral award No. 7197)] (see full text of the decision).

²²Oberlandesgericht Dresden, Germany 21 March 2007 (Stolen automobile case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070321g1.html>.

²³Oberlandesgericht Koblenz, Germany, 19 October 2006 (T-Shirts case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061019g2.html>.

²⁴Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 16 February 2004 (Arbitral award No. 107/2002), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040216r1.html>.

²⁵Handelsgericht St. Gallen, Switzerland, 3 December 2002 (Sizing machine case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021203s1.html> (buyer disassembled custom-built sizing machine to sell parts).

²⁶Tribunal of International Commercial Arbitration at the Ukraine Chamber of Commerce and Trade, Ukraine, 2005 (Arbitral award No. 48), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050000u5.html>; China International Economic and Trade Arbitration Commission, People's Republic of China, 20 January 1998 (Polyester thread case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/980120c1.html>.

²⁷CLOUT case No. 474 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 24 January 2004 (Arbitral award No. 54/1999)].

²⁸CLOUT case No. 284 [Oberlandesgericht Köln, Germany, 21 August 1997].

²⁹CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999].

³⁰CLOUT case No. 318 [Oberlandesgericht Celle, Germany, 2 September 1998].

³¹CLOUT case No. 476 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 6 June 2000 (Arbitral award No. 406/1998)].

³²CLOUT case No. 303 [Arbitration Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7331)].

³³Helsingin hovioikeus, Finland, 26 October 2000, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/001026f5.html>.

³⁴CLOUT case No. 1029 [Cour d'appel de Rennes, France, 27 May 2008] (Brassiere cups case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080527f1.html>.

³⁵Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 27 July 1999 (Arbitral award No. 302/1996), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/990727r1.html>.

³⁶China International Economic and Trade Arbitration Commission, People's Republic of China, 8 September 1997 (BOPP film case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/970908c1.html>.

³⁷CLOUT case No. 235 [Bundesgerichtshof, Germany, 25 June 1997].

³⁸CLOUT case No. 343 [Landgericht Darmstadt, Germany, 9 May 2000] (see full text of the decision).

³⁹CLOUT case No. 296 [Amtsgericht Berlin-Tiergarten, Germany, 13 March 1997] (refusing to permit recovery 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 www.cisg-online.ch/cisg/urteile/173.htm (hiring collection agency deemed contrary to mitigation 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).

⁴⁰Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 13 April 2006 (Arbitral award No. 105/2005), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060413r1.html>.

⁴¹CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 21 March, 21 June 1996] (no “manifest violation” of mitigation principle) (see full text of the decision).

⁴²Amtsgericht München, Germany, 23 June 1995, Unilex.

⁴³Rechtbank Arnhem, the Netherlands, 1 March 2006 (Skoda Kovarny v. B. van Dijk Jr. Staalhandelmaatschappij B.V.), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060301n1.html>. See also China International Economic and Trade Arbitration Commission, People’s Republic of China, 15 November 1996 (Oxytetrycline case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/961115c1.html>.

⁴⁴Rechtbank Arnhem, the Netherlands, 1 March 2006 (Skoda Kovarny v. B. van Dijk Jr. Staalhandelmaatschappij B.V.), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060301n1.html>.

⁴⁵CLOUT case No. 318 [Oberlandesgericht Celle, Germany, 2 September 1998] (see full text of the decision); (buyer destroyed irradiated meat which may have been difficult to resell in the local market, instead of relabeling and trying to resell).

⁴⁶CLOUT case No. 301 [Arbitration Court of the International Chamber of Commerce, 1992 (Arbitral award No. 7585)] (need to mitigate because of size and specifications of machinery) (see full text of the decision).

⁴⁷CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994]; CLOUT case No. 93 [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]; Iran-US Claims Tribunal, 28 July 1989 (Watkins-Johnson Co. v. Islamic Republic of Iran), Unilex (seller’s right to sell undelivered equipment in mitigation of its damages is consistent with recognized international law of commercial contracts).

⁴⁸U.S. Court of Appeals for the Eleventh Circuit, United States, 12 September 2006 (Treibacher Industrie, A.G. v. Allegheny Technologies, Inc.), 464 F.3d 1235 (11th Cir. 2006), available on the Internet at <http://cisgw3.law.pace.edu/cases/060912u1.html>; China International Economic and Trade Arbitration Commission, People’s Republic of China, 6 January 1999 (Australian raw wool case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/990106c1.html>.

⁴⁹Oberlandesgericht Graz, Austria, 24 January 2002 (Excavator case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020124a3.html>.

⁵⁰CLOUT case No. 133 [Oberlandesgericht München, Germany, 8 February 1995] (aggrieved seller drew on guaranty following breach without taking steps to mitigate).

⁵¹CLOUT case No. 395 [Tribunal Supremo, Spain, 28 January 2000]; Hof van Beroep Antwerpen, Belgium 22 January 2007 (N.V. Secremo v. Helmut Papst), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070122b1.html> (cars sold almost immediately to a third party); China International Economic and Trade Arbitration Commission, People’s Republic of China, 28 November 1996 (Moly-oxide case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/961128c1.html> (seller failed to make cover sales within three months which would have been a reasonable period).

⁵²Hof van Beroep Antwerp, Belgium, 24 April 2006 (GmbH Lothringer Gunther Grosshandelsgesellschaft für Bauelemente und Holzwerkstoffe v. NV Fepco International), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060424b1.html>.

⁵³Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 10 February 2000 (Arbitral award No. 340/1999), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/000210r1.html>.

⁵⁴CLOUT case No. 1082 [Tribunal of International Commercial Arbitration at the Ukraine Chamber of Commerce and Trade, Ukraine, 27 October 2004] (Lavatory paper case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/041027u5.html>; Tribunal of International Commercial Arbitration at the Ukraine Chamber of Commerce and Trade, Ukraine, 12 January 2004 (Automobile tires), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040112u5.html>.

⁵⁵CLOUT case No. 977 [China International Economic and Trade Arbitration Commission, People’s Republic of China, 19 June 2003] (PTA case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030619c1.html>.

⁵⁶CLOUT case No. 861 [China International Economic and Trade Arbitration Commission, People’s Republic of China, 29 September 1997] (Aluminium oxide case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/970929c1.html>.

⁵⁷China International Economic and Trade Arbitration Commission, People’s Republic of China, 5 February 1996 (Antimony ingot case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/960205c2.html>.

⁵⁸CLOUT case No. 480 [Cour d’appel Colmar, France, 12 June 2001].

⁵⁹CLOUT case No. 361 [Oberlandesgericht Braunschweig, Germany, 28 October 1999].

⁶⁰China International Economic and Trade Arbitration Commission, People’s Republic of China, post-1989, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/900000c1.html>.

⁶¹CLOUT case No. 427 [Oberster Gerichtshof, Austria, 28 April 2000] (see full text of the decision).

⁶²Handelsgericht St. Gallen, Switzerland, 3 December 2002, (Sizing machine case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021203s1.html>.

⁶³Hof van Beroep Antwerp, Belgium, 24 April 2006 (GmbH Lothringer Gunther Grosshandelsgesellschaft für Bauelemente und Holzwerkstoffe v. NV Fepco International), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060424b1.html>.

⁶⁴Tribunal of International Commercial Arbitration at the Ukraine Chamber of Commerce and Trade, Ukraine, 2005 (Arbitral award No. 48), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050000u5.html>. See also China International Economic and Trade Arbitration Commission, People’s Republic of China, June 1999 (Peanut kernel case), English translation available

on the Internet at <http://cisgw3.law.pace.edu/cases/990600c1.html> (damages reduced with reference to the current market price where there was a cover sale for a lower price); China International Economic and Trade Arbitration Commission, People's Republic of China, 28 November 1996 (Moly-oxide case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/961128c1.html> (damages reduced with reference to market prices within a three month period after the breach of contract).

⁶⁵CLOUT case No. 977 [China International Economic and Trade Arbitration Commission, People's Republic of China, 19 June 2003] (PTA case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030619c1.html> (buyer refused to have goods remeasured where there was incorrect packaging and where remeasuring would have solved the problem).

⁶⁶CLOUT case No. 474 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 24 January 2000 (Arbitral award No. 54/1999)].

⁶⁷CLOUT case No. 265 [Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 25 May 1999].

⁶⁸Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russia, 13 April 2006 (Arbitral award No. 105/2005), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060413r1.html>.

⁶⁹CLOUT case No. 343 [Landgericht Darmstadt, Germany, 9 May 2000].

⁷⁰Arbitration Court of the International Chamber of Commerce, June 1999 (Arbitral award No. 9187), Unilex.

⁷¹Bundesgericht, Switzerland, 15 September 2000 (FCF S.A. v. Adriafil Commerciale S.r.l.), available on the Internet at www.bger.ch/fr/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/000915s1.html>. See also U.S. Court for the Eleventh Circuit, United States, 12 September 2006 (Treibacher Industrie, A.G. v. Allegheny Technologies, Inc.), 464 F.3d 1235 (11th Cir. 2006), available on the Internet at <http://cisgw3.law.pace.edu/cases/060912u1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 17 June 2004 (Arbitral award No. 186/2003 (barter transaction), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040617r1.html>; Handelsgericht St. Gallen, Switzerland, 3 December 2002 (Sizing machine case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021203s1.html>.

⁷²CLOUT 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).

⁷³CLOUT case No. 318 [Oberlandesgericht Celle, Germany, 2 September 1998] (see full text of the decision); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 13 April 2006 (Arbitral award No. 105/2005), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060413r1.html>; Hovioikeus hovrätt Turku, Finland, 24 May 2005 (Radiated spice case) available on the Internet at <http://cisgw3.law.pace.edu/cases/050524f5.html>.

⁷⁴CLOUT 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); U.S. Court for the Eleventh Circuit, United States, 12 September 2006 (Treibacher Industrie, A.G. v. Allegheny Technologies, Inc.), 464 F.3d 1235 (11th Cir. 2006), available on the Internet at <http://cisgw3.law.pace.edu/cases/060912u1.html>; Handelsgericht St. Gallen, Switzerland, 3 December 2002 (Sizing machine case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021203s1.html>; Arbitration Court of the International Chamber of Commerce, September 1996 (Arbitral award No. 8574) (Metal concentrate case), available on the Internet at <http://cisgw3.law.pace.edu/cases/968574i1.html>.

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 V, 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, Section II.¹

Notes

¹See the Digest for article 74.

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, which one court considered to constitute a “compromise”,¹ deals with the general right or entitlement to interest on “the price or any other sum that is in arrears”.² 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”.³ According to case law, the aforementioned wording entitles a party to interest on damages.⁴ According to one court, the text referred to also entitles to interest on a contractual penalty that has not been paid, “despite the fact that this case concerns the payment of interest on a contractual penalty and that the CISG itself does not govern contractual penalties as such. Article 78 CISG provides for a duty to pay interest with respect to ‘any other sum that is in arrears’ and, therefore, also embraces exercisable contractual penalties that have been stipulated in a sales contract subject to the CISG.”⁵

PREREQUISITES FOR ENTITLEMENT TO INTEREST

3. Entitlement to interest requires only⁶ that the sum for which interest is sought is due⁷, and that the debtor has failed to comply with its obligation to pay the sum by the time specified either in the contract⁸ or, absent such specification, by the Convention.⁹ One court stated that the issue of whether the sum was due was one left to the applicable domestic law, since the Convention did not cover it.¹⁰

4. 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 or reminder to the debtor.¹¹ 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.¹²

5. Both an arbitral tribunal¹³ and a court,¹⁴ however, have stated that interest does not accrue unless the creditor has sent to the debtor in default a formal notice requiring payment.

6. 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.¹⁵ On the other hand, the obligation to pay interest is not subject to exemption under article 79 of the Convention.¹⁶ One court justified this on the following grounds: “Also an exemption of the debtor under article 79 CISG is not possible. The exemption of the debtor under article 79 CISG does only lead to a lapse of the claim for compensation, but the creditor can still rely on any other legal remedy. The payment of interest under article 78 CISG is not compensation and it is therefore independent of the question whether the debtor can justify its delay of payment according to article 79 CISG.”¹⁷

7. 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 74.¹⁸ Such damages might include finance charges incurred because, without access to the funds in arrears, the creditor was forced to take out a bank loan;¹⁹ or lost investment income that would have been earned from the sum in arrears.²⁰ This has led one arbitral tribunal to state that the purpose of article 78 is to introduce the distinction between interest and damages.²¹ 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 met²² and the burden of proving those elements must be carried by the creditor,²³ i.e. the damaged party.

8. The Convention does not deal with compound interest. This led one court to decide on the admissibility of compound interest on the basis of its domestic law.²⁴ One court stated, on the contrary, that the Convention does not allow for compound interest.²⁵ A different court stated that “under the CISG, compound interest is not accorded automatically and the claimant, in this case the [seller], has to prove that it is entitled to compound interest, e.g., because [seller] had to pay extra interests itself since it lacked the payments that were due.”²⁶

INTEREST RATE

9. Several courts have pointed out that article 78 merely sets forth a general entitlement to interest;²⁷ it does not specify the interest rate to be applied,²⁸ which is why one court considered article 78 a “compromise”.²⁹ According to some courts³⁰ and an arbitral tribunal,³¹ the compromise resulted from irreconcilable differences that emerged during the Vienna Diplomatic Conference at which the text of the Convention was approved.

10. 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.³² 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.

11. Several decisions have sought a solution to the interest rate question on the basis of general principles on which the Convention is based.³³ Some courts and arbitral tribunals³⁴ have invoked article 9 of the Convention and determined the rate of interest by reference to relevant trade usages. According to two arbitral awards³⁵ "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.³⁶ One arbitral tribunal expressly stated that: "since the matter of interest rates is governed, but not settled by the CISG, there is no need to examine [seller]'s request in the light of any national law, but rather examine whether it is within the checks provided in article 7 of the CISG. Therefore, the proposed rate has to be determined in accordance with the principles underlying the CISG One of the main principles of the CISG is the principle of full compensation. However, another principle suggests that compensation should not put creditor in a better position than he would be had the contract been performed. [Seller]'s request is fully in line with the above mentioned principles. In order to determine exact 'domicile' (Serbian) rate for euro, one should not resort to Serbian law, since it regulates and is appropriate for local currency (RSD) rates only and would result in overcompensation if applied to sums denominated in Euro. Rather, it is more appropriate to apply interest rate which is regularly used for savings, such as short-term deposits in the first class banks at the place of payment (Serbia) for the currency of payment, as this represents rate on a relatively

riskless investment. After examining interest rate figures and indicators on short-term euro deposits in Serbia, Sole arbitrator finds that the appropriate rate would be 6 per cent annually."³⁷

12. Other tribunals simply refer to a "commercially reasonable" rate,³⁸ such as the London Interbank Offered Rate (LIBOR)³⁹ or the EURIBOR.⁴⁰ Other courts simply refer to the interest rate law of the currency.⁴¹ One tribunal, although recognizing that the Convention does not specify an interest rate, stated that "the Treasury Bill Rate is appropriate to apply from among those argued by the parties".⁴²

13. The majority of courts consider the interest rate issue to be a matter outside the scope of the Convention⁴³ and, therefore, pursuant to article 7 (2) subject to domestic law.⁴⁴ Most such courts have resolved the question by applying the domestic law of a specific country, determined by employing the applicable private international law rules;⁴⁵ 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.⁴⁶ There are also a few cases in which the interest rate was determined by reference to the law of the country in which currency the sum in arrears was to be paid (*lex monetae*);⁴⁷ in other cases, the courts applied the interest rate of the country in which the price was to be paid,⁴⁸ the rate applied in the debtor's country,⁴⁹ or even the rate of the *lex fori*.⁵⁰ Some courts applied the rate provided for in the Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on Combating Late Payment in Commercial Transactions. While some courts based this result on a private international law analysis,⁵¹ other courts apply the Directive "directly", without justifying resort to the Directive on private international law grounds.⁵²

14. A few decisions have applied the interest rate specified by article 7.4.9 of the UNIDROIT Principles of International Commercial Contracts.⁵³

15. 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,⁵⁴ that is, the law that would be applicable to the sales contract if it were not subject to the Convention.⁵⁵

16. Where, however, the parties have agreed upon an interest rate, that rate is to be applied.⁵⁶ Where trade usages under article 9 allow one to determine the rate of interest, that rate of interest applies rather than the one to be determined on the basis of the law applicable pursuant to the rules of private international law of forum.⁵⁷

Notes

¹See CLOUT case No. 55 [Pretore della giurisdizione di Locarno, Switzerland, 16 December 1991] (see full text of the decision).

²Kantongsericht Zug, Switzerland, 14 December 2009, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/2026.pdf>; Oberlandesgericht Koblenz, Germany, 19 October 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061019g2.html>; CLOUT case No. 823 [Oberlandesgericht Köln, Germany, 13 February 2006], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060213g1.html>; Landgericht Bamberg, Germany, 13 April 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050413g1.html>; Handelsgericht Bern, Switzerland, 22 December 2004, English translation

available on the Internet at <http://cisgw3.law.pace.edu/cases/041222s1.html>; Oberlandesgericht Köln, Germany, 15 September 2004, available on the Internet at www.cisg-online.ch/cisg/urteile/1057.pdf; Oberlandesgericht Köln, Germany, 15 September 2004, available on the Internet at www.cisg-online.ch/cisg/urteile/1057.pdf; Oberlandesgericht Düsseldorf, Germany, 22 July 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040722g1.html>; CLOUT case No. 591 [Oberlandesgericht Düsseldorf, Germany, 28 May 2004] (see full text of the decision); CLOUT case No. 248 [Bundesgericht, Switzerland, 28 October 1998] (see full text of the decision); Landgericht Aachen, Germany, 20 July 1995, available on the Internet at <http://cisgw3.law.pace.edu/cases/950720g1.html>; Oberlandesgericht Frankfurt, Germany, 18 January 1994, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/940118g1.html>; CLOUT case No. 281 [Oberlandesgericht Koblenz, Germany, 17 September 1993] (see full text of the decision).

³See, however, U.S. District Court, Southern District of Florida, United States, 19 May 2008, available on the Internet at <http://cisgw3.law.pace.edu/cases/080519u2.html>, stating that “[t]he CISG is silent on the issue of interest.”

⁴CLOUT 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).

⁵Oberlandesgericht Hamburg, Germany, 25 January 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080125g1.html>.

⁶See Kantonsgericht Zug, Switzerland, 14 December 2009, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/2026.pdf>; Kreisgericht St. Gallen, Switzerland, 16 October 2009, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/2023.pdf>; Landgericht Bamberg, Germany, 23 October 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061023g1.html>; Landgericht Bamberg, Germany, 13 April 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050413g1.html>; CLOUT case No. 590 [Landgericht Saarbrücken, Germany, 1 June 2004] (see full text of the decision); CLOUT case No. 252 [Handelsgericht des Kantons Zürich, Switzerland, 21 September 1998] (see full text of the decision); Bezirksgericht Arbon, Switzerland, 9 December 1994, available on the Internet at www.Unilex.info/case.cfm?pid=1&do=case&id=172&step=FullText.

⁷Handelsgericht Aargau, Switzerland, 26 November 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081126s1.html>; Amtsgericht Freiburg, Germany, 6 July 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070706g1.html>; CLOUT case No. 908 [Handelsgericht Zürich, Switzerland, 22 December 2005], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051222s1.html>; CLOUT case No. 907 [Tribunal Cantonal du Valais, Switzerland, 27 May 2005] (see full text of the decision); CLOUT case No. 906 [Kantonsgericht Nidwalden, Switzerland, 23 May 2005] (see full text of the decision); Kantonsgericht Zug, Switzerland, 2 December 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/041202s1.html>; CLOUT case No. 590 [Landgericht Saarbrücken, Germany, 1 June 2004] (see full text of the decision); CLOUT case No. 591 [Oberlandesgericht Düsseldorf, Germany, 28 May 2004] (see full text of the decision); CLOUT case No. 893 [Amtsgericht Willisau, Switzerland, 12 March 2004] (see full text of the decision); Hof van Beroep Ghent, Belgium, 8 October 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/031008b1.html>; Landgericht Tübingen, Germany, 18 June 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030618g1.html>; CLOUT case No. 629 [Kantonsgericht Zug, Switzerland, 12 December 2002]; CLOUT case No. 217 [Handelsgericht des Kantons Aargau, Switzerland, 26 September 1997] (see full text of the decision); Amtsgericht Nordhorn, Germany, 14 June 1994, available on the Internet at www.cisg-online.ch/cisg/urteile/259.htm and www.unilex.info/case.cfm?pid=1&do=case&id=114&step=FullText.

⁸Kantonsgericht Zug, Switzerland, 14 December 2009, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/2026.pdf>; Landgericht München, Germany, 18 May 2009, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/1998.pdf>; Kantonsgericht Zug, Switzerland, 27 November 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081127s1.html>; Handelsgericht Aargau, Switzerland, 26 November 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081126s1.html>; Amtsgericht Freiburg, Germany, 6 July 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070706g1.html>; Landgericht Coburg, Germany, 12 December 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061212g1.html>; CLOUT case No. 906 [Kantonsgericht Nidwalden, Switzerland, 23 May 2005] (see full text of the decision); Kantonsgericht Zug, Switzerland, 2 December 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/041202s1.html>; CLOUT case No. 254 [Handelsgericht des Kantons Aargau, Switzerland, 19 December 1997] (see full text of the decision).

⁹For 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 Kantonsgericht Zug, Switzerland, 14 December 2009, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/2026.pdf>; Handelsgericht Bern, Switzerland, 17 August 2009, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/1995.pdf>; Kantonsgericht Zug, Switzerland, 27 November 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081127s1.html>; Handelsgericht Aargau, Switzerland, 26 November 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081126s1.html>; District Court in Dolny Kubin, Slovakia, 17 July 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080617k1.html>; Supreme Court, Slovakia, 3 April 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080403k1.html>; Oberlandesgericht Hamburg, Germany, 25 January 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080125g1.html>; CLOUT case No. 906 [Kantonsgericht Nidwalden, Switzerland, 23 May 2005] (see full text of the decision); Landgericht Bamberg, Germany, 13 April 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050413g1.html>; Handelsgericht Bern, Switzerland, 22 December 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/041222s1.html>; CLOUT case No. 591 [Oberlandesgericht Düsseldorf, Germany, 28 May 2004] (see full text of the decision); Landgericht Mönchengladbach, Germany, 15 July 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030715g1.html>; Handelsgericht St. Gallen, Switzerland, 11 February 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030211s1.html>; 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).

¹⁰CLOUT case No. 1038 [Audiencia Provincial de Valencia, sección 8ª, Spain, 8 April 2008], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080408s4.html>.

¹¹See Polimeles Protodikio Athinon, Greece, 2009 (docket No. 4505/2009), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/094505gr.html>; Handelsgericht Aargau, Switzerland, 26 November 2008, English translation available on the Internet

at <http://cisgw3.law.pace.edu/cases/081126s1.html>; Kantonsgericht Appenzell-Ausserhoden, Switzerland, 6 September 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070906s1.html>; CLOUT case No. 934 [Tribunal Cantonal du Valais, Switzerland, 27 April 2007] (see full text of the decision); Oberlandesgericht Köln, Germany, 3 April 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060403g1.html>; CLOUT case No. 908 [Handelsgericht Zürich, Switzerland, 22 December 2005], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051222s1.html>; Rechtbank van Koophandel Hasselt, Belgium, 20 September 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050920b1.html>; CLOUT case No. 907 [Tribunal Cantonal du Valais, Switzerland, 27 May 2005] (see full text of the decision); Landgericht Bamberg, Germany, 13 April 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050413g1.html>; Handelsgericht Bern, Switzerland, 22 December 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/041222s1.html>; CLOUT case No. 893 [Amtsgericht Willisau, Switzerland, 12 March 2004] (see full text of the decision); Landgericht Düsseldorf, Germany, 28 August 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030828g1.html>; Handelsgericht St. Gallen, Switzerland, 11 February 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030211s1.html>; Tribunal commercial Namur, Belgium, 15 January 2002, available on the Internet at www.law.kuleuven.ac.be/int/tradelaw/WK/2002-01-15.htm; Rechtbank van koophandel Kortrijk, Belgium, 3 October 2001, available on the Internet at www.law.kuleuven.ac.be/int/tradelaw/WK/2001-10-03.htm; Rechtbank van Koophandel Kortrijk, Belgium, 4 April 2001, available on the Internet at www.law.kuleuven.ac.be/int/tradelaw/WK/2001-04-05.htm; Landgericht Stendal, Germany, 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, available on the Internet at www.unilex.info/case.cfm?pid=1&do=case&id=320&step=FullText; Landgericht Aachen, Germany, 20 July 1995, available on the Internet at www.cisg-online.ch/cisg/urteile/169.htm and www.unilex.info/case.cfm?pid=1&do=case&id=125&step=FullText; CLOUT case No. 301 [Court of Arbitration of the International Chamber of Commerce, 1992 (Arbitral award No. 7585)], *Journal du droit international*, 1995, 1015 ff.; CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 21 March, 21 June 1996]; CLOUT case No. 152 [Cour d'appel, Grenoble, France, 26 April 1995]; CLOUT case No. 303 [Court of Arbitration of the International Chamber of Commerce, 1994 (Arbitral award No. 7331)] (see full text of the decision); Amtsgericht Nordhorn, Germany, 14 June 1994, available on the Internet at www.cisg-online.ch/cisg/urteile/259.htm and www.unilex.info/case.cfm?pid=1&do=case&id=114&step=FullText; CLOUT case No. 55 [Canton del Ticino, Pretore di Locarno Campagna, Switzerland, 16 December 1991, cited as 15 December in CLOUT case No. 55].

¹²CLOUT 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).

¹³Arbitral Tribunal at the Bulgarian Chamber of Commerce and Industry, 1996 (Arbitral award No. 11/1996), available on the Internet at www.unilex.info/case.cfm?pid=1&do=case&id=420&step=FullText.

¹⁴See Landgericht Zwickau, Germany, 19 March 1999, available on the Internet at www.cisg-online.ch/cisg/urteile/519.htm.

¹⁵See Polimeles Protodikio Athinon, Greece, 2009 (docket No. 4505/2009), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/094505gr.html>; 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).

¹⁶Cámara Nacional de Apelaciones en lo Comercial de Buenos Aires, Argentina, 7 October 2010, available on the Internet at <http://turan.uc3m.es/uc3m/dpto/PR/dppr03/cisg/sargen18.htm>.

¹⁷CLOUT case No. 893 [Amtsgericht Willisau, Switzerland, 12 March 2004] (see full text of the decision).

¹⁸This has often been emphasized in case law. See, e.g., Cámara Nacional de Apelaciones en lo Comercial de Buenos Aires, Argentina, 7 October 2010, available on the Internet at <http://turan.uc3m.es/uc3m/dpto/PR/dppr03/cisg/sargen18.htm>; Kantonsgericht Zug, Switzerland, 14 December 2009, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/2026.pdf>; Kantonsgericht Zug, Switzerland, 27 November 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081127s1.html>; Supreme Court, Slovakia, 17 September 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080917k1.html>; Supreme Court, Slovakia, 10 March 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080310k1.html>; Congrád County Court, Hungary, 6 June 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070606h1.html>; Supreme Court, Slovakia, 8 January 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070108k2.html>; Hof van Beroep Antwerpen, Belgium, 24 April 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060424b1.html>; Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, 21 February 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050221sb.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 10 February 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050210r1.html>; Oberlandesgericht Düsseldorf, Germany, 22 July 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040722g1.html>; Handelsgericht St. Gallen, Switzerland, 29 April 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040429s1.html>; Supreme Court, Slovakia, 29 March 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040329k1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 19 March 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040319r1.html>; Tribunal Cantonal du Valais, Switzerland, 19 August 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030819s1.html>; Rechtbank van Koophandel Hasselt, Belgium, 17 June 1998, available on the Internet at www.law.kuleuven.ac.be/int/tradelaw/WK/1998-06-17.htm; CLOUT case No. 248 [Bundesgericht, Switzerland, 28 October 1998] (see full text of the decision); Court of Arbitration of the International Chamber of Commerce, September 1997 (Arbitral award No. 8962), available on the Internet at 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 [Court of Arbitration of the International Chamber of Commerce, 1993 (Arbitral award No. 7197)]; CLOUT case No. 7 [Amtsgericht Oldenburg in Holstein, Germany, 24 April 1990] (see full text of the decision).

¹⁹See Cámara Nacional de Apelaciones en lo Comercial de Buenos Aires, Argentina, 7 October 2010, available on the Internet at <http://turan.uc3m.es/uc3m/dpto/PR/dppr03/cisg/sargen18.htm>; Kantonsgericht Zug, Switzerland, 14 December 2009, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/2026.pdf>; Oberlandesgericht Hamburg, Germany, 25 January 2008, English

translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080125g1.html>; CLOUT case No. 248 [Bundesgericht, Switzerland, 28 October 1998] (see full text of the decision); Amtsgericht Koblenz, 12 November 1996, available on the Internet at www.cisg-online.ch/cisg/urteile/400.htm; CLOUT case No. 195 [Handelsgericht des Kantons Zürich, Switzerland, 21 September 1995]; Landgericht Kassel, Germany, 14 July 1994, available on the Internet at www.cisg-online.ch/cisg/urteile/194.htm; CLOUT case No. 79 [Oberlandesgericht Frankfurt a.M., Germany, 18 January 1994] (see full text of the decision).

²⁰CLOUT case No. 7 [Amtsgericht Oldenburg in Holstein, Germany, 24 April 1990] (see full text of the decision).

²¹CLOUT case No. 301 [Court of Arbitration of the International Chamber of Commerce, 1992 (Arbitral Award No. 7585)] (see full text of the decision).

²²See 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.

²³It has often been stated that the damages referred to in the final clause of article 78 must be proved by the damaged party; see Kantonsgericht Zug, Switzerland, 14 December 2009, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/2026.pdf>; Oberlandesgericht Düsseldorf, Germany, 22 July 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040722g1.html>; 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, available on the Internet www.cisg-online.ch/cisg/urteile/400.htm; Amtsgericht Bottrop, 25 June 1996, available on the Internet at www.cisg-online.ch/cisg/urteile/534.htm and www.unilex.info/case.cfm?pid=1&do=case&id=289&step=FullText; CLOUT case No. 132 [Oberlandesgericht Hamm, Germany, 8 February 1995]; Landgericht Kassel, 14 July 1994, available on the Internet at www.cisg-online.ch/cisg/urteile/194.htm; CLOUT case No. 79 [Oberlandesgericht Frankfurt a.M., Germany, 18 January 1994] (see full text of the decision).

²⁴See Tribunal de commerce de Versailles, France, 12 March 2010, available on the Internet at [www.globalsaleslaw.org/content/api/cisg/urteile/2064.pdf](http://globalsaleslaw.org/content/api/cisg/urteile/2064.pdf).

²⁵Oberlandesgericht Brandenburg, Germany, 18 November 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081118g1.html>.

²⁶Hof van Beroep Antwerpen, Belgium, 24 April 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060424b1.html>.

²⁷See Kantonsgericht Zug, Switzerland, 14 December 2009, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/2026.pdf>; Rechtbank Breda, the Netherlands, 16 January 2009, English translation available on the internet at <http://cisgw3.law.pace.edu/cases/090116n1.html>; CLOUT case No. 248 [Bundesgericht, Switzerland, 28 October 1998] (see full text of the decision); CLOUT case No. 301 [Court of Arbitration of the International Chamber of Commerce, 1992 (Arbitral award No. 7585)], *Journal du droit international*, 1995, 1015 ff.; Land-gericht Aachen, 20 July 1995, available on the Internet at 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).

²⁸Cámara Nacional de Apelaciones en lo Comercial de Buenos Aires, Argentina, 7 October 2010, available on the Internet at <http://turan.uc3m.es/uc3m/dpto/PR/dppr03/cisg/sargen18.htm>; Oberlandesgericht Saarbrücken, Germany, 12 May 2010, available on the Internet at [www.globalsaleslaw.org/content/api/cisg/urteile/2155.pdf](http://globalsaleslaw.org/content/api/cisg/urteile/2155.pdf); Kantonsgericht Zug, Switzerland, 14 December 2009, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/2026.pdf>; Landgericht Stuttgart, Germany, 20 October 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/091029g1.html>; Kreisgericht St. Gallen, Switzerland, 16 October 2009, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/2023.pdf>; Handelsgericht Bern, Switzerland, 17 August 2009, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/1995.pdf>; Rechtbank Breda, the Netherlands, 16 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090116n1.html>; Landgericht München, Germany, 18 May 2009, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/1998.pdf>; U.S. District Court, New Jersey, United States, 15 April 2009, available on the Internet at <http://cisgw3.law.pace.edu/cases/090415u1.html>; Kantonsgericht Zug, Switzerland, 27 November 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081127s1.html>; Handelsgericht Aargau, Switzerland, 26 November 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081126s1.html>; U.S. District Court, Western District of Pennsylvania, United States, 25 July 2008, available on the Internet at <http://cisgw3.law.pace.edu/cases/080725u1.html>; District Court in Dolny Kubin, Slovakia, 17 July 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080617k1.html>; District Court in Nitra, Slovakia, 29 May 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080529k1.html>; Rechtbank Zutphen, the Netherlands, 27 February 2008 (docket No. 87379/HA ZA 07-716), unpublished; Oberlandesgericht Hamburg, Germany, 25 January 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080125g1.html>; CLOUT case No. 1022 [Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, 23 January 2008], English translation available on the internet at <http://cisgw3.law.pace.edu/cases/080123sb.html>; Monomeles Protodikio Thessalonikis, Greece, 2007 (docket No. 43945/2007), English summary available on the Internet at <http://cisgw3.law.pace.edu/cases/080002gr.html>; CLOUT case No. 1022 [Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, 1 October 2007], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071001sb.html>; Kantonsgericht Appenzell-Ausserrhoden, Switzerland, 6 September 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070906s1.html>; Amtsgericht Freiburg, Germany, 6 July 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070706g1.html>; Handelsgericht Aargau, Switzerland, 19 June 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070619s1.html>; Congrád County Court, Hungary, 6 June 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070606h1.html>; CLOUT case No. 934 [Tribunal Cantonal du Valais, Switzerland, 27 April 2007] (see full text of the decision); CLOUT case No. 828 [Hof 's-Hertogenbosch, the Netherlands, 2 January 2007]; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 29 December 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061229r1.html>; CLOUT case No. 945 [District Court in Galanta, Slovakia, 15 December 2006]; Landgericht Coburg, Germany, 12 December 2006, English translation available on the Internet at <http://>

cisgw3.law.pace.edu/cases/061212g1.html; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 15 November 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061115r2.html>; Tribunal Cantonal du Valais, Switzerland, 27 October 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061027s1.html>; CLOUT case No. 723 [Germany, 19 October 2006]; District Court in Nitra, Slovakia, 27 July 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060627k1.html>; CLOUT case No. 930 [Tribunal Cantonal du Valais, Switzerland, 23 May 2006] (see full text of the decision); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 27 December 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051227r1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 14 December 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051214r1.html>; CLOUT case No. 919 [High Commercial Court, Croatia, 26 July 2005], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050726cr.html>; CLOUT case No. 907 [Tribunal Cantonal du Valais, Switzerland, 27 May 2005] (see full text of the decision); CLOUT case No. 906 [Kantonsgericht Nidwalden, Switzerland, 23 May 2005] (see full text of the decision); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 9 February 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050209r1.html>; CLOUT case No. 590 [Landgericht Saarbrücken, Germany, 1 June 2004] (see full text of the decision); Rechtbank van Koophandel Hasselt, Belgium, 25 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040225b2.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 3 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040203r1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 30 December 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/031230r1.html>; Handelsgericht Aargau, Switzerland, 18 December 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/031218s1.html>; CLOUT case No. 634 [Landgericht Berlin, Germany 21 March 2003]; Handelsgericht St. Gallen, Switzerland, 11 February 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030211s1.html>; CLOUT case No. 629 [Kantonsgericht Zug, Switzerland, 12 December 2002]; Court of Arbitration of the International Chamber of Commerce, 2003 (Arbitral award No. 11849), available on the Internet at <http://cisgw3.law.pace.edu/cases/031849i1.html>; CLOUT case No. 380 [Tribunale di Pavia, Italy, 29 December 1999]; Arbitral Tribunal at the Bulgarian Chamber of Commerce and Industry, 1996 (Arbitral award No. 11/1996), available on the Internet at www.Unilex.info/case.cfm?pid=1&do=case&id=420&step=FullText.

²⁹CLOUT 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).

³⁰Cámara Nacional de Apelaciones en lo Comercial de Buenos Aires, Argentina, 7 October 2010, available on the Internet at <http://turan.uc3m.es/uc3m/dpto/PR/dppr03/cisg/sargen18.htm>; CLOUT case No. 97 [Handelsgericht des Kantons Zürich, Switzerland, 9 September 1993] (see full text of the decision).

³¹Court of Arbitration of the International Chamber of Commerce, 1995 (Arbitral award No. 8128), available on the Internet at www.Unilex.info/case.cfm?pid=1&do=case&id=207&step=FullText.

³²For a case listing various criteria employed in case law to determine the rate of interest, see CLOUT case No. 301 [Court of Arbitration of the International Chamber of Commerce, 1992 (Arbitral award No. 7585)], *Journal du droit international*, 1995, 1015 ff.

³³For a very critical comment on decisions taking this approach, see Tribunale di Padova, Italy, 31 March 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040331i3.html>.

³⁴See Rechtbank van Koophandel Ieper, Belgium, 29 January 2001, available on the Internet at www.law.kuleuven.ac.be/int/tradelaw/WK/2001-01-29.htm; CLOUT case No. 103 [Court of Arbitration of the International Chamber of Commerce, 1993 (Arbitral award No. 6653)]; Juzgado Nacional de Primera Instancia en lo Comercial n. 10, Buenos Aires, Argentina, 6 October 1994, available on the Internet at 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, available on the Internet at www.Unilex.info/case.cfm?pid=1&do=case&id=184&step=FullText.

³⁵See CLOUT cases Nos. 93 [Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft–Wien, Austria, 15 June 1994] and 94 [Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft–Wien, Austria, 15 June 1994] (see full text of the decisions).

³⁶For other tribunals applying the interest rate of the country in which the creditor has its place of business, see China International Economic and Trade Arbitration Commission, People's Republic of China, 2005 (Arbitral award No. CISG/2005/2), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051000c1.html#iv>; CLOUT case no. 303 [Court of Arbitration of the International Chamber of Commerce, 1994 (Arbitral award No. 7331)].

³⁷CLOUT case No 1020 [Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, 28 January 2009] (see full text of the decision), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090128sb.html>.

³⁸See China International Economic and Trade Arbitration Commission, People's Republic of China, 18 April 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030418c1.html>; Court of Arbitration of the International Chamber of Commerce, December 1996 (Arbitral award No. 8769), available on the Internet at www.Unilex.info/case.cfm?pid=1&do=case&id=397&step=FullText.

³⁹See China International Economic and Trade Arbitration Commission, People's Republic of China, 2007 (Arbitral award No. CISG/2007/05), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070100c1.html>; Handelsgericht Bern, Switzerland, 22 December 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/041222s1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 19 March 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040319r1.html>; Court of Arbitration of the International Chamber of Commerce, France, December 1998 (Arbitral award No. 8908), available on the Internet at www.Unilex.info/case.cfm?pid=1&do=case&id=401&step=FullText; see also CLOUT case No. 103 [Court of Arbitration of the International Chamber of Commerce, 1993 (Arbitral award No. 6653)]; 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.

⁴⁰Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, 16 March 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090316sb.html>; Foreign Trade Court of Arbitration, Serbia, 5 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090105sb.html>; Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, 15 July 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080715sb.html>; CLOUT case No. 1022 [Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia], 23 January 2008, English translation available on the internet at <http://cisgw3.law.pace.edu/cases/080123sb.html>; Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, 1 October 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071001sb.html>; Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, 30 October 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061030sb.html>.

⁴¹See Handelsgericht des Kantons Bern, Switzerland, 17 August 2009, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/1995.pdf>; Audiencia Provincial de Alicante, Spain, 24 April 2009, available on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/2086.pdf.

⁴²American Arbitration Association, United States, 12 December 2007, available on the Internet at <http://cisgw3.law.pace.edu/cases/071212a5.html>.

⁴³For this statement, see U.S. District Court, New Jersey, United States, 15 April 2009, available on the Internet at <http://cisgw3.law.pace.edu/cases/090415u1.html>; Tribunal Cantonal du Valais, Switzerland, 28 January 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090128s1.html>; Rechtbank Rotterdam, the Netherlands, 21 January 2009, docket No. 277329 / HA ZA 97-272, unpublished; Handelsgericht Aargau, Switzerland, 26 November 2008, English translation available on the <http://cisgw3.law.pace.edu/cases/081126s1.html>; Monomeles Protodikio Thessalonikis, Greece, 2007 (docket No. 43945/2007), English summary available on the Internet at <http://cisgw3.law.pace.edu/cases/080002gr.html>; Handelsgericht Aargau, Switzerland, 19 June 2007, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/1741.pdf>; Congrád County Court, Hungary, 6 June 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070606h1.html>; Pretore Distretto di Lugano, Switzerland, 19 April 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070419s1.html>; CLOUT case No. 828 [Hof 's-Hertogenbosch, the Netherlands, 2 January 2007]; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 29 December 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061229r1.html>; CLOUT case No. 945 [District Court in Galanta, Slovakia, 15 December 2006]; Landgericht Coburg, Germany, 12 December 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061212g1.html>; CLOUT case No. 917 [High Commercial Court, Croatia, 24 October 2006]; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 14 December 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051214r1.html>; CLOUT case No. 944 [Hof 's-Hertogenbosch, the Netherlands, 11 October 2005]; CLOUT case No. 919 [High Commercial Court, Croatia, 26 July 2005]; Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, 21 February 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050221sb.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 10 February 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050210r1.html>; Handelsgericht Kanton Aargau, Switzerland, 25 January 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050125s1.html>; Landgericht Kiel, Germany, 27 July 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040727g1.html>; Tribunale di Padova, Italy, 31 March 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040331i3.html>; Landgericht Mönchengladbach, Germany, 15 July 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030715g1.html>; Landgericht Tübingen, Germany, 18 June 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030618g1.html>; Tribunal Cantonal du Valais, Switzerland, 30 April 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030430s1.html>; Foreign Trade Court of Arbitration attached to the Yugoslav Chamber of Commerce, Serbia, 9 December 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021209sb.html>; Kantonsgericht Schaffhausen, Switzerland, 25 February 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020225s1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 30 July 2001, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/010730r1.html>; Bulgarian Chamber of Commerce and Industry, Bulgaria, 12 March 2001, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/010312bu.html>; Rechtbank van Koophandel Ieper, Belgium, 29 January 2001, available on the Internet at www.law.kuleuven.be/ipr/eng/cases/2001-01-29.html; Court of Arbitration of the International Chamber of Commerce, 2001 (Arbitral award No. 9771), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/019771i1.html>. For a decision referring to this conflict of laws approach as well as the approach favouring resort to the general principles of the Convention (for procedural reasons, the court did not have to decide which approach to favour), see Oberlandesgericht Köln, Germany, 15 September 2004, available on the Internet at www.cisg-online.ch/cisg/urteile/1057.pdf.

⁴⁴Some decisions do 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.).

⁴⁵See Cámara Nacional de Apelaciones en lo Comercial de Buenos Aires, Argentina, 7 October 2010, available on the Internet at <http://turan.uc3m.es/uc3m/dpto/PR/dppr03/cisg/sargen18.htm>; Oberlandesgericht Saarbrücken, Germany, 12 May 2010, available on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/2155.pdf; Tribunal de Commerce de Versailles, France, 12 March 2010, available on the internet at www.cisg-france.org/decisions/120310.htm; Kantonsgericht Zug, Switzerland, 14 December 2009, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/2026.pdf>; Landgericht Stuttgart, Germany, 20 October 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/091029g1.html>; Kreisgericht St. Gallen, Switzerland, 16 October 2009, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/2023.pdf>; Handelsgericht Bern, Switzerland, 17 August 2009, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/1995.pdf>; Landgericht München, Germany, 18 May 2009, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/1998.pdf>; U.S. District Court, New Jersey, United States, 15 April 2009, available on the Internet at <http://cisgw3.law.pace.edu/cases/090415u1.html>; Rechtbank Breda, the Netherlands, 16 January 2009, English translation available on the internet at <http://cisgw3.law.pace.edu/cases/090116n1.html>; Kantonsgericht Zug, Switzerland, 27 November 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081127s1.html>; Handelsgericht

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⁴⁶Several 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 Rechtbank van Koophandel Hasselt, Belgium, 20 September 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050920b1.html>; Bezirksgericht Arbon, Switzerland, 9 December 1994, available on the Internet at 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, available on the Internet www.unilex.info/case.cfm?pid=1&do=case&id=143&step=FullText.

⁴⁷See Audiencia Provincial de Alicante, Spain, 24 April 2009, available on the Internet at www.globalsaleslaw.org/content/api/cisg/urteile/2086.pdf; Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, 5 January 2009 (Arbitral award No. T-05/08), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090105sb.html>; Rechtbank van Koophandel Ieper, 18 February 2002, available on the Internet at www.law.kuleuven.ac.be/int/tradelaw/WK/2002-02-18.htm; Rechtbank van Koophandel Veurne, 25 April 2001, available on the Internet at www.law.kuleuven.ac.be/int/tradelaw/WK/2001-04-25.htm; CLOUT case No. 164 [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, available on the Internet at www.unilex.info/case.cfm?pid=1&do=case&id=217&step=FullText.

⁴⁸See 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 [Court of Arbitration of the International Chamber of Commerce, 1992 (Arbitral award No. 7153)].

⁴⁹See CLOUT case No. 911 [Cour de Justice de Genève, Switzerland, 12 May 2006] (see full text of the decision); Landgericht Heidelberg, Germany, 2 November 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051102g1.html>; Landgericht Bamberg, Germany, 13 April 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050413g1.html>; Landgericht Kiel, Germany, 27 July 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040727g1.html>; 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 available on the Internet at www.Unilex.info/case.cfm?pid=1&do=case&id=320&step=FullText.

⁵⁰CLOUT case No. 85 [U.S. District Court, Northern District of New York, United States, 9 September 1994].

⁵¹Judicial Board of Szeged, Hungary, 22 November 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/071122h1.html>; Kantonsgericht Appenzell-Ausserrhoden, Switzerland, 6 September 2007, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070906s1.html>.

⁵²Handelsgericht Bern, Switzerland, 17 August 2009, available on the Internet at <http://globalsaleslaw.com/content/api/cisg/urteile/1995.pdf>; Landgericht Bielefeld, Germany, 15 August 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030815g1.html>.

⁵³See China International Economic and Trade Arbitration Commission, People's Republic of China, 2 September 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050902c1.html>; CLOUT case No. 499 [Supreme Economic Court of the Republic of Belarus, Belarus, 20 May 2003]; Court of Arbitration of the International Chamber of Commerce, France, December 1996 (Arbitral award No. 8769), available on the Internet at www.Unilex.info/case.cfm?pid=1&do=case&id=397&step=FullText; Court of Arbitration of the International Chamber of Commerce, France, 1995 (Arbitral award No. 8128), *Journal du droit international*, 1996, 1024 ff.; CLOUT cases Nos. 93 [Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft–Wien, Austria, 15 June 1994] and 94 [Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft–Wien, Austria, 15 June 1994].

⁵⁴Some 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.

⁵⁵See Landgericht Aachen, Germany, 20 July 1995, available on the Internet at www.cisg-online.ch/cisg/urteile/169.htm and www.unilex.info/case.cfm?pid=1&do=case&id=125&step=FullText; Amtsgericht Riedlingen, Germany, 21 October 1994, available on the Internet at www.Unilex.info/case.cfm?pid=1&do=case&id=116&step=FullText; Amtsgericht Nordhorn, Germany, 14 June 1994, available on the Internet at www.Unilex.info/case.cfm?pid=1&do=case&id=114&step=FullText.

⁵⁶See Cámara Nacional de Apelaciones en lo Comercial de Buenos Aires, Argentina, 7 October 2010, available on the Internet at <http://turan.uc3m.es/uc3m/dpto/PR/dppr03/cisg/sargen18.htm>; Hof van Beroep Antwerpen, Belgium, 24 April 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060424b1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 7 April 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060407r1.html>; CLOUT case No. 1018 [Hof van beroep Antwerpen, Belgium, 4 November 1998], available in Dutch on the Internet at www.law.kuleuven.ac.be/int/tradelaw/WK/1998-11-04.htm; Landgericht Kassel, Germany, 22 June 1995, available on the Internet at www.cisg-online.ch/cisg/urteile/370.htm and www.unilex.info/case.cfm?pid=1&do=case&id=143&step=FullText.

⁵⁷Landgericht Bamberg, Germany, 23 October 2006, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061023g1.html>; CLOUT case No. 590 [Landgericht Saarbrücken, Germany, 1 June 2004] (see full text of the decision).

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

¹See the Digest for article 79.

²See the Digest for article 80.

³It has been questioned whether article 79 is applicable to a seller’s failure to deliver conforming goods as provided in Section II of Part III, Chapter II. See the Digest for article 79.

⁴See the Digest for article 79.

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 than 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 if such 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," the party who claims exemption is "liable for damages resulting from such non-receipt." Article 79 (4) has been applied in a small number of decisions. Two decisions have cited the second sentence of article 74 (2).¹ Another decision noted that the party claiming exemption in that case had satisfied the notice requirement.²

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. A number of decisions have addressed the level of challenge in performing that a party must experience in order to claim exemption under article 79. The Belgian Court of Cassation has indicated that the "impediment" referred to in article 79 (1) CISG may include changed circumstances that have made a party's performance a matter of economic hardship, even if performance has not been rendered literally impossible; the court emphasized that, in order to qualify as an "impediment," the change of circumstances ought not to have been reasonably foreseeable at

the time of the conclusion of the contract and performing the contract must involve an extraordinary and disproportionate burden under the circumstances.³ Several earlier decisions suggested that exemption under article 79 requires satisfaction of something akin to an “impossibility” standard.⁴ One decision compared the standard for exemption under article 79 to those for excuse under national legal doctrines of *force majeure*, economic impossibility, and excessive onerousness⁵—although another decision asserted that article 79 was of a different nature than the domestic Italian hardship doctrine of *eccessiva onerosità sopravvenuta*.⁶ 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 law⁷ and *eccessiva onerosità sopravvenuta* in Italian law.⁸ Another decision 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 regardless of whether the failure to perform resulted from the seller’s fault.⁹ 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.¹⁰

6. Several decisions have suggested that a correct application of article 79 must focus on assessing the risks that a party claiming exemption assumed when it concluded the contract.¹¹ 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.¹² This 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 the 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.¹³ 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.¹⁴

7. Article 79 has been invoked with some frequency in litigation, but with limited success. In five cases, a seller successfully claimed exemption for a failure to perform,¹⁵ but in at least 27 other cases a seller’s claim of exemption was denied.¹⁶ Buyers have been granted an exemption under article 79 only four times¹⁷ and have been rebuffed in at least 14 other cases.¹⁸

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),¹⁹ a court recognized that the situation raised an issue concerning the scope of article 79.²⁰ The court, however, reserved decision on the issue because the particular appeal could be disposed of on other grounds. The same court subsequently noted that it had not yet resolved this issue, although its discussion suggests that article 79 applies when a seller delivers non-conforming goods.²¹ Nevertheless, at least one case has in fact granted an article 79 exemption to a seller that delivered non-conforming goods.²²

9. Decisions have granted exemptions for the following breaches by a seller: late delivery of goods;²³ delivery of non-conforming goods;²⁴ failure to deliver goods;²⁵ late payment of a customs penalty.²⁶ Buyers have been held exempt for the following breaches: late payment of the price;²⁷ failure to take delivery after having paid the price.²⁸ 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;²⁹ a buyer’s failure to pay the interest for delay in payment;³⁰ a buyer’s failure to take delivery after paying the price;³¹ a buyer’s failure to open a letter of credit;³² a seller’s failure to deliver goods;³³ and a seller’s delivery of non-conforming goods.³⁴

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”.³⁵ Another decision asserted that conditions leading to the delivery of defective goods can constitute an impediment under article 79;³⁶ 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.³⁷ Another 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 79.³⁸ Yet another decision indicated that a prohibition on exports by the seller’s country may constitute an “impediment” within the meaning of article 79 for a seller who failed to deliver the full quantity of goods; the tribunal, however, denied the exemption because the impediment was foreseeable when the contract was concluded.³⁹

11. In some cases in which a party was deemed exempt under article 79, tribunals failed to explain whether the

impediment requirement of article 79 had been met. Presumably, those tribunals were convinced that this element had been satisfied. The impediments to performance in those cases included: 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);⁴⁰ 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);⁴¹ 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);⁴² seller's delivery of non-conforming goods (found to exempt the buyer from liability for interest for a delay in paying the price).⁴³

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;⁴⁴ 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;⁴⁵ 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;⁴⁶ 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.⁴⁷

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;⁴⁸ import regulations on radioactivity in food that the seller could not satisfy;⁴⁹ increased market prices for tomatoes caused by adverse weather in the seller's country;⁵⁰ significantly decreased market prices for the goods occurring after conclusion of the contract but before the buyer opened a letter of credit;⁵¹ 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;⁵² 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;⁵³ 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;⁵⁴ 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;⁵⁵ 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;⁵⁶ an order by the buyer's government suspending payment of foreign debts;⁵⁷ chemical contamination of the goods (paprika) from an unknown source;⁵⁸ 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.⁵⁹

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.⁶⁰ In several cases a seller has invoked its supplier's default as an impediment that, they argued, should exempt the seller from liability for its own resulting failure to deliver the goods⁶¹ or to deliver conforming goods.⁶² 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.⁶³ 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 79.⁶⁴ 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.⁶⁵ 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.⁶⁶

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,⁶⁷ 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.⁶⁸ 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.⁶⁹ 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".⁷⁰ 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 ...".⁷¹ 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.⁷² Other reasons advanced for denying exemptions because of a change in financial circumstances are that the consequences of the change could have been overcome,⁷³ and that the possibility of the change should have been taken into account when the contract was concluded.⁷⁴

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.⁷⁵ 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.⁷⁶ 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.⁷⁷ 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.⁷⁸ 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.⁷⁹ 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.⁸⁰ 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 its obligation to test the wax before it was shipped to its buyer;⁸¹ 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.⁸²

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.⁸³ 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.⁸⁴ Similarly, a seller's claim of exemption based on regulations prohibiting the export of coal⁸⁵ and a buyer's claim of exemption based on regulations suspending payment of foreign debts⁸⁶ 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.⁸⁷

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,⁸⁸ as well as a seller whose supplier failed to produce the goods due to an emergency shut-down of its plant,⁸⁹ should reasonably have been expected to have avoided or surmounted these impediments, and thus to have fulfilled their contractual obligations.⁹⁰ 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.⁹¹ 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.⁹² In some cases, tribunals have inquired into whether the party claiming the exemption could reasonably overcome the impediment by rendering a similar performance that amounts to a "commercially reasonable substitute."⁹³

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.⁹⁴ 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;⁹⁵ 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.⁹⁶ 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,⁹⁷ and that this also establishes that the burden of proof is generally a matter within the scope of the Convention.⁹⁸ 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.⁹⁹ 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.¹⁰⁰

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." One decision commented generally, "CISG Article 79 (2) has as its scope maintaining the responsibility of the seller if he relies on third parties for the total or partial execution of the contract. The seller's employees and suppliers are not considered third parties according to the CISG, though they are subjects who, autonomously or as independent parties, fulfill a part or the whole of the contract. More generally, the individuals that are charged—by the seller and after the conclusion of the contract—with the fulfillment of the existing obligations toward the buyer are considered third parties according to the CISG. They are, in particular, the carriers that deliver the merchandise to the seller and the subcontractors that are assigned by the seller to carry out the finish work."¹⁰¹ 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).¹⁰² 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).¹⁰³ 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).¹⁰⁴ 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".¹⁰⁵ 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).¹⁰⁶ 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).¹⁰⁷

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 79.¹⁰⁸ 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.¹⁰⁹ 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.¹¹⁰ The Belgian Court of Cassation, applying general principles pursuant to article 7 (2) CISG, has held that, "under these principles, as incorporated *inter alia* in the UNIDROIT Principles of International Commercial Contracts, the party who invokes changed circumstances that fundamentally disturb the contractual balance . . . is also entitled to claim the renegotiation of the contract."¹¹¹

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.¹¹² 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.¹¹³

Notes

¹District Court in Komarno, Slovakia, 12 March 2009 (Frozen peas case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090312k1.html>; District Court in Komarno, Slovakia, 24 February 2009 (Potatoes case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090224k1.html>.

²Amtsgericht Charlottenburg, Germany, 4 May 1994, available on the Internet at www.cisg-online.ch/cisg/urteile/386.htm, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/940504g1.html>. For further discussion of article 79 (4), see the Digest for Section II of Part III, Chapter V, and the Digest for article 74.

³Hof van Cassatie, Belgium, 19 June 2009 (Scafom International BV v. Lorraine Tubes S.A.S.), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090619b1.html>. The court also held that, under general principles applicable pursuant to article 7 (2) CISG, the legal consequences of economic hardship included an obligation by the parties to renegotiate the contract. This aspect of the decision is addressed in the discussion of article 79 (5) below.

⁴Oberlandesgericht 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 www.cisg-online.ch/cisg/urteile/386.htm, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/940504g1.html>, 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.

⁵CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 21 March, 21 June 1996].

⁶CLOUT case No. 54 [Tribunale Civile di Monza, Italy, 14 January 1993] (see full text of the decision).

⁷CLOUT case No. 47 [Landgericht Aachen, Germany, 14 May 1993] (see full text of the decision).

⁸CLOUT case No. 54 [Tribunale Civile di Monza, Italy, 14 January 1993].

⁹CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999].

¹⁰Tribunal de Commerce de Besançon, France, 19 January 1998, Unilex.

¹¹See CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 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 Arrondissementsrechtbank 's-Hertogenbosch, the Netherlands, 2 October 1998, Unilex; Rechtbank van Koophandel Hasselt, Belgium, 2 May 1995, Unilex; Bulgarian Chamber of Commerce and Industry, Bulgaria, 12 February 1998, Unilex; CLOUT case No. 102 [Arbitration Court of the International Chamber of Commerce, 1989 (Arbitral award No. 6281)]; CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997]; Arbitration Court of the International Chamber of Commerce, 1995 (Arbitral award No. 8128), 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.”).

¹²See CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 21 March, 21 June 1996] (see full text of the decision).

¹³CLOUT case No. 163 [Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 10 December 1996].

¹⁴CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999].

¹⁵Federal Arbitration Court for the Moscow Region, Russian Federation, 4 February 2002 (Rimpi Ltd v. Moscow Northern Customs Department), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020204r1.html>; U.S. District Court, Northern District of Illinois, United States, 6 July 2004 (Raw Materials Inc. v. Manfred Forberich GmbH & Co.), available on the Internet at <http://cisgw3.law.pace.edu/cases/040706u1.html>; 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).

¹⁶Arrondissementsrechtbank Rotterdam, the Netherlands, 12 July 2001, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/010712n1.html> (the tribunal ordered the seller to evidence the impediment); China International Economic & Trade Arbitration Commission, People's Republic of China, 25 December 2001, (DVD HiFi case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/011225c1.html>; Bundesgerichtshof, Germany, 9 January 2002, available on the Internet at www.cisg.law.pace.edu/cisg/text/020109g1german.html, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020109g1.html> (tribunal ordered the seller to evidence the impediment); China International Economic & Trade Arbitration Commission, People's Republic of China, 9 August 2002 (Arbitral award No. CISG 2002/21) (Yellow phosphorus case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020809c1.html>; Landgericht Freiburg, Germany, 22 August 2002 (Automobile case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020822g1.html>; China International Economic & Trade Arbitration Commission, People's Republic of China, 21 October 2002 (Arbitral award No. CISG 2002/16) (Engraving machine case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/021021c1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 16 June 2003 (Arbitral award No. 135/2002), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030616r1.html>; Oberlandesgericht Zweibrücken, 2 February 2004, Germany, (Milling equipment case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040202g1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 9 April 2004 (Arbitral award No. 129/2003), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040409r1.html>; Oberster Gerichtshof, Austria, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040421a3.html> (Omnibus case) (although the appellate court granted the seller's claim under article 79 (2), the Oberster Gerichtshof reversed, holding that no third parties were involved, but only a relationship between principal company and its subsidiary); Rechtbank van Koophandel Tongeren, Belgium, 25 January 2005 (Scaform International BV & Orion Metal BVBA v. Exma CPI SA), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050125b1.html>; Hovioikeus/hovrätt Turku, Finland, 24 May 2005 (Radiated spice case), English editorial analysis available at <http://cisgw3.law.pace.edu/cases/050524f5.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 21 November 2005 (Arbitral award No. 42/2005) (Equipment case), English translation available on the internet at <http://cisgw3.law.pace.edu/cases/051121r1.html>; Efetio Lamias, Greece, 2006 (docket No. 63/2006) (Sunflower seed case), English editorial analysis available on the Internet at <http://cisgw3.law.pace.edu/cases/060001gr.html>; Oberlandesgericht Dresden, Germany, 21 March 2007 (Stolen automobile case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070321g1.html>; China International Economic & Trade Arbitration Commission, People's Republic of China, May 2007 (Hammer mill case), English translation available on the Internet <http://cisgw3.law.pace.edu/cases/070500c1.html>; U.S. District Court, Southern District of New York, United States, 16 April 2008 (Macromex Srl. v. Globex International, Inc.), available on the Internet at <http://cisgw3.law.pace.edu/cases/080416u1.html>; CLOUT case No. 140 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russian Federation, 16 March 2005 (arbitral award No. 155/1994)]; Arrondissementsrechtbank '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]; Bulgarian Chamber of Commerce and Industry, Bulgaria, 24 April 1996, Unilex; CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997]; Arbitration Court of the International Chamber of Commerce, 1995 (Arbitral award No. 8128), Unilex; CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 21 March, 21 June 1996]; Landgericht Ellwangen, Germany, 21 August 1995, Unilex. See *also* CLOUT case No. 102 [Arbitration Court of the International Chamber of Commerce, 1989 (Arbitral award No. 6281)] (tribunal applies Yugoslav national doctrines, but also indicates that exemption would have been denied under article 79).

¹⁷CLOUT case No. 893 [Amtegerich Willisau, Switzerland, 12 March 2004 (Wood case)] (denying the buyer an exemption from paying interest, but granting an exemption from damages); U.S. District Court, Southern District of New York, United States, 20 August 2008 (Hilaturas Miel, S.L. v. Republic of Iraq), available on the Internet at <http://cisgw3.law.pace.edu/cases/080820u1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russian Federation, 22 January 1997 (Arbitral award No. 155/1996), 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 www.cisg-online.ch/cisg/urteile/386.htm, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/940504g1.html> (buyer granted exemption from liability for interest and damages due to late payment).

¹⁸Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 30 July 2001 (Arbitral award No. 198/2000), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/010730r1.html>; China International Economic & Trade Arbitration Commission, People's Republic of China, 4 February 2002 (Steel bar case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020204c2.html>; CLOUT case No. 976 [China International Economic & Trade Arbitration Commission, People's Republic of China, 26 June 2003] (Alumina case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030626c1.html>; China International Economic & Trade Arbitration Commission, People's Republic of China, 17 September 2003 (Australia cotton case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030917c1.html>; CLOUT case No. 893 [Amtegerich Willisau, Switzerland, 12 March 2004 (Wood case) (denying the buyer an exemption from paying interest, but granting an exemption from damages)]; Clout case No. 839 [Cour de Cassation, France, 30 June 2004 (Société Romay AG v. SARL Behr France)]; China International Economic & Trade Arbitration Commission, People's Republic of China, 25 May 2005 (Iron ore case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050525c1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 15 November 2006 (Arbitral award No. 30/2006), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/061115r1.html>; CLOUT case No. 142 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 17 October 1995 (Arbitral award No. 123/1992)]; Information Letter No. 29 of the High Arbitration Court of the Russian Federation, Russian Federation, 16 February 1998, Unilex; Rechtbank van Koophandel, Hasselt, Belgium, 2 May 1995, Unilex; 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 Court of the International Chamber of Commerce, 1993 (Arbitral award No. 7197)]; CLOUT case No. 480 [Cour d'appel Colmar, France, 12 June 2001].

¹⁹CLOUT case No. 272 [Oberlandesgericht Zweibrücken, Germany, 31 March 1998].

²⁰CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999].

²¹Bundesgerichtshof, Germany, 9 January 2002, available on the Internet at www.cisg.law.pace.edu/cisg/text/020109g1german.html, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020109g1.html>.

²²Tribunal de Commerce de Besançon, France, 19 January 1998, Unilex.

²³CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999].

²⁴Tribunal de Commerce de Besançon, France, 19 January 1998, Unilex.

²⁵U.S. District Court, Northern District of Illinois, United States, 6 July 2004 (Raw Materials Inc. v. Manfred Forberich GmbH & Co., KG), available on the Internet at <http://cisgw3.law.pace.edu/cases/040706u1.html>.

²⁶Federal Arbitration Court for the Moscow Region, Russian Federation, 4 February 2002 (Rimpi Ltd v. Moscow Northern Customs Department), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020204r1.html>.

²⁷Amtsgericht Charlottenburg, Germany, 4 May 1994, available on the Internet at www.cisg-online.ch/cisg/urteile/386.htm, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/940504g1.html>.

²⁸Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russian Federation, 22 January 1997 (Arbitral award No. 155/1996), Unilex.

²⁹CLOUT case No. 142 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 17 October 1995 (Arbitral award No. 123/1992)]; Information Letter No. 29 of the High Arbitration Court of the Russian Federation, Russian Federation, 16 February 1998, Unilex; CLOUT case No. 163 [Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 10 December 1996]; Bulgarian Chamber of Commerce and Industry, Bulgaria, 12 February 1998, Unilex; CLOUT case No. 410 [Landgericht Alsfeld, Germany, 12 May 1995].

³⁰CLOUT case No. 893 [Amtegerich Willisau, Switzerland, 12 March 2004 (Wood case)] (denying the buyer an exemption from paying interest, but granting an exemption from damages).

³¹Clout case No. 839 [Cour de Cassation, France, 30 June 2004 (Société Romay AG v. SARL Behr France)].

³²CLOUT case No. 104 [Arbitration Court of the International Chamber of Commerce, 1993 (Arbitral award No. 7197)]; Rechtbank van Koophandel Hasselt, Belgium, 2 May 1995, Unilex.

³³CLOUT case No. 140 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 16 March 1995 (Arbitral award No. 155/1994)]; Arrondissementsrechtbank 's-Hertogenbosch, the Netherlands, 2 October 1998, Unilex; Oberlandesgericht Hamburg, Germany, 4 July 1997, Unilex; CLOUT case No. 102 [Arbitration Court of the International Chamber of Commerce, 1989 (Arbitral award No. 6281)]; Bulgarian Chamber of Commerce and Industry, Bulgaria, 24 April 1996, Unilex; CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997]; Arbitration Court of the International Chamber of Commerce, 1995 (Arbitral award No. 8128), Unilex; CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 21 March, 21 June 1996].

³⁴CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999]; Landgericht Ellwangen, Germany, 21 August 1995, Unilex. See also Arrondissementsrechtbank '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).

³⁵CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 21 March, 21 June 1996] (see full text of the decision).

³⁶CLOUT 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.

³⁷CLOUT 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 paragraph 8 *supra*.

³⁸Bundesgerichtshof, Germany, 9 January 2002, available on the Internet at www.cisg.law.pace.edu/cisg/text/020109g1german.html, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020109g1.html>.

³⁹Bulgarian Chamber of Commerce and Industry, Bulgaria, 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.

⁴⁰Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russian Federation, 22 January 1997 (Arbitral award No. 155/1996), Unilex.

⁴¹Tribunal de Commerce de Besançon, France, 19 January 1998, Unilex.

⁴²CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999] (see full text of the decision).

⁴³Amtsgericht Charlottenburg, Germany, 4 May 1994, available on the Internet at www.cisg-online.ch/cisg/urteile/386.htm, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/940504g1.html>.

⁴⁴CLOUT case No. 142 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 17 October 1995 (Arbitral award No. 123/1992)].

⁴⁵CLOUT case No. 140 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 16 March 1995 (Arbitral award No. 155/1994)].

⁴⁶Bulgarian Chamber of Commerce and Industry, Bulgaria, 12 February 1998, Unilex.

⁴⁷CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 21 March, 21 June 1996].

⁴⁸Information Letter No. 29 of the High Arbitration Court of the Russian Federation, Russian Federation, 16 February 1998, Unilex.

⁴⁹Arrondissementsrechtsbank 's-Hertogenbosch, the Netherlands, 2 October 1998, Unilex.

⁵⁰Oberlandesgericht Hamburg, Germany, 4 July 1997, Unilex.

⁵¹Rechtbank van Koophandel Hasselt, Belgium, 2 May 1995, Unilex.

⁵²CLOUT case No. 163 [Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 10 December 1996] (see full text of the decision).

⁵³CLOUT case No. 54 [Tribunale Civile di Monza, Italy, 14 January 1993].

⁵⁴CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997].

⁵⁵Arbitration Court of the International Chamber of Commerce, 1995 (Arbitral award No. 8128), Unilex.

⁵⁶CLOUT case No. 410 [Landgericht Alsfeld, Germany, 12 May 1995].

⁵⁷CLOUT case No. 104 [Arbitration Court of the International Chamber of Commerce, 1993 (Arbitral award No. 7197)] (see full text of the decision).

⁵⁸Landgericht 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 Court of the International Chamber of Commerce, 1989 (Arbitral award No. 6281)] (see full text of the decision).

⁵⁹CLOUT case No. 480 [Cour d'appel Colmar, France, 12 June 2001].

⁶⁰This situation also raises issues concerning the applicability of article 79 (2)—a topic discussed *infra*, paragraph 21.

⁶¹CLOUT case No. 140 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 16 March 1995 (Arbitral award No. 155/1994)]; CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 21 March, 21 June 1996]; Arbitration Court of the International Chamber of Commerce, 1995 (Arbitral award No. 8128), Unilex; CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997].

⁶²CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999]; Tribunal de Commerce de Besançon, France, 19 January 1998, Unilex.

⁶³CLOUT case No. 140 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 16 March 1995 (Arbitral award No. 155/1994)]; CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997]; Arbitration Court of the International Chamber of Commerce, 1995 (Arbitral award No. 8128); CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 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.

⁶⁴CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999] (see full text of the decision).

⁶⁵The 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.

⁶⁶Tribunal 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 paragraph 16 *infra*.

⁶⁷Oberlandesgericht Hamburg, Germany, 4 July 1997, Unilex; CLOUT case No. 102 [Arbitration Court of the International Chamber of Commerce, 1989 (Arbitral award No. 6281)]; CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997]; CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 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).

⁶⁸Rechtbank van Koophandel Hasselt, Belgium, 2 May 1995, Unilex; Bulgarian Chamber of Commerce and Industry, Bulgaria, 12 February 1998, Unilex.

⁶⁹See Bulgarian Chamber of Commerce and Industry, Bulgaria, 12 February 1998, Unilex; CLOUT case No. 102 [Arbitration Court of the International Chamber of Commerce, 1989 (Arbitral award No. 6281)]; CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997]; CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 21 March, 21 June 1996].

⁷⁰Rechtbank van Koophandel Hasselt, Belgium, 2 May 1995.

⁷¹CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997].

⁷²CLOUT case No. 54 [Tribunale Civile di Monza, Italy, 14 January 1993] (see full text of the decision).

⁷³Oberlandesgericht Hamburg, Germany, 4 July 1997, Unilex.

⁷⁴Bulgarian Chamber of Commerce and Industry, Bulgaria, 12 February 1998, Unilex; CLOUT case No. 102 [Arbitration Court of the International Chamber of Commerce, 1989 (Arbitral award No. 6281)]. 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.”).

⁷⁵Information Letter No. 29 of the High Arbitration Court of the Russian Federation, Russian Federation, 16 February 1998, Unilex.

⁷⁶Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russian Federation, 22 January 1997 (Arbitral award No. 155/1996), Unilex.

⁷⁷Bulgarian Chamber of Commerce and Industry, Bulgaria, 4 April 1996, Unilex (denying an exemption because the impediment was foreseeable at the time of the conclusion of the contract).

⁷⁸For 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* paragraph 14, and *infra* paragraphs 17, 18 and 21.

⁷⁹Tribunal de Commerce de Besançon, France, 19 January 1998, Unilex.

⁸⁰CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 21 March, 21 June 1996].

⁸¹CLOUT case No. 272 [Oberlandesgericht Zweibrücken, Germany, 31 March 1998].

⁸²CLOUT 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, available on the Internet at www.cisg-online.ch/cisg/urteile/386.htm, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/940504g1.html> (buyer granted exemption from liability for interest and damages due to late payment).

⁸³CLOUT case No. 140 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation 16 March 1995 (Arbitral award No. 155/1994)]. 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* paragraphs 14 and 16, and *infra* paragraphs 18 and 21.

⁸⁴Arrondissementsrechtbank ’s-Hertogenbosch, the Netherlands, 2 October 1998, Unilex.

⁸⁵Bulgarian Chamber of Commerce and Industry, Bulgaria, 24 April 1996, Unilex.

⁸⁶CLOUT case No. 104 [Arbitration Court of the International Chamber of Commerce, 1993 (Arbitral award No. 7197)] (see full text of the decision).

⁸⁷Rechtbank 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); 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 Court of the International Chamber of Commerce, 1989 (Arbitral award No. 6281)] (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, available on the Internet at www.cisg-online.ch/cisg/urteile/386.htm, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/940504g1.html> (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, 22 January 1997 (Arbitral award No. 155/1996), Unilex (buyer that had paid price for goods granted exemption from liability for damages caused by its failure to take delivery).

⁸⁸CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999], *affirming* (on somewhat different reasoning) CLOUT case No. 272 [Oberlandesgericht Zweibrücken, Germany, 31 March 1998]. The Bundesgerichtshof (CLOUT case No. 271) generalized that a supplier's breach is normally something that, for purposes of article 79, the seller must avoid or overcome.

⁸⁹CLOUT case No. 140 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 16 March 1995 (Arbitral award No. 155/1994)].

⁹⁰For 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* paragraphs 14, 16 and 17, and *infra* paragraph 21.

⁹¹Oberlandesgericht 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, available on the Internet at www.cisg-online.ch/cisg/urteile/386.htm, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/940504g1.html> (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, 22 January 1997 (Arbitral award in case No. 155/1996), Unilex (buyer that had paid price for goods granted exemption from liability for damages caused by its failure to take delivery).

⁹²CLOUT case No. 596 [Oberlandesgericht Zweibrücken, Germany, 2 February 2004] (see full text of the decision).

⁹³International Centre for Dispute Resolution of the American Arbitration Association, United States, 23 October 2007 (Macromex Srl. v. Globex International Inc.), available on the Internet at <http://cisgw3.law.pace.edu/cases/071023a5.html>, affirmed by U.S. District Court, Southern District of New York, United States, 16 April 2008, available on the Internet at <http://cisgw3.law.pace.edu/cases/080416u1.html>, affirmed by U.S. Court of Appeals for the Second Circuit, United States, 26 May 2009, available on the Internet at <http://cisgw3.law.pace.edu/cases/090526u1.html>. See also U.S. District Court, Southern District of New York, United States, 20 August 2008 (Hilaturas Miel, S.L. v. Republic of Iraq), available on the Internet at <http://cisgw3.law.pace.edu/cases/080820u1.html>.

⁹⁴CLOUT case No. 104 [Arbitration Court of the International Chamber of Commerce, 1993 (Arbitral award No. 7197)] (see full text of the decision). See also Bulgarian Chamber of Commerce and Industry, Bulgaria, 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).

⁹⁵CLOUT case No. 272 [Oberlandesgericht Zweibrücken, Germany, 31 March 1998].

⁹⁶CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999].

⁹⁷CLOUT case No. 596 [Oberlandesgericht Zweibrücken, Germany, 2 February 2004] (see full text of the decision).

⁹⁸CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000]; Bundesgerichtshof, Germany, 9 January 2002, available on the Internet at www.cisg.law.pace.edu/cisg/text/020109g1german.html, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020109g1.html>. 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.

⁹⁹CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000]; Bundesgerichtshof, Germany, 9 January 2002, available on the Internet at www.cisg.law.pace.edu/cisg/text/020109g1german.html, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020109g1.html>; CLOUT case No. 380 [Tribunale di Pavia, Italy, 29 December 1999] (see full text of the decision).

¹⁰⁰CLOUT case No. 140 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 16 March 1995 (Arbitral award No. 155/1994)] (denying the seller's claim to exemption because seller was unable to prove the required facts); CLOUT case No. 104 [Arbitration Court of the International Chamber of Commerce, 1993 (Arbitral award No. 7197)] (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 [Schiedsgericht der Handelskammer Hamburg, Germany, 21 March, 21 June 1996] (employing language suggesting that the seller, who claimed exemption, had to submit facts to substantiate the claim).

¹⁰¹CLOUT case No. 890 [Tribunale d'appello Lugano, Cantone del Ticino, Switzerland, 29 October 2003], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/031029s1.html> (citations omitted).

¹⁰²The 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*, paragraphs 14, 16, 17 and 18.

¹⁰³CLOUT case No. 272 [Oberlandesgericht Zweibrücken, Germany, 31 March 1998].

¹⁰⁴CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999].

¹⁰⁵CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 21 March, 21 June 1996] (see full text of the decision).

¹⁰⁶Arbitration Court of the International Chamber of Commerce, 1995 (Arbitral award No. 8128), Unilex.

¹⁰⁷CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999].

¹⁰⁸CLOUT 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, 22 January 1997 (Arbitral award in case No. 155/1996), Unilex.

¹⁰⁹Amtsgericht Charlottenburg, Germany, 4 May 1994, available on the Internet at www.cisg-online.ch/cisg/urteile/386.htm, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/940504g1.html>.

¹¹⁰Tribunal de Commerce de Besançon, France, 19 January 1998, Unilex.

¹¹¹Hof van Cassatie, Belgium, 19 June 2009 (Scafom International BV v. Lorraine Tubes S.A.S.), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090619b1.html>.

¹¹²CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997].

¹¹³CLOUT case No. 142 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 17 October 1995 (Arbitral award No. 123/1992)]; Information Letter No. 29 of the High Arbitration Court of the Russian Federation, Russian Federation, 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 responsible for returning 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 the buyer 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 promptly. Thereafter, however, the seller refused to return the goods to the buyer until the buyer paid other debts owed by the buyer. 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 The Supreme Court of Poland rejected a seller's article 80 defence, holding that the buyer's declaration of avoidance based on non-conformity of goods did not result from lack of mutual performance under the contract, but rather from seller's failure to tender conforming goods; the court commented, "Article 80 imposes on the parties the duty of loyalty and abstention from any acts that would hinder the performance of the contract. One of the imperative elements of this article is the legal relation (causation) between the obligor's conduct and obligee's performance. It is an objective element independent from the obligor's will."⁶

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.⁷ 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.⁸ 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.⁹ 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.¹⁰ A higher appeals court affirmed the denial of the buyer's right to avoid on grounds that did not involve article 80.¹¹

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);¹² a buyer's failure to pay the price for delivered goods;¹³ a buyer's failure to take delivery;¹⁴ a seller's failure to perform its obligation to designate the port from which the goods would be shipped;¹⁵ a seller's repudiation of future delivery obligations;¹⁶ a buyer's unjustified refusal to accept the seller's offer to cure a lack of conformity in the goods.¹⁷ 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);¹⁸ 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);¹⁹ 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);²⁰ a buyer's failure to prepare suitable business premises for the goods (where the seller was obliged to prepare the goods in a way that the buyer would later be able to put it into operation);²¹ a buyer's failure to open a letter of credit based on a changed price list (where the buyer did not prove that its failure to open the letter of credit was caused, at that time, by seller).²²

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.²³ 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;²⁴ 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.²⁵

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;²⁶ a buyer's failure to pay the price for delivered goods, causing the seller to fail to deliver other goods;²⁷ a buyer's failure to take delivery of the goods, causing the seller's failure to make delivery;²⁸ 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;²⁹ a seller's repudiation of future delivery obligations, causing the buyer's failure to pay for some prior deliveries;³⁰ a buyer's unjustified refusal to accept the seller's offer to cure a non-conformity, causing the seller's failure to cure;³¹ a buyer's failure to perform its obligation to notify the seller and the carrier in charge of the transportation of the time and place of delivery.³²

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,³³ but also to block a party from avoiding the contract³⁴ and from using the other side's non-performance as a defence.³⁵

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.³⁶ 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 man-

ager's dismissal, and in fact had become an "accomplice" of the general manager.³⁷ 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

¹CLOUT 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].

²Amtsgericht München, Germany, 23 June 1995, Unilex.

³CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997].

⁴CLOUT case No. 311 [Oberlandesgericht Köln, Germany, 8 January 1997] (see full text of the decision).

⁵CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 21 March, 21 June 1996].

⁶Supreme Court, Poland, 11 May 2007 (Shoe leather case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/070511p1.html>.

⁷See, 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 fulfill 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).

⁸Zurich Chamber of Commerce, Switzerland, 31 May 1996 (Arbitral award No. ZHK 273/95), Unilex.

⁹Landgericht Düsseldorf, Germany, 9 July 1992, Unilex.

¹⁰Oberlandesgericht Düsseldorf, Germany, 18 November 1993, available on the Internet at www.cisg-online.ch/cisg/urteile/92.htm, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/931118g1.html>.

¹¹CLOUT case No. 124 [Bundesgerichtshof, Germany, 15 February 1995].

¹²Oberlandesgericht Düsseldorf, Germany, 18 November 1993, available on the Internet at www.cisg-online.ch/cisg/urteile/92.htm, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/931118g1.html>. 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].

¹³CLOUT case No. 273 [Oberlandesgericht München, Germany, 9 July 1997].

¹⁴CLOUT case No. 133 [Oberlandesgericht München, Germany, 8 February 1995] (see full text of the decision).

¹⁵CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (see full text of the decision).

¹⁶Zurich Chamber of Commerce, Switzerland, 31 May 1996 (Arbitral award No. ZHK 273/95), Unilex.

¹⁷CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997].

¹⁸Amtsgericht München, Germany, 23 June 1995, Unilex.

¹⁹CLOUT case No. 311 [Oberlandesgericht Köln, Germany, 8 January 1997] (see full text of the decision).

²⁰CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 21 March, 21 June 1996].

²¹Oberlandesgericht Hamburg, Germany, 25 January 2008 (Café inventory case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080125g1.html>.

²²Arbitration Court of the International Chamber of Commerce, 2003 (Arbitral award No. 11849) (Fashion products case), available on the Internet at <http://cisgw3.law.pace.edu/cases/031849i1.html>.

²³Amtsgericht München, Germany, 23 June 1995, Unilex.

²⁴CLOUT case No. 311 [Oberlandesgericht Köln, Germany, 8 January 1997] (see full text of the decision).

²⁵CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 21 March, 21 June 1996].

²⁶Oberlandesgericht 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].

²⁷CLOUT case No. 273 [Oberlandesgericht München, Germany, 9 July 1997].

²⁸CLOUT case No. 133 [Oberlandesgericht München, Germany, 8 February 1995].

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

³⁰Zurich Chamber of Commerce, Switzerland, 31 May 1996 (Arbitral award No. ZHK 273/95), Unilex.

³¹CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997].

³²China International Economic and Trade Arbitration Commission, People's Republic of China, 9 January 2008 (Metallic silicon case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080109c1.html> (seller exempted from liability for non-delivery because of the buyer's termination of the contract and what the tribunal characterized as the buyer's blackmail).

³³Tribunal of International Commercial Arbitration at the Ukraine Chamber of Commerce and Trade, Ukraine, 15 February 2006 (Coal case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060215u5.html>; 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].

³⁴Landgericht Düsseldorf, Germany, 9 July 1992, Unilex, affirmed in relevant part by Oberlandesgericht Düsseldorf, Germany, 18 November 1993, Unilex, affirmed in relevant part without invoking article 80 in CLOUT case No. 124 [Bundesgerichtshof, Germany, 15 February 1995].

³⁵CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (see full text of the decision); Zurich Chamber of Commerce, Switzerland, 31 May 1996 (Arbitral award No. ZHK 273/95), Unilex.

³⁶Supreme 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.

³⁷Arbitration Court of the International Chamber of Commerce, December 1997 (Arbitral award No. 8817), 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 has not been avoided but the buyer has demanded 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 restitutive 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 article 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

¹Landgericht Düsseldorf, Germany, 11 October 1995, Unilex.

²CLOUT 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” which overrides 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.⁵ 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 pay⁹ 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 article 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 articles 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 is obliged, under article 84 (1), to pay interest on the funds until they are restored.²³ It has been held, however, 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 Similarly, it was held that a buyer was not entitled to claim reimbursement of the purchase price from the seller where it failed to avoid the contract within the period set out in article 49 (2) (b) CISG.²⁷ A court has held that a party who claims restitution of unused materials bears the burden of proving the existence of the alleged claim.²⁸

6. In many cases where the buyer has properly avoided the contract, tribunals have awarded the aggrieved buyer restitution of the price (or the part thereof) that it paid to the seller.²⁹ A breaching seller is entitled to the restitution of the goods it delivered to a buyer who thereafter avoided the contract,³⁰ 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.³¹ A seller who properly avoided the contract has also been awarded restitution of the goods it delivered,³² 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.³³ It has been held, however, that not all restitution claims arising

out of a terminated sales contract are governed by the CISG. In one decision³⁴ the parties mutually agreed to cancel their contract and the seller gave the buyer a refund in the amount of the buyer’s payment check. The buyer’s check, however, 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 consensually terminated. The court held that the seller’s claim was based on unjust enrichment principles and was governed by applicable national law. On the other hand, it has been asserted that articles 81 (2) and 84 (2) establish that the Convention embodies a general principle of prevention of unjust enrichment, and that this general principle pre-empts national law on this subject³⁵ (see article 7 (2)).

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 place of performance of the obligation to make restitution under article 81 (2). 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—in this case, the law governing the enforcement of a judgement ordering such restitution.³⁶ 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)) does not embody 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.³⁷ 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 article 31 of the CISG, designating the place for performance of the obligation to deliver the goods.³⁸ 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 thus 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.³⁹ The court also found this result consistent with article 82, which creates very broad exceptions to an avoiding buyer's obligation to return goods in their original condition, thereby suggesting 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, at the exchange rate specified in the contract for payment of the price to the seller.⁴⁰

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.⁴¹ 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.⁴² Another decision stated that an avoiding seller need not make restitution of the buyer's payments until delivered goods were returned.⁴³

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.⁴⁴ 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.⁴⁵ 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

¹CLOUT case No. 422 [Oberster Gerichtshof, Austria, 29 June 1999], Unilex.

²Ibid. See also Landgericht Düsseldorf, Germany, 11 October 1995, Unilex (stating that avoidance "changes the contractual relationship into a restitutional relationship [winding up]").

³Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 3 March 1997 (Arbitral award No. 82/1996), 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.

⁴Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 3 March 1997 (Arbitral award No. 82/1996), Unilex; CLOUT case No. 422 [Oberster Gerichtshof, Austria, 29 June 1999], Unilex.

⁵Tribunal of International Commercial Arbitration at the Federation Chamber of Commerce and Industry, Russian Federation, 3 March 1997 (Arbitral award No. 82/1996), Unilex.

⁶CLOUT case No. 422 [Oberster Gerichtshof, Austria, 29 June 1999], Unilex.

⁷For general statements regarding the parties' release from their obligations upon avoidance see, e.g. CLOUT case No. 422 [Oberster Gerichtshof, Austria, 29 June 1999], also in 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]; Arbitration Court of the International Chamber of Commerce, August 1999 (Arbitral award No. 9887), Unilex.

⁸CLOUT case No. 235 [Bundesgerichtshof, Germany, 25 June 1997] (partial avoidance); CLOUT case No. 348 [Bundesgericht, Switzerland, 28 October 1998]; CLOUT case No. 2 [Oberlandesgericht Frankfurt am Main, Germany, 17 September 1991] (see full text of the decision); Arbitration Court of the International Chamber of Commerce, March 1995 (Arbitral award No. 7645), Unilex. See also Landgericht Krefeld, Germany, 24 November 1992, Unilex (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).

⁹Arbitration Court of the International Chamber of Commerce, August 1999 (Arbitral award No. 9887), Unilex.

¹⁰CLOUT case No. 261 [Bezirksgericht der Sanne, Switzerland, 20 February 1997]. See also Zürich Chamber of Commerce, Switzerland, 31 May 1996 (Arbitral award No. ZHK 273/95), 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.

¹¹In 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 contract is not released from its obligation to deliver the goods. Zürich Chamber of Commerce, Switzerland, 31 May 1996 (Arbitral award No. ZHK 273/95), Unilex.

¹²CLOUT 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)); Arbitration Court of the International Chamber of Commerce, August 1999 (Arbitral award No. 9887), 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)).

¹³CLOUT 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); Zürich Chamber of Commerce, Switzerland, 31 May 1996 (Arbitral award No. ZHK 273/95), 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); Arbitration Court of the International Chamber of Commerce, August 1999 (Arbitral award No. 9887), 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)).

¹⁴CLOUT 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]").

¹⁵CLOUT 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; Zürich Chamber of Commerce, Switzerland, 31 May 1996 (Arbitral award No. ZHK 273/95), Unilex; CLOUT case No. 166 [Arbitration, Schiedsgericht der Handelskammer Hamburg, Germany, 21 March, 21 June 1996] (see full text of the decision).

¹⁶CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 21 March, 21 June 1996] (see full text of the decision).

¹⁷CLOUT case No. 23 [U.S. District Court, Southern District of New York, United States, 14 April 1992] (see full text of the decision).

¹⁸Arbitration Court of the International Chamber of Commerce, March 1999 (Arbitral award No. 9978), Unilex.

¹⁹CLOUT case No. 422 [Oberster Gerichtshof, Austria, 29 June 1999], Unilex.

²⁰Ibid.

²¹See the Digest for article 82.

²²See the Digest for article 84, paragraphs 5-6.

²³See the Digest article 84, paragraphs 2-4.

²⁴Arbitration Court of the International Chamber of Commerce, March 1999 (Arbitral award No. 9978), 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).

²⁵CLOUT case No. 293 [Schiedsgericht der Hamburger freundschaftlichen Arbitrage, Germany, 29 December 1998] ("The claimant's claim as buyer under article 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, Russian Federation, 15 April 1994 (Arbitral award No. 1/1993), Unilex; Landgericht Krefeld, Germany, 24 November 1992, Unilex. But see Comisión para la Protección del Comercio Exterior de México (Compromex), 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).

²⁶Landgericht Düsseldorf, Germany, 11 October 1995, Unilex.

²⁷Oberlandesgericht Stuttgart, Germany, 31 March 2008 (Automobile case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080331g1.html>.

²⁸Oberlandesgericht Brandenburg, Germany, 18 November 2008 (Beer case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081118g1.html>.

²⁹Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 15 April 1994 (Arbitral award No. 1/1993), Unilex; CLOUT case No. 302 [Arbitration Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7660)] (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, People's Republic of China, 30 October 1991, Unilex, English translation available on the Internet at 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 Court of the International Chamber of Commerce, 1993 (Arbitral award no. 6653)] (without citing article 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; Kärjääoikeus Kuopio, Finland, 5 November 1996 (Butter case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/961105f5.html>; Arbitration Court of the International Chamber of Commerce, March 1999 (Arbitral award No. 9978), Unilex; CLOUT case No. 293 [Schiedsgericht der Hamburger freundschaftlichen Arbitrage, Germany, 29 December 1998] (awarding restitution of the buyer's prepayment for a delivery because "[t]he rendered prepayment is, in the meaning of article 81 (2) first sentence CISG, performance of the contract on the part of the claimant as buyer") (see full text of the decision).

³⁰See 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, 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).

³¹Landgericht Krefeld, Germany, 24 November 1992, Unilex.

³²CLOUT case No. 308 [Federal Court of Australia, Australia, 28 April 1995] (see full text of the decision).

³³CLOUT case No. 261 [Berzirksgericht der Sanne, Switzerland, 20 February 1997]; CLOUT case No. 308 [Federal Court of Australia, Australia, 28 April 1995] (see full text of the decision).

³⁴CLOUT case No. 288 [Oberlandesgericht München, Germany, 28 January 1998].

³⁵Polimeles Protodikio Athinon, Greece, 2009 (docket No. 4505/2009), English editorial analysis available on the Internet at <http://cisgw3.law.pace.edu/cases/094505gr.html>.

³⁶Landgericht Landshut, Germany, 5 April 1995, Unilex.

³⁷CLOUT case No. 312 [Cour d'appel Paris, France, 14 January 1998].

³⁸CLOUT case No. 295 [Oberlandesgericht Hamm, Germany, 5 November 1997] (see full text of the decision).

³⁹CLOUT case No. 422 [Oberster Gerichtshof, Austria, 29 June 1999], Unilex.

⁴⁰CLOUT case No. 302 [Arbitration Court of the International Chamber of Commerce, 1994 (Arbitral award no. 7660)].

⁴¹China International Economic and Trade Arbitration Commission, 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").

⁴²Landgericht Landshut, Germany, 5 April 1995, Unilex.

⁴³CLOUT case No. 308 [Federal Court of Australia, Australia, 28 April 1995] (see full text of the decision).

⁴⁴CLOUT case No. 613 [U.S. District Court, Northern District of Illinois, United States, 28 March 2002] (Usinor Industeel v. Leeco Steel Products, Inc.), available on the Internet at <http://cisgw3.law.pace.edu/cases/020328u1.html>.

⁴⁵CLOUT case No. 308 [Federal Court of Australia, 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 82 is closely related to article 81 (2) of the Convention, which 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 the buyer received them. 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 the goods perished or deteriorated as a consequence of the examination of the goods provided for in article 38 (article 82 (2) (b)); or if the buyer’s inability to return the goods in their original condition 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 had resold the goods.⁷ 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 Another decision held that the buyer had lost its right to avoid the contract because it had used the goods (a machine) for five years, which precluded restitution of the machine in the condition in which buyer had received it.⁹

4. On the other hand a court, noting that article 82 (1) only requires that goods be returned “*substantially*” in the condition in which they were received, declared that a buyer loses its right to declare avoidance under article 82 (1) only in cases where “the condition of the goods

has changed in such a way that it would be unreasonable to expect the seller to redeem the goods.”¹⁰ Another decision has noted that article 82 does not prevent a buyer from avoiding the contract where the seller failed to claim that the requirements of article 82 were not met¹¹—suggesting that, when a seller intends to invoke article 82 (1) in order to challenge the buyer’s avoidance of the contract, the seller bears the burden of coming 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.¹² 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.¹³ Another decision found that article 82 (1) did not deprive a buyer of the right to avoid the contract when the 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.¹⁴ 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 buyer had satisfied the requirements of one or more of the exceptions in article 82 (2).¹⁵

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.¹⁶ 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.¹⁷

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.¹⁸ 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.¹⁹ 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).²⁰

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.²¹ 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; as a result, the buyer lost the right to avoid because it could not make restitution of the goods as required by article 82 (1).²² A buyer that cut and processed marble slabs after discovering that they were non-conforming also did not meet the requirements of article 82 (2) (c), and the buyer was deemed to have lost the right to avoid the contract.²³ It has been suggested that a buyer’s resale of the goods after declaring the contract avoided is beyond the scope of article 82.²⁴ It has also been held that the provisions of article 82, specifically including the exception in article 82 (2) (c), do not apply by analogy when the seller is the party avoiding the contract, and do not prevent a seller from avoiding even when the buyer has resold the goods.²⁵

Notes

¹Although 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.

²Landgericht Düsseldorf, Germany, 11 October 1995, Unilex.

³CLOUT case No. 422 [Oberster Gerichtshof, Austria, 29 June 1999], Unilex.

⁴Ibid.

⁵Ibid.

⁶Rechtbank 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.

⁷CLOUT 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.

⁸CLOUT case No. 316 [Oberlandesgericht Koblenz, Germany, 27 September 1991].

⁹CLOUT case No. 1025 [Cour de cassation, France, 3 November 2009 (Société Anthon GmbH & Co. v. SA Tonnellerie Ludonnaise)], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/091103f1.html> (see full text of the decision).

¹⁰Bundesgericht, Switzerland, 18 May 2009 (Packaging machine case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/090518s1.html>.

¹¹CLOUT case No. 2 [Oberlandesgericht Frankfurt am Main, Germany, 17 September 1991] (see full text of the decision).

¹²Ibid.

¹³Amtsgericht 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—resales that occur after the buyer discovered or ought to have discovered the lack of conformity do not come within the exception.

¹⁴CLOUT case No. 594 [Oberlandesgericht Karlsruhe, Germany 19 December 2002].

¹⁵CLOUT 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* paragraphs 5-7.

¹⁶CLOUT case No. 422 [Oberster Gerichtshof, Austria, 29 June 1999], Unilex.

¹⁷CLOUT case No. 316 [Oberlandesgericht Koblenz, Germany, 27 September 1991].

¹⁸CLOUT case No. 235 [Bundesgerichtshof, Germany, 25 June 1997].

¹⁹Ibid. (see full text of the decision).

²⁰CLOUT case No. 316 [Oberlandesgericht Koblenz, Germany, 27 September 1991].

²¹Landgericht Ellwangen, Germany, 21 August 1995, Unilex.

²²CLOUT case No. 82 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994].

²³CLOUT case No. 316 [Oberlandesgericht Koblenz, Germany, 27 September 1991].

²⁴Amtsgericht 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—resales that occur after the buyer discovered or ought to have discovered the lack of conformity do not come within the exception.

²⁵Oberlandesgericht Karlsruhe, Germany, 14 February 2008, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080214g1.html>.

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 (articles 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 article 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’s attempt to avoid the contract was found impermissible because the goods’ lack of conformity did not constitute a fundamental breach as defined in article 25; citing article 83, the court nevertheless permitted the buyer to reduce the price for the non-conforming goods as provided in article 50.⁵ In another 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.⁶

Notes

¹Chapter V, Section V of Part III comprises articles 81 through 84 of the CISG.

²Landgericht Düsseldorf, Germany, 11 October 1995, Unilex.

³Landgericht Düsseldorf, Germany, 11 October 1995, Unilex.

⁴CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 21 March, 21 June 1996] (see full text of the decision).

⁵Oberlandesgericht Stuttgart, Germany, 12 March 2001 (Apple juice concentrate case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/010312g1.html>.

⁶CLOUT 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 finding support in article 7 (2) on the view

that questions regarding the rate of interest fall within the scope of the CISG, yet since such rate is settled neither by its express provisions nor by the general principles on which it is based, the rate must be fixed "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 An arbitral tribunal has held that the rate of interest under article 84 (1) should be the one used in international trade with respect to the currency of the transaction (in this case, 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 awarding interest under article 84, other courts opted for awarding damages under article 74 in favour of buyers who timely and properly avoided the contract, measuring such damages by the finance charges that the buyer incurred in order to finance payment for the goods (provided such charges were foreseeable at the time of the conclusion of the contract).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 fewer decisions than those rendered under 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 it is the seller's burden to prove the amount of benefits for which the buyer must account to the seller under article 84 (2).¹⁹ In line with this principle, an appellate court reversed a lower court's award under article 84 (2) in favour of a seller whom the appeals court found had not carried its burden: the seller had shown only that the buyer's customer might in the future avoid its contract to purchase 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 dismissed the seller's claim for benefits allegedly received by the buyer "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

RETURN OF UNJUSTIFIED ENRICHMENT AS A GENERAL PRINCIPLE OF THE CONVENTION

7. A court has held that "the provision of CISG article 84 (2) is the basis for the relevant general principle of the Convention which orders the return of the enrichment received in case the sales contract is declared avoided at a later time."²³

Notes

¹CLOUT Case No. 103 [Arbitration Court of the International Chamber of Commerce, 1993 (Arbitral award No. 6653)]; Cour d'appel Paris, France, 6 April 1995, Unilex; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 15 April 1994 (Arbitral award No. 1/1993), 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 Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7660)]; Landgericht Landshut, Germany, 5 April 1995, Unilex; Arbitration Court of the International Chamber of Commerce, March 1999 (Arbitral award No. 9978), 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 [Schiedsgericht der Hamburger freundschaftlichen Arbitrage, Germany, 29 December 1998]; China International Economic and Trade Arbitration Commission, People's Republic of China, 30 October 1991, Unilex, English translation also available on the Internet at 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 Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7531)]; Kärjäoikeus Kuopio, Finland, 5 November 1996, available on the Internet at www.utu.fi/oik/tdk/xcisg/tap6.html, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/961105f5.html>.

²Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 15 April 1994 (Arbitral award No. 1/1993), 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; Arbitration Court of the International Chamber of Commerce, March 1999 (Arbitral award No. 9978), Unilex; CLOUT case No. 293 [Schiedsgericht der Hamburger freundschaftlichen Arbitrage, Germany, 29 December

1998]; China International Economic and Trade Arbitration Commission, People's Republic of China, 30 October 1991, Unilex; CLOUT case No. 103 [Arbitration Court of the International Chamber of Commerce, 1993 (Arbitral award No. 6653)]; Cour d'appel Paris, France, 6 April 1995. See also Käräjaoikeus Kuopio, Finland, 5 November 1996, available on the Internet at www.utu.fi/oik/tdk/xcisg/tap6.html, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/961105f5.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 Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7660)] (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).

³CLOUT case No. 261 [Berzirksgericht der Sanne, Switzerland, 20 February 1997].

⁴CLOUT case No. 133 [Oberlandesgericht München, Germany, 8 February 1995].

⁵CLOUT case No. 103 [Arbitration Court of the International Chamber of Commerce, 1993 (Arbitral award No. 6653)], 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.

⁶CLOUT 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 Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7660)]; 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 [Schiedsgericht der Hamburger freundschaftlichen 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, Russian Federation, 15 April 1994, Arbitral award No. 1/1993, Unilex; Cour d'appel Aix-en-Provence, France, 21 November 1996, Unilex; Arbitration Court of the International Chamber of Commerce, March 1999 (Arbitral award No. 9978), Unilex. See also CLOUT case No. 90 [Pretura circondariale di Parma, Italy, 24 November 1989] where the court held that the buyer was entitled to avoid the contract and recover its payments from the seller under the CISG; 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, 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).

⁷CLOUT case No. 867 [Tribunale di Forlì, Italy, 11 December 2008 (Mitias v. Solieda S.r.l)], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081211i3.html>; 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 Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7660)]; Landgericht Landshut, Germany, 5 April 1995, Unilex; CLOUT case No. 136 [Oberlandesgericht Celle, Germany, 24 May 1995]; Arbitration Court of the International Chamber of Commerce, March 1999 (Arbitral award No. 9978), Unilex; CLOUT case No. 261 [Berzirksgericht der Sanne, Switzerland, 20 February 1997]; CLOUT case No. 293 [Schiedsgericht der Hamburger freundschaftlichen Arbitrage, Germany, 29 December 1998]; CLOUT case No. 133 [Oberlandesgericht München, Germany, 8 February 1995].

⁸CLOUT 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 [Schiedsgericht der Hamburger freundschaftlichen Arbitrage, Germany, 29 December 1998] (see full text of the decision).

⁹CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997] (see full text of the decision).

¹⁰CLOUT case No. 103 [Arbitration Court of the International Chamber of Commerce, 1993 (Arbitral award No. 6653)].

¹¹Cour d'appel Paris, France, 6 April 1995, Unilex.

¹²See CLOUT case No. 304 [Arbitration Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7531)], Unilex; Käräjaoikeus Kuopio, Finland, 5 November 1996, English translation available on the Internet at www.utu.fi/oik/tdk/xcisg/tap6.html.

¹³China International Economic and Trade Arbitration Commission, People's Republic of China, 18 April 2008 (PTA powder case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080418c1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 15 April 1994 (Arbitral award No. 1/1993), 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 Court of the International Chamber of Commerce, 1994 (Arbitral award 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 [Schiedsgericht der Hamburger freundschaftlichen Arbitrage, Hamburg, Germany, 29 December 1998]; China International Economic and Trade Arbitration Commission, 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).

¹⁴Cour d'appel Aix-en-Provence, France, 21 November 1996, Unilex; CLOUT case No. 315 [Cour de Cassation, France, 26 May 1999], also available in Unilex.

¹⁵CLOUT case No. 103 [Arbitration Court of the International Chamber of Commerce, 1993 (Arbitral award No. 6653)]; Cour d'appel Paris, France, 6 April 1995, Unilex.

¹⁶Tribunal 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.

¹⁷CLOUT case No. 302 [Arbitration Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7660)].

¹⁸CLOUT case No. 165 [Oberlandesgericht Oldenburg, Germany, 1 February 1995] (see full text of the decision).

¹⁹Ibid. (see full text of the decision).

²⁰Ibid. (see full text of the decision).

²¹Ibid. (see full text of the decision).

²²Amtsgericht Charlottenburg, Germany, 4 May 1994, Unilex.

²³Polimeles Protodikio Athinon, Greece, 20 September 2009 (Bullet-proof vest case), English editorial analysis available on the Internet at <http://cisgw3.law.pace.edu/cases/094505gr.html>.

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 thereafter either avoids the contract (meaning 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) (requiring 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 its possession, 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. Article 87 provides that storing the goods in a third party's warehouse at the other side's expense (provided that expense is "not unreasonable") is one proper method of preservation. Article 88 gives a preserving party the right (or even the 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;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 it 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, who is 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

¹After avoidance, the goods effectively belong to the seller, and the seller has a financial interest in preserving them. The legal obligation to preserve imposed by article 85, however, is presumably eliminated: it makes no sense for the seller to owe the buyer an obligation to preserve the seller's own goods that, because of the avoidance, will not be transferred to the buyer.

²See CLOUT case No. 304 [Arbitration Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7531)] (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 number of decisions have dealt with the seller’s obligation to preserve goods under article 85. 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 incurred by an aggrieved seller to preserve the goods. Thus it has been held that the costs of storing and insuring goods for a reasonable period after the buyer improperly refused delivery were recoverable under article 85.³ Decisions awarding seller the costs of preserving goods usually (although not always) cite article 85 in support of the award,⁴ but they frequently characterize the award as damages recoverable under article 74 CISG.⁵ 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.”⁶ The preservation costs for which sellers have successfully claimed reimbursement have generally been incurred after the buyer unjustifiably refused to take delivery,⁷ although in one case they were incurred after the buyer failed to open a letter of credit required by the sales contract.⁸ 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,⁹ and in one case reimbursement for part of the seller’s preservation expenses was denied because they were not reasonably incurred.¹⁰ 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 reimbursement, under either article 74 or article 85, 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.¹¹ 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.¹² 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.¹³

Notes

¹CLOUT case No. 141 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 25 April 1995 (Arbitral award No. 192/1994)], also in Unilex.

²CLOUT case No. 96 and No. 200 [Tribunal Cantonal Vaud, Switzerland, 17 May 1994] (both abstracts dealing with the same case).

³Hof van Beroep Antwerpen, Belgium, 24 April 2006 (GmbH Lothringer Gunther Grosshandelsgesellschaft für Bauelemente und Holzwerkstoffe v. NV Fepco International), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060424b1.html>.

⁴See 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); Arbitration Court of the International Chamber of Commerce, August 1998 (Arbitral award No. 9574), 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, 25 April 1995 (Arbitral award No. 192/1994)], also in Unilex (citing article 85 and awarding the seller's costs for storing trucks in warehouse); CLOUT case No. 104 [Arbitration Court of the International Chamber of Commerce, 1993 (Arbitral award no. 7197)] (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, 9 September 1994 (Arbitral award No. 375/1993), Unilex (apparently not citing article 85 when awarding seller's costs for storing goods). See also U.S. District Court, Eastern District of California, United States, 19 May 2008 (*The Rice Corporation v. Grain Board of Iraq*), available on the Internet at <http://cisgw3.law.pace.edu/cases/080519u1.html> (without citing article 85, court finds that "the Convention require[s] the seller of goods to take all reasonable steps to preserve the cargo where the buyer has delayed taking delivery of the goods, [and] permits the seller to store the goods at the expense of the buyer, . . ."); 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).

⁵See CLOUT case No. 361 [Oberlandesgericht Braunschweig, Germany, 28 October 1999] (see full text of the decision); CLOUT case No. 104 [Arbitration Court of the International Chamber of Commerce, 1993 (Arbitral award No. 7197)] (see full text of the decision).

⁶CLOUT case No. 361 [Oberlandesgericht Braunschweig, Germany, 28 October 1999] (see full text of the decision).

⁷Hof van Beroep Antwerpen, Belgium, 24 April 2006 (GmbH Lothringer Gunther Grosshandelsgesellschaft für Bauelemente und Holzwerkstoffe v. NV Fepco International), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060424b1.html>; CLOUT case No. 141 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 25 April 1995 (Arbitral award No. 192/1994)], also in Unilex; CLOUT case No. 361 [Oberlandesgericht Braunschweig, Germany, 28 October 1999] (see full text of the decision); Arbitration Court of the International Chamber of Commerce, August 1998 (Arbitral award No. 9574), Unilex; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 9 September 1994 (Arbitral award No. 375/1993), Unilex.

⁸CLOUT case No. 104 [Arbitration Court of the International Chamber of Commerce, 1993 (Arbitral award No. 7197)] (see full text of the decision).

⁹Hof van Beroep Antwerpen, Belgium, 24 April 2006 (GmbH Lothringer Gunther Grosshandelsgesellschaft für Bauelemente und Holzwerkstoffe v. NV Fepco International), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060424b1.html> (awarding reimbursement for the cost of storing and insuring the goods to the extent such costs were reasonably incurred); CLOUT case No. 141 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 25 April 1995 (Arbitral award No. 192/1994)], 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, 9 September 1994 (Arbitral award No. 375/1993), Unilex.

¹⁰Hof van Beroep Antwerpen, Belgium, 24 April 2006 (GmbH Lothringer Gunther Grosshandelsgesellschaft für Bauelemente und Holzwerkstoffe v. NV Fepco International), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/060424b1.html>.

¹¹CLOUT case No. 293 [Schiedsgericht der Hamburger freundschaftlichen Arbitrage, Hamburg, Germany, 29 December 1998] (see full text of the decision).

¹²CLOUT case No. 104 [Arbitration Court of the International Chamber of Commerce, 1993 (Arbitral award No. 7197)] (see full text of the decision).

¹³CLOUT 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." A buyer that takes possession under these circumstances 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, costs incurred by the buyer, after timely and proper avoidance, for storing rejected air conditioner compressors were 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 Where a buyer unjustifiably demanded that the seller stop delivering the goods, and the buyer did not qualify for an exemption for non-performance under article 79 CISG, its claim for the costs of storing goods that the seller delivered was denied.⁶ 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.⁷

Notes

¹As was the case with the seller's article 85 obligation to preserve goods, 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). See Higher Court [Appellate Court] in Ljubljana, Slovenia, 14 December 2005 (Door and door jamb case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051214sv.html> (where a seller did not wish to take back delivered goods (doors and door jambs) after the buyer had properly avoided the contract, the court, citing article 88 (1) (but not article 86), held that the buyer properly resold the goods in order to reduce storage costs); Appellate Court of Barcelona, Spain, 11 March 2002 (G & D Iberica S.A. v. Cardel), English translation available at <http://cisgw3.law.pace.edu/cases/020311s4.html>, where the court applied domestic law that allowed the deposit of the goods with the court for the benefit of the seller, suggesting that that under articles 86 and 87 CISG depositing the goods with the court may also be carried out for the benefit of the buyer.

²CLOUT case No. 867 [Tribunale di Forlì, Italy, 11 December 2008 (Mitas v. Solidea S.r.l)], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081211i3.html> (allowing the buyer to recover the reasonable costs of storing goods after

properly avoiding the contract; citing article 85 rather than article 86). 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 non-conforming goods back to a seller who had agreed to remedy the lack of conformity (see full text of the decision).

³CLOUT case No. 867 [Tribunale di Forlì, Italy, 11 December 2008 (Mitias v. Solidea S.r.l)], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/081211i3.html> (allowing the buyer to recover the reasonable costs of storing goods after properly avoiding the contract; citing article 85 rather than article 86); CLOUT case No. 304 [Arbitration Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7531)].

⁴CLOUT case No. 85 [U.S. 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 [U.S. 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).

⁵China International Economic and Trade Arbitration Commission, People's Republic of China, 6 June 1991, Unilex, English translation available on the Internet at www.cisg.law.pace.edu/cisg/wais/db/cases2/910606c1.html.

⁶Bulgarian Chamber of Commerce and Industry, Bulgaria, 12 February 1998 (Arbitral award No. 11/1996) (Steel ropes case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/980212bu.html>.

⁷CLOUT 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, the tribunal awarded seller compensation for those expenses.¹ Similarly, article 87 has been cited in support

of a buyer's recovery of the cost of storing delivered goods in a warehouse after the buyer justifiably avoided the contract.² Another arbitral tribunal held a breaching buyer liable for the seller's costs of storing the goods in a warehouse; however, 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 on the grounds that 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 any reference to article 87.⁵ In a case where a buyer sought interim relief to prevent re-sale of a key component of industrial machinery, which the seller had retained after the buyer failed to make full payment, the court held that the seller was entitled to move the component to a warehouse, but the seller would itself have to advance the storage expenses because article 87 could not be relied upon in a proceeding involving interim measures of protection.⁶ Another court referred to articles 86 and 87 in determining that a buyer who is bound to take steps to preserve the goods may deposit such goods with the court.⁷

Notes

¹CLOUT case No. 141 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 25 April 1995 (Arbitral award No. 192/1994)], also in Unilex.

²CLOUT case No. 304 [Arbitration Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7531)] (see full text of the decision).

³CLOUT case No. 104 [Arbitration Court of the International Chamber of Commerce, 1993 (Arbitral award No. 7197)] (see full text of the decision).

⁴CLOUT case No. 293 [Schiedsgericht der Hamburger freundschaftlichen Arbitrage, Germany, 29 December 1998] (see full text of the decision).

⁵CLOUT case No. 85 [U.S. 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 [U.S. 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).

⁶CLOUT 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).

⁷Appellate Court of Barcelona, Spain, 11 March 2002 (*G & D Iberica S.A. v. Cardel*), English translation available at <http://cisgw3.law.pace.edu/cases/020311s4.html>. The court applied domestic law that allowed the deposit of the goods with the court for the benefit of the seller, suggesting that that under articles 86 and 87 CISG depositing the goods with the court may also be carried out for the benefit of the buyer.

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. It has been held in several decisions that a party bound to preserve goods is entitled under article 88 (1) 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 In another case, the buyer was found to have the right to sell scaffold fittings when, after the goods were delivered, the buyer rightfully avoided the contract, thus assuming the obligation to preserve the goods on behalf of the seller pursuant to article 86, and the seller refused to take the goods back.² And where a seller did not wish to take back delivered goods (doors and door jambs) after the buyer had properly avoided the contract, the court, citing article 88 (1), held that the buyer properly resold the goods in order to reduce storage costs.³ In another decision, a buyer had rightfully avoided a contract for jeans that proved non-conforming, and on 22 September 1993 the buyer made the jeans available to the seller for their return, but the seller did not take them back; the court approved the buyer's sale of the goods, which took place between April 1995 and November 1996.⁴ The court also approved the buyer's actions in disposing of a portion of the jeans that were infected with fungus; the buyer had resold them through "special sales" of second-quality goods, and the seller had been notified that the buyer would initiate the sale in order to recoup its costs unless the seller suggested another solution.⁵ Where a buyer's refusal to pay the

purchase price or to take delivery of the goods amounted to a breach of contract, a court held that the seller was entitled to stop delivery of the goods and to take measures to mitigate the loss by reselling the goods.⁶

3. In another decision, which was reached under applicable domestic law but which the tribunal justified by reference to article 88 of the CISG, an arbitral tribunal approved a party's decision to dispose of some of the 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."⁷ Specifically, the tribunal found that the seller proved it had made reasonable efforts in reselling the goods by showing that it had sought buyers all over the world, also offering a reasonable explanation as to 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 of the equipment, the buyer had never responded to the sales notices. It was clear that the buyer was not genuinely interested in receiving delivery of the goods and had not been prejudiced.⁸ 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.⁹ 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): 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).¹⁰

4. 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, and the buyer sought interim relief seeking to prevent the seller from selling the component to any third party, the court recognized that article 88 (1) would authorize the seller to sell the goods if the buyer had unreasonably delayed paying the price.¹¹ However, the court issued the order against resale on the grounds that it was not bound by article 88 of the CISG in an action for interim relief.¹² An arbitral tribunal found that a seller was authorized to resell undelivered goods under article 88 (1) (and thus to recover the expenses of preserving and reselling the goods) only 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).¹³ Another court held that the buyer was not entitled to sell the goods under article 88 (1) (unless it could do so at a price higher than the contract price with the seller) where the seller, in response to the buyer's notice of non-conformity, had sought return of the goods.¹⁴ In another case, a court held that the seller was entitled to resell the goods where the buyer, based on an improper rejection of the goods, had unreasonably delayed acceptance of the goods.¹⁵

ARTICLE 88 (2): A PRESERVING PARTY'S OBLIGATION TO TAKE REASONABLE MEASURES TO SELL THE GOODS TO A THIRD PARTY

5. 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 totaling 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.¹⁶ On the other hand, several decisions have involved circumstances that were deemed not to trigger an obligation to attempt to resell goods under article 88 (2). Thus in issuing an interim order forbidding an aggrieved seller from reselling a key component of industrial machinery, which the seller had retained because of the buyer's failure to pay the full contract price, the court noted that article 88 (2) would not require the seller to sell the component because it was not subject to rapid deterioration.¹⁷ 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.¹⁸ In another case, the seller allowed part of the goods, which were subject to rapid deterioration, to spoil, and gave the rest away to charitable organizations, without furnishing any evidence of inability to resell the goods; the court found that, having failed in its duty to resell, the seller was entitled to recover only 25 per cent of the contract price.¹⁹

ARTICLE 88 (3): DISPOSITION OF THE PROCEEDS OF SALE

6. Several decisions have dealt with the allocation of the proceeds of a sale under article 88. 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 is bound to "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.²⁰ Similarly, a seller who justifiably resold goods that the buyer had refused to receive was held entitled to be reimbursed for the expenses of "eliminating the defects in the goods, which arose at the time of storage, since without eliminating such defects the [seller] would have not been able to sell the goods."²¹ A buyer who rightfully avoided the contract and justifiably sold the goods after the seller refused to take them back was found to have submitted exhibits that adequately documented the total profit the buyer gained from the sale, and the seller had not made specific objection to the documentation; the buyer, however, was denied the right to deduct other expenses (agent costs and carriage costs) because it failed to prove it was entitled to such deductions.²² 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) refers only to a selling party's right to deduct reasonable costs of preserving and selling the goods from the sale proceeds, the court suggested that the CISG contained a general principle within the meaning of article 7 (2) that permitted reciprocal claims arising under the CISG (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 settle whether the buyer's right to set off its damage claim against its liability for the balance of the sale proceeds derived directly from the CISG or from the applicable domestic law that led to the same result.²³

Notes

¹Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 25 April 1995 (Arbitral award No. 142/94) (Trucks case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/950425r2.html>.

²CLOUT case No. 304 [Arbitration Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7531 (Scaffold fittings case)) (see full text of the decision).

³Higher Court [Appellate Court] in Ljubljana, Slovenia, 14 December 2005 (Door and door jamb case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/051214sv.html>.

⁴CLOUT case No. 348 [Oberlandesgericht Hamburg, Germany, 26 November 1999 (Jeans case)] (see full text of the decision).

⁵Ibid. (see full text of the decision).

⁶Second Intermediate People's Court of Shanghai, People's Republic of China, 22 June 1998 (China Yituo Group Company v. Germany Gerhard Freyso LTD GmbH & Co. KG), available on the Internet at http://aff.whu.edu.cn/cisgchina/en/news_view.asp?newsid=64, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/980622c1.html>.

⁷Iran/US Claims Tribunal, 28 July 1989 (Watkins-Johnson Co., Watkins-Johnson Ltd. v. Islamic Republic of Iran), Unilex.

⁸Ibid.

⁹CLOUT case No. 485 [Audiencia Provincial de Navarra, Spain, 22 January 2003].

¹⁰CLOUT case No. 540 [Oberlandesgericht Graz, Austria, 16 September 2002].

¹¹Audiencia Provincial de Navarra, Spain, 22 January 2003 (Goods case). 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.

¹²CLOUT case No. 96 and No. 200 [Tribunal Cantonal Vaud, Switzerland, 17 May 1994] (both abstracts dealing with the same case). Oberlandesgericht Graz, Austria, 16 September 2002 (Garments case).

¹³CLOUT case No. 293 [Schiedsgericht der Hamburger freundschaftlichen Arbitrage, Germany, 29 December 1998] (see full text of the decision).

¹⁴Foreign Trade Arbitration Court attached to the Yugoslav Chamber of Commerce in Belgrade, Serbia, 25 May 2001 (Berries case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/010525sb.html>.

¹⁵U.S. District Court, Eastern District of California, United States, 19 May 2008 (The Rice Corporation v. Grain Board of Iraq). available on the Internet at <http://cisgw3.law.pace.edu/cases/080519u1.html>.

¹⁶China International Economic and Trade Arbitration Commission, People's Republic of China, 6 June 1991, Unilex. 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.

¹⁷CLOUT 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).

¹⁸CLOUT case No. 361 [Oberlandesgericht Braunschweig, Germany, 28 October 1999] (see full text of the decision).

¹⁹Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 10 February 2000, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/000210r1.html>.

²⁰Iran/US Claims Tribunal, 28 July 1989 (Watkins-Johnson Co., Watkins-Johnson Ltd. v. Islamic Republic of Iran), Unilex.

²¹Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 25 April 1995 (Arbitral award No. 142/94) (Trucks case), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/950425r2.html>.

²²CLOUT case No. 348 [Oberlandesgericht Hamburg, Germany, 26 November 1999] (see full text of the decision).

²³Ibid. (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).

Article 89

The Secretary-General of the United Nations is hereby designated as the depositary for this Convention.

OVERVIEW

1. Consistent with the custom for conventions prepared by the United Nations, article 89 designates the Secretary-General of the United Nations as the depositary. This article does not describe the duties of the Secretary-General; however, the Convention does provide for the functions and obligations of the depositary in other articles, including articles 91 (4), 93 (2), 97 (2) and (4), 99 (2) and (6), and 101 (1) and (2).
2. The depositary's obligations are also listed in Part VII (Depositaries, Notifications, Corrections and Registration) of the Vienna Convention on the Law of Treaties (1969),

articles 76-80. Article 77 (1) of the Law of Treaties lists the functions of the depositary.

3. Obligations and functions of the depositary are performed by: Depositary Functions of the Treaty Section, Office of Legal Affairs, United Nations, New York, NY 10017.
4. The depositary has published rectifications of the authentic Arabic and Russian text versions of the Convention.¹
5. Court decisions and arbitral awards referring to article 89 have not been identified.

Notes

¹Depositary notification C.N.862.1998.TREATIES-5 of 19 February 1999 (procès-verbal of rectification of the authentic Arabic text); C.N.233.2000.TREATIES-2 of 27 April 2000 (rectification of the Russian authentic text); and C.N.1075.2000.TREATIES-5 of 1 December 2000 [rectification of the original of the Convention (Arabic authentic text)].

Article 90

This Convention does not prevail over any international agreement which has already been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the parties have their places of business in states parties to such agreement.

OVERVIEW

1. Article 90 aims at providing priority to other international agreements that concern matters covered by the Convention. Specifically, Article 90 aids in the determination of the governing law for a dispute over a contract for the international sale of goods, or some aspect thereof, by providing that the Convention shall not prevail over any international agreement “which has already been made or may be entered into...” and which concerns the same matters covered by the Convention, as long as the parties’ places of business are in States party to such agreement.¹

2. Several cases have held that when an international agreement existed prior to the Convention coming into force, priority is given to the treaty already in place with regard to any overlapping substantive issues.² In order for the international agreement to supplant the Convention, both of the contracting parties must have their place of business in States signatory to the international agreement.³

THE PROTOCOL ON THE GENERAL CONDITIONS OF DELIVERY BETWEEN THE USSR AND THE PEOPLE’S REPUBLIC OF CHINA

3. There are a number of arbitral awards rendered in cases between parties from the Russian Federation and the People’s Republic of China in which the applicability of the Protocol on the General Conditions of Delivery between the USSR and the People’s Republic of China (“Protocol”) in relation to the Convention is addressed. The Protocol⁴ was signed by both States prior to the Convention becoming effective in either country. In none of the cases did the contract of sale include a choice of law provision. Acknowledging that, by virtue of article 1 (1) CISG, the Convention

would normally be applicable as both parties are Contracting States, the tribunals gave priority to the Protocol on matters otherwise covered by the Convention pursuant to article 90.⁵

1955 HAGUE CONVENTION ON THE LAW APPLICABLE TO INTERNATIONAL SALE OF GOODS

4. The cases concerning the relationship between the CISG and the Convention on the Law Applicable to Contracts for the International Sale of Goods (1955 Hague Convention) have held that, as the rules covered by the two are not overlapping in scope, there is no issue regarding which international agreement shall prevail.⁶ The CISG provides substantive rules for the sale of goods and the 1955 Hague Convention provides, in relevant part, for conflict of law issues. Article 3 of the Hague Convention of 15 June 1955 provides that, unless the parties agreed otherwise in the contract, the law of the seller’s country is applicable to the dispute involving the contract for the sale of goods.⁷ See the discussion in the Digest for article 1 regarding “Indirect Applicability.”

1980 ROME CONVENTION ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS

5. It has been held that there is no conflict in the context of article 90 between the Rome Convention of 19 June 1980⁸ (regarding applicable law) and the CISG (regarding uniform material law), and there is therefore no reason to determine which international agreement prevails.⁹ See the discussion in the Digest for article 1 regarding “Indirect Applicability.”

Notes

¹Hungary has filed certain remarks under article 90 providing that it “considers the General Conditions of Delivery of Goods between Organizations of the Member Countries of the Council for Mutual Economic Assistance/GCD CMEA...to be subject to the provisions of article 90 of the Convention.” (16 June 1983) UN Treaty Collection, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=X-10&chapter=10&lang=en#EndDec. There are currently no identified cases clarifying the application these remarks.

²Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russian Federation, 5 July 2006, information available on the Internet at <http://cisgw3.law.pace.edu/cases/060705r1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russian Federation, 14 April 1998, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/980414r1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of

Commerce, Russian Federation, 2 October 1998, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/981002r1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russian Federation, 24 January 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050124r1.html> (regarding calculation of interest); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russian Federation 22 March 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020322r1.html>.

³See the Digest for article 10 regarding place of business.

⁴Also referred to in translated arbitral awards as the GTS USSR-PRC, GTB, and the General Principle of Deliveries between the Soviet Union and the People's Republic of China.

⁵See also Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russian Federation, 5 July 2006, information available on the Internet at <http://cisgw3.law.pace.edu/cases/060705r1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russian Federation, 14 April 1998, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/980414r1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russian Federation, 2 October 1998, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/981002r1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russian Federation, 24 January 2005, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/050124r1.html> (regarding calculation of interest); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russian Federation 22 March 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020322r1.html>.

⁶Tribunal commercial de Bruxelles, Belgium, 5 October 1994, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/941005b1.html>; CLOUT case No. 647 [Suprema Corte di Cassazione, Italy, 19 June 2000], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/000619i3.html>.

⁷Tribunal commercial de Bruxelles Brussels, Belgium, 5 October 1994, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/941005b1.html>; CLOUT case No. 647 [Suprema Corte di Cassazione, Italy, 19 June 2000], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/000619i3.html>.

⁸For the text of this Convention, see Official Journal L 266, 9 October 1980, 1 et seq.

⁹Tribunal commercial de Bruxelles, Belgium, 5 October 1994, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/941005b1.html>; CLOUT case No. 647 [Suprema Corte di Cassazione, Italy, 19 June 2000], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/000619i3.html> (further providing that with regard to the International Sales of Moveable Goods, the Hague Convention of 15 June 1955 prevails over the Rome Convention of June 1980).

Article 91

(1) This Convention is open for signature at the concluding meeting of the United Nations Conference on Contracts for the International Sale of Goods and will remain open for signature by all States at the Headquarters of the United Nations, New York until 30 September 1981.

(2) This Convention is subject to ratification, acceptance or approval by the signatory states.

(3) This Convention is open for accession by all States which are not signatory States as from the date it is open for signature.

(4) Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

OVERVIEW

1. The Convention was opened for signature at the concluding meeting of the United Nations Conference on Contracts for the International Sale of Goods held in Vienna from 10 March to 11 April 1980, and remained open for signature at the United Nations Headquarters in New York until 30 September 1981. Under article 91 (2) all states that signed the Convention were able to ratify, accept or approve it. Only after acceptance, ratification or approval does a State become a Contracting State. By 30 September 1981, 18 States signed the Convention.¹ All of the signatory States, except Ghana and Venezuela, subsequently ratified, accepted or approved the Convention.

2. Article 91 (3) grants the right to all States that are not signatory states to accede to the Convention.² Ratification, acceptance, approval and accession have the same effect under the Convention. Many more States beyond the original signatories have acceded to the Convention.³

3. Article 91 (4) is self-explanatory. Obligations and functions of the depositary are performed by: Depositary Functions of the Treaty Section, Office of Legal Affairs, United Nations, New York, NY 10017. See also the discussion of the depositary's functions and obligations in the Digest for article 89.

4. Court decisions referring to article 91 are extremely rare.⁴

Notes

¹The 18 Signatory States are: Austria, Chile, People's Republic of China, Denmark, Finland, France, Germany, Ghana, Hungary, Italy, Lesotho, Netherlands, Norway, Poland, Singapore, Sweden, United States of America and Venezuela (Bolivarian Republic of). The Convention was also signed by three additional states which no longer exist: the former German Democratic Republic signed the Convention on 13 August 1981 and ratified on 23 February 1989, with the Convention entering into force for the former German Democratic Republic on 1 March 1990; the former Czechoslovakia signed the Convention on 1 September 1981 and deposited an instrument of ratification on 5 March 1990, with the Convention entering force for the former Czechoslovakia on 1 April 1991; the former Yugoslavia signed and ratified the Convention on 11 April 1980 and 27 March 1985, respectively, with the Convention entering into force for the former Yugoslavia on 1 April 1986.

²Non-member States may accede to the Conventions as well. See Vienna Convention on the Law of Treaties, article 6.

³For a list of Contracting States on the Internet, see the website for the United Nations Commission on International Trade Law (UNCITRAL) at www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html.

⁴For a decision that cites article 91 (4), see CLOUT case No. 170, [Landgericht Trier, Germany, 12 October 1995], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/951012g1.html>. For a decision for which article 91 appears relevant, see Higher Court in Koper, Slovenia, 4 May 1993, <http://cisgw3.law.pace.edu/cases/930504sv.html>.

Article 92

(1) A Contracting State may declare at the time of signature, ratification, acceptance, approval or accession that it will not be bound by Part II of this Convention or that it will not be bound by Part III of this Convention.

(2) A Contracting State which makes a declaration in accordance with the preceding paragraph in respect of Part II or Part III of this Convention is not to be considered a Contracting State within paragraph (1) of article 1 of this Convention in respect of matters governed by the Part to which the declaration applies.

OVERVIEW

1. Article 92 (1) of the Convention permits a State to make a declaration at the time of signature, ratification, acceptance, approval or accession that it will not be bound by Part II (formation of the contract) or Part III (obligations under the contract) of the Convention.

2. Sweden made an article 92 declaration providing that, “[w]ith reference to article 92, Sweden will not be bound by Part II of the Convention (Formation of the Contract).” (15 December 1987).¹ In October 2009, the Ministry of Justice of Sweden announced it would adopt Part II by withdrawing this article 92 declaration.²

3. Norway made an article 92 declaration providing that, “[i]n accordance with article 92, paragraph (1) Norway will not be bound by Part II of this Convention (Formation of the Contract).” (20 July 1988).³ At the time this is written, Norway is considering withdrawing its article 92 declaration.⁴

4. Finland made an article 92 declaration providing that, “Finland will not be bound by Part II of the Convention.” (15 December 1987).⁵ In October 2009 the Ministry of Justice of Finland announced that Finland would adopt Part II by withdrawing its article 92 declaration.⁶

5. Denmark made an article 92 declaration providing that, “Denmark will not be bound by Part II of the Convention.” (14 February 1989).⁷ In October 2009 the Ministry of Justice of Denmark announced that Denmark would adopt Part II and withdraw its article 92 declaration.⁸

6. See article 97 regarding the withdrawal of declarations of reservations, and the effective date of such withdrawals.

7. Article 92 (2) modifies the notion of what constitutes a Contracting State by providing that a State that has made a declaration under article 92 (1) is not a Contracting State as regards the Part which it has excluded by its declaration. Accordingly, as regards the excluded Part the Convention is not applicable via article 1 (1) (a) since both parties are not from Contracting States with regard to the excluded Part.⁹ Rather, whether the Part of the Convention subject to the declaration applies can be determined by article 1 (1) (b)—

i.e., by applying the rules of private international law of the forum (assuming that the forum State has not made an article 95 declaration).¹⁰ It is generally held that if the rules of private international law lead to the law of the Contracting State that has not made an article 92 declaration, the Part of the Convention subject to the other State’s declaration is applicable by virtue of article 1 (1) (b).¹¹ However, the possible application of article 1 (1) (b) has sometimes been overlooked.

8. In one case, in which one party was from a State that had made an article 92 declaration excluding the applicability of Part II of the Convention (and the other party came from a Contracting State without such a declaration), a Court applied the domestic law of the forum because the parties did not raise the Convention’s possible applicability.¹²

9. One case held that even if a party is from a Contracting State that has taken a declaration not to be bound by Part II, a contract may still be concluded if mutual consensus is reached by other means, even if it not “geared to the applicable domestic law.”¹³ In other words, “[a] contract may thus be validly concluded, provided that the conduct by the parties sufficiently demonstrates a consensus and thus the intention to enter into a binding contract and that the content of their agreement is similar to contracts concluded under article 14 *et seq.* CISG.”¹⁴ Thus the court relied on the Convention’s articles in Part I to determine whether a contract was concluded.

10. In one case, the Court faced the issue of whether the United States parol evidence rule was applicable when domestic law (the law of the state of Illinois) governed contract formation issues, and the Convention was otherwise applicable (one party was from a Contracting State that excluded Part II of the Convention via article 92; the other party was from a Contracting State that had not made an article 92 declaration).¹⁵ The Court held that issues of parol evidence are addressed by article 8 of the Convention and not by the contract formation provisions in Part II. As neither Contracting State had declared they were not bound by Part I, the Court held that the Convention—and not domestic law—governed the parol evidence issue in the case.

Notes

¹United Nations Convention on Contracts for the International Sale of Goods, 11 April, 1980, 1489 U.N.T.S. 3, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&lang=en. See also CLOUT case No. 121 [Appellate Court, Frankfurt, 4 March 1994], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/940304g1.html> (overlooking the article 92 declaration made by Sweden and applying the Convention to contract formation issues).

²Sweden, in CISG: Table of Contracting States, available on the Internet at www.cisg.law.pace.edu/cisg/countries/cntries-Sweden.html.

³United Nations Convention on Contracts for the International Sale of Goods, 11 April, 1980, 1489 U.N.T.S. 3, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&lang=en

⁴Norway, in CISG: Table of Contracting States, available on the Internet at www.cisg.law.pace.edu/cisg/countries/cntries-Norway.html.

⁵United Nations Convention on Contracts for the International Sale of Goods, 11 April, 1980, 1489 U.N.T.S. 3, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&lang=en

⁶Finland, in CISG: Table of Contracting States, available on the Internet at www.cisg.law.pace.edu/cisg/countries/cntries-Finland.html.

⁷United Nations Convention on Contracts for the International Sale of Goods, 11 April, 1980, 1489 U.N.T.S. 3, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&lang=en. See also CLOUT case No. 362 [Oberlandesgericht Naumburg, Germany, 27 April 1999] (overlooking the article 92 reservation made by Denmark and applying the Convention to contract formation issues).

⁸Denmark, in CISG: Table of Contracting States, available on the Internet at www.cisg.law.pace.edu/cisg/countries/cntries-Denmark.html.

⁹Arbitration Court of the International Chamber of Commerce, 1999 (Arbitral award No. 10274), available on the Internet at <http://cisgw3.law.pace.edu/cases/990274i1.html> (“with regard to the issue of the formation of the alleged contracts (and only with regard to this issue), Danish law (without incorporation of the CISG applies”; “The obligations under the alleged contracts and the contract remedies are generally governed by the CISG [as no Part III reservation was made by either Contracting State]”); CLOUT case No. 997 [Sø og Handelsretten, Denmark, 31 January 2002] (Dr. S. Sergueev Handelsagentur v. DAT-SCHAUB A/S), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/020131d1.html> (“[Seller] stated that the question of which contract the parties had made was to be decided by the general rules of Danish law, as Denmark has made a declaration under Article 92 reserving out of the contract formation provisions of the CISG. Otherwise it is agreed that the CISG applies.”); Landgericht Flensburg, Germany, 19 January 2001, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/010119g1.html> (court held the Convention was the applicable law, as the dispute did not concern Part II of the Convention); Corte de Appello di Milano, Italy, 23 January 2002, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/010123i3.html>; CLOUT case No. 201, [Richteramt Laufen des Kantons Berne, Switzerland, 7 May 1993], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/930507s1.html>; U.S. District Court, New Jersey, United States, 15 June 2005 (Valero Marketing v. Greeni Oy), available on the Internet at <http://cisgw3.law.pace.edu/cases/050615u1.html> (“[t]he CISG doesn’t govern in this matter with respect to contract formation and thus with respect to the effect to be given to [Buyer’s] confirmation designating New York law”; “[B]ecause Finland is not a signatory to Part II of the CISG, the CISG does not govern the effect of the choice of law provision contained in [Buyer’s] written confirmation.”); Landgericht Bielefeld, Germany, 12 December 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/031212g1.html>.

¹⁰CLOUT case No.228 [Oberlandesgericht Rostock, Germany, 27 July 1995], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/950727g1.html> (“...Denmark had made a reservation under article 92(2) CISG such that it was not bound by Part II (Formation) of the CISG. Therefore, under the German rules of private international law, the formation of the parties’ contract was governed by Danish law...”); CLOUT case no. 143 [Fovarosi Biroasag Budapest, Hungary, 21 May 1996], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/960521h1.html>.

¹¹CLOUT case No. 301, [Arbitration Court of the International Chamber of Commerce, 1992], available on the Internet at <http://cisgw3.law.pace.edu/cases/927585i1.html> (“Finland has made a reservation upon ratification, declaring that it would not be bound by Part II of the Convention. The conflict of laws rules expressed in the 1955 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods (which both States are signatories) led to the application of Italian law, i.e., the Convention, including Part II”); CLOUT case No 309 [Østre Landsret, Denmark, 23 April 1998 (Elinette Konfektion Trading ApS v. Elodie S.A.)], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/980423d1.html>.

¹²CLOUT case No. 612, [U.S. Court of Appeals for the Third Circuit, United States, 20 June 2003 (Standard Bent Glass Corp v. Glassrobots Oy)], available on the Internet at <http://cisgw3.law.pace.edu/cases/030620u1.html> (“Because the parties have not raised the CISG’s applicability to this dispute, we decline to address it here” (footnote 7)).

¹³CLOUT case No. 134 [Oberlandesgericht Munchen, Germany, 8 March 1995], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/950308g1.html>.

¹⁴Ibid.

¹⁵CLOUT case No. 419 [U.S. District Court, Northern District of Illinois, United States, 27 October 1998 (Mitchell Aircraft Spares v. European Aircraft Service)], available on the Internet at <http://cisgw3.law.pace.edu/cases/981027u1.html>.

Article 93

- (1) If a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.
- (2) These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.
- (3) If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.
- (4) If a Contracting State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State.

OVERVIEW

1. Article 93 enables States to restrict the application of the Convention to some of its territorial units, thereby excluding other territorial units from the Convention's application. This enables federal States to accede to the Convention for some territorial units when otherwise legally restricted to apply it to all their territorial units.
2. Australia,¹ Canada,² Denmark³ and New Zealand⁴ have made declarations pursuant to Article 93.
3. By virtue of article 93 (1) and article 93 (4), if a declaration is not made restricting the Convention's applicability to select territorial units, the Convention will extend to all territorial units of that State. Otherwise, if an article 93 declaration is made, a territory is not considered a Contracting State (for purposes of article 1 (1) (a)) unless so provided by the declaration.
4. Article 93 (2) is self-explanatory. See also the discussion of the depositary's functions and obligations in the Digest for article 89.
5. If a place of business is within a territorial unit that the State has declared will not be bound to the Convention under article 93 (1), the place of business is not considered within a Contracting State under article 93 (3). As such, applicability of the Convention cannot be established via article 1 (1) (a). Regarding issues surrounding multiple places of business, see the discussion in the Digest for article 10.
6. A declaration made pursuant to article 93 (1) must be made at the time of signature,⁵ ratification, acceptance, approval or accession, and may be amended at any time by submitting another declaration.⁶

PEOPLE'S REPUBLIC OF CHINA AND HONG KONG

7. Prior to the retrocession of Hong Kong to the People's Republic of China on 1 July 1997, the Convention did not apply to Hong Kong. After the retrocession (under which Hong Kong is now considered a Special Administrative Zone of China with a different legal system), the People's Republic of China deposited with the Secretary General of the United Nations a declaration announcing the conventions to which China was a party and which thereafter should apply to Hong Kong.⁷ The CISG was not on this list.
8. There is a division among court decisions as to whether China's declaration satisfies the requirements to constitute an article 93 (1) declaration, thereby excluding application of the Convention to Hong Kong. Some decisions have held that China's declaration as it relates to the Convention amounts to an article 93 declaration,⁸ i.e., as Hong Kong is not listed as a territorial unit to which the Convention applies, the Convention is not applicable to disputes between parties from Hong Kong (a non-contracting "State") and another Contracting State (China has also made an article 95 reservation, excluding the application of article 1 (1) (b)). Other cases have held, based on the interpretation of article 93 (1) in conjunction with article 93 (4), that China's declaration does not preclude the applicability of the Convention to disputes between parties from Hong Kong and another Contracting State.⁹ Under article 93 (1) a Contracting State must make an affirmative declaration as to which territorial units the Convention will apply (which was not done in China's declaration to the United Nations). Absent such a declaration, article 93 (4) automatically extends the Convention to all the territorial units, including Hong Kong.

Notes

¹“The Convention shall apply to all Australian States and mainland territories and to all external territories except the territories of Christmas Island, the Cocos (Keeling Islands) and the Ashmore and Cartier Islands.” http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=X-10&chapter=10&lang=en#10.

²“The Government of Canada declares, in accordance with article 93 of the Convention that the Convention will extend to Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario, Prince Edward Island and the Northwest Territories.” 9 April 1992. “The Convention shall also extend to Quebec and Saskatchewan.” 29 June 1992. “The Convention applies also to the Territory of the Yukon.” 18 June 2003. “The Government of Canada declares, in accordance with Article 93 of the Convention, that in addition to the provinces of Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island, Quebec and Saskatchewan, as well as the Northwest Territories and the Yukon Territory, the Convention shall extend to the Territory of Nunavut. The Government of Canada also declares that the declaration made at the time of its accession to the Convention on April 23, 1991, the declaration deposited on April 9, 1992, the declaration deposited on June 29, 1992 and the declaration deposited on July 31, 1992, remain in effect.” http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=X-10&chapter=10&lang=en#10.

³Upon ratification Denmark declared that the Convention shall not apply to the Faroe Islands and Greenland. United Nations Convention on Contracts for the International Sale of Goods, 11 April, 1980, 1489 U.N.T.S. 3, see Note 10. Available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=X-10&chapter=10&lang=en.

⁴New Zealand acceded to the Convention with a declaration of non-application to the Cook Islands, Niue and Tokelau (22 September 1994) United Nations Convention on Contracts for the International Sale of Goods, 11 April, 1980, 1489 U.N.T.S. 3, see Note 10. Available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=X-10&chapter=10&lang=en.

⁵Article 97 (1) provides that “[d]eclarations made under this Convention at the time of signature are subject to confirmation upon ratification, acceptance or approval.

⁶See *infra* note 2.

⁷Letter of notification of Treaties Applicable to Hong Kong after 1 July 1997, Deposited by the Government of the People’s Republic of China with the Secretary-General of the United Nations, June 20, 1997, 36 I.L.M 1675.

⁸CLOUT case No. 1030 [Cour de Cassation, France, 2 April 2008], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/080402f1.html> (“[T]he People’s Republic of China has effectuated with the depositary of the Convention a formality equivalent to which is provided for in article 93 CISG. Consequently, the CISG is not applicable to the special administrative region of Hong Kong.”). See also U.S. District Court, Eastern District of Tennessee, United States, 20 October 2010 (America’s Collectibles Network, Inc. v. Timlly (HK), 746 F. Supp. 2d 914), available on the Internet at <http://cisgw3.law.pace.edu/cases/101020u1.html>; U.S. District Court, Northern District of Georgia, United States, 17 December 2009 (Innotex Precision Limited v. Horei Image Products, Inc.), available on the Internet at <http://cisgw3.law.pace.edu/cases/091217u1.html> (“The CISG was not included among the 127 listed treaties [on the list], indicating that the Chinese Government did not intend to extend the CISG to Hong Kong.”); Hubei High People’s Court, People’s Republic of China, 19 March 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030319c1.html> (“Hong Kong is not a Contracting State of the CISG. Therefore the CISG is not applicable.”).

⁹U.S. District Court, Northern District of Illinois, United States, 3 September 2008 (CAN Int’l, Inc. v. Guangdong Kelon Electronical Holdings et al.), available on the Internet at <http://cisgw3.law.pace.edu/cases/080903u1.html> (“In the absence of such a declaration [pursuant to article 93], Article 93 (4) automatically extends the CISG to China’s territorial units, including Hong Kong.”); U.S. District Court, District of Arkansas, United States, 23 December 2009 (Electrocraft Arkansas, Inc. v. Electric Motors, Ltd. et al.), available on the Internet at <http://cisgw3.law.pace.edu/cases/091223u1.html>, But see U.S. District Court, Arkansas, United States, 2 April 2010] (Electrocraft Arkansas, Inc. v. Super Electric Motors, Ltd.), available on the Internet at <http://cisgw3.law.pace.edu/cases/100402u1.html> (inviting counsel to revisit question of whether Hong Kong is a Contracting State under the Convention).

Article 94

(1) Two or more Contracting States which have the same or closely related legal rules on matters governed by this Convention may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States. Such declarations may be made jointly or by reciprocal unilateral declarations.

(2) A Contracting State which has the same or closely related legal rules on matters governed by this Convention as one or more non-Contracting States may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States.

(3) If a State which is the object of a declaration under the preceding paragraph subsequently becomes a Contracting State, the declaration made will, as from the date on which the Convention enters into force in respect of the new Contracting State, have the effect of a declaration made under paragraph (1), provided that the new Contracting State joins in such declarations or makes a reciprocal unilateral declaration.

OVERVIEW

1. Article 94 (1) enables Contracting States that have largely harmonized domestic legal rules on matters governed by the Convention to exclude application of the Convention, or parts thereof, to sales between parties located in those States; the exclusion may be accomplished via joint or reciprocal unilateral declarations.

2. When a Contracting State has the same or closely related rules on matters covered by the Convention as a non-contracting State, article 94 (2) enables the Contracting State to make a declaration that the Convention will not apply to contracts of sale or to their formation between a party that has a place of business in that Contracting State and a party that has a place of business in the non-contracting State. Regarding issues surrounding multiple places of business, see the Digest for article 10.

3. Pursuant to article 94 (3), if a non-contracting State that is identified in a declaration made under article 94 (2))

becomes a Contracting State, the article 94 (2) declaration will, as of the time the Convention enters into force in respect of the new Contracting State, have the same effect as a declaration made under article 94 (1), provided the new Contracting State joins the declaration made pursuant to 94 (2) or makes a reciprocal unilateral declaration.

4. To date Denmark,¹ Finland,² Norway,³ Sweden⁴ and Iceland⁵ have made article 94 declarations.

5. If there is an international agreement between two or more Contracting States that prevails over the applicability of the Convention via article 90, there is no need for the Contracting States to make article 94 declarations in order to preserve the other international agreement.

6. There are no time restrictions for declarations made pursuant to Article 94.

7. Court decisions and arbitral awards referring to article 94 have not been identified.

Notes

¹Denmark made an article 94 declaration providing that, “under paragraph 1 cf. paragraph 3 of article 94 that the Convention shall not apply to contracts of sale where one of the parties has his place of business in Denmark, Finland, Norway or Sweden and the other party has his place of business in another of the said States...[U]nder paragraph 2 of article 94 that the Convention is not to apply to contracts of sale where one of the parties has his place of business in Denmark, Finland, Norway or Sweden and the other party has his place of business in Iceland.” (14 February 1989). United Nations Convention on Contracts for the International Sale of Goods, 11 April, 1980, 1489 U.N.T.S. 3. Available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&lang=en.

²Finland made an article 94 declaration providing that, “[w]ith reference to Article 94, in respect of Sweden in accordance with paragraph (1) and otherwise in accordance with paragraph (2) the Convention will not apply to contracts of sale where the parties have their places of business in Finland, Sweden, Denmark, Iceland or Norway.” (15 December 1987). United Nations Convention on Contracts for the International Sale of Goods, 11 April, 1980, 1489 U.N.T.S. 3. Available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&lang=en.

³Identical reservation as the one made by Finland. United Nations Convention on Contracts for the International Sale of Goods, 11 April, 1980, 1489 U.N.T.S. 3. Available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&lang=en.

⁴Identical reservation as the one made by Finland. United Nations Convention on Contracts for the International Sale of Goods, 11 April, 1980, 1489 U.N.T.S. 3. Available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=X-10&chapter=10&lang=en.

⁵Iceland made an article 94 declaration providing that, “the Convention will not apply to contracts of sale or to their formation where the parties have their places of business in Denmark, Finland, Iceland, Norway or Sweden.” (12 March 2003). United Nations Convention on Contracts for the International Sale of Goods, 11 April, 1980, 1489 U.N.T.S. 3. Available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=X-10&chapter=10&lang=en.

Article 95

Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1) (b) of article 1 of this Convention.

OVERVIEW

1. A State's article 95 declaration, made at the time of the deposit of its instrument of ratification, acceptance, approval or accession of the Convention, excludes the application of the Convention via article 1 (1) (b)—i.e., if the rules of private international law lead to the law of a Contracting State. Accordingly, if there is a dispute between a party from a Contracting State that has made an article 95 declaration and a party located in a non-contracting State, the applicable law is determined based on the domestic conflict of laws rules. The declaration does not impact the application of the Convention between two Contracting States under article 1 (1) (a). [See the discussion in the Digest for article 1 for decisions and awards applying article 1 (1) (b) where an article 95 reservation was not taken by any relevant contracting country.]

2. The following States have made an Article 95 declaration:¹ the People's Republic of China, Czech Republic, Saint Vincent and the Grenadines, Singapore,² Slovakia, and the United States of America.³

APPLICATION OF ARTICLE 95 RESERVATION

3. There are several decisions in which one party was from a Contracting State that has made an article 95 declaration and the other party was from a non-Contracting State. As such, the Convention was not applicable via article 1 (1) (a). In the majority of these cases, the court or tribunal applied domestic conflict of law rules leading to the application of domestic sales law rather than the CISG.⁴

4. In one case between parties from a Contracting State and a non-Contracting State⁵ the Court ignored that the Contracting State made an article 95 declaration and applied the CISG pursuant to article 1 (1) (b).⁶

5. One court held that the Convention should not be applied in circumstances where the forum is in a non-Contracting State, the forum has determined that the applicable law is that of a Contracting State that has made an article 95 declaration, and the parties are from a non-Contracting and a Contracting State that has made an article 95 declaration.⁷

6. One court has indicated that an Article 95 declaration would not preclude application of the CISG where the parties agreed during the course of legal proceedings that the Convention would apply.⁸

Notes

¹For information on reservations to the Convention made by Contracting States, see www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html.

²See Sub-section 3 (2) of the Singapore Sale of Goods (United Nations Convention) Act: "Subparagraph (1) (b) of Article 1 of the Convention shall not have the force of law in Singapore and accordingly the Convention will apply to contracts of sale of goods only between those parties whose places of business are in different states when the States are Contracting States."

³Upon accession to the Convention in 1991 Canada made an article 95 declaration providing that its territorial unit of British Columbia would not be bound by Article 1(1) (b). In July 1992 this declaration was withdrawn.

⁴Supreme Court of the People's Republic of China, People's Republic of China, 20 July 1999 (Zheng Hong Li Ltd. Hong Kong v. Jill Bert Ltd), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/990720c1.html> (a contract between a buyer from Hong Kong and a seller from Switzerland designated the law of the People's Republic of China, which has made an article 95 declaration; although not expressly stated by the court, the Article 95 declaration likely was the basis for the application of domestic PRC Law on Economic Contracts); China International Economic and Trade Arbitration Commission, People's Republic of China, 24 December 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/041224c1.html> (because the seller was not from a Contracting State (Japan at the time) and the buyer was from a State that made an article 95 declaration (the People's Republic of China), the tribunal applied the domestic contract law of the People's Republic of China); CLOUT case no. 616 [U.S. District Court, Southern District of Florida, United States, 22 November 2002 (Impuls v. Psion-Teklogi)], available on the Internet at www.cisg.law.pace.edu/cisg/wais/db/cases2/021122u1.html; U.S. District Court, Western District of Washington, United States, 17 July 2006 (Prime Start Ltd. v. Maher Forest Products Ltd.), available on the Internet at <http://cisgw3.law.pace.edu/cases/060717u1.html>.

⁵At the time the contract was concluded the CISG was not in effect in Germany (the buyer's country).

⁶CLOUT case no. 49 [Oberlandesgericht Dusseldorf, Germany, 2 July 1993], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/930702g1.html>.

⁷Tokyo Chiho Saibansho, Japan, 19 March 1998, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/980319j1.html>.

⁸CLOUT case no. 280 [Oberlandesgericht Thuringer, Germany, 26 May 1998] (see full text of the decision), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/980526g1.html>.

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.

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 work together to permit a Contracting State to make a declaration that recognizes this policy: a reservation under article 96 operates, as provided in article 12,¹ 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.² Article 96, however, limits the availability of the declaration to those Contracting States whose legislation requires contracts of sale to be concluded in or evidenced by writing. To date Argentina,³ Armenia,⁴ Belarus,⁵ Chile,⁶ People's Republic of China,⁷ Hungary,⁸ Latvia,⁹ Lithuania,¹⁰ Paraguay,¹¹ Russian Federation,¹² and Ukraine¹³ have made article 96 declarations.¹⁴

SPHERE OF APPLICATION AND EFFECTS

2. Both the language and the drafting history of article 12 confirm that, under the provision, an article 96 declara-

tion 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.¹⁵

3. 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 96,¹⁶ but different views exist as to the further effects of such a declaration. According to one view, the mere fact that one party has its place of business in a State that made an article 96 declaration does not necessarily bring the form requirements of that State into play;¹⁷ instead, the applicable form requirements—if any—will depend on the rules of private international law ("PIL") 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.¹⁸ Another view is that, if one party has its relevant place of business in an article 96 reservatory State, writing requirements apply.¹⁹

Notes

¹As provided in the second sentence of article 12—and as confirmed by the drafting history of the provision, the text of article 6, and case law—article 12, unlike most provisions of the Convention, cannot be derogated from. See the Digest for article 12.

²For 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 of the Main Committee, 1981, 20.

³Effective 19 July 1983 upon accession.

⁴Effective 2 December 2008 upon accession.

⁵Effective 9 October 1989 upon accession.

⁶Effective 7 February 1990 upon ratification.

⁷Effective 11 December 1986 upon approval.

⁸Effective 16 June 1983 upon ratification.

⁹Effective 31 July 1997 upon accession.

¹⁰Effective 18 January 1995 upon accession.

¹¹Effective 13 January 2006 upon accession.

¹²Effective 16 August 1990 upon accession.

¹³Effective 3 January 1990 upon accession.

¹⁴Estonia made an article 96 declaration upon ratification of the Convention on 20 September 1983; however, on 9 March 2004 Estonia withdrew the declaration.

¹⁵See 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.

¹⁶See *Rechtbank van Koophandel Hassel*, Belgium, 2 May 1995, available on the Internet at www.law.kuleuven.be/ipr/eng/cases/1995-05-02.html, information in English available on the Internet at <http://cisgw3.law.pace.edu/cases/950502b1.html>; CLOUT case No. 534 [Oberster Gerichtshof, Austria, 17 December 2003], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/031217a3.html>; China International Economic & Trade Arbitration Commission, People's Republic of China, 6 September 1996, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/960906c1.html>; China International Economic & Trade Arbitration Commission, People's Republic of China, 31 December 1997, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/971231c1.html>; CLOUT case No. 770 [Economic & Trade Arbitration Commission, People's Republic of China, 29 March 1999] English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/990329c1.html>; CLOUT case No. 52 [Fovarosi Biroşag] Budapest, Hungary, 24 March 1992] English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/920324h1.html>.

¹⁷*Rechtbank Rotterdam*, Netherlands, 12 July 2001, *Nederlands Internationaal Privaatrecht*, 2001, No. 278, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/010712n1.html>; U.S. Court of Appeals for the Third Circuit, United States, 21 July 2010 (*Forestal Guarani, S.A. v. Daros International, Inc.*), available on the Internet at <http://cisgw3.law.pace.edu/cases/081007u1.html>.

¹⁸*Rechtbank Rotterdam*, Netherlands, 12 July 2001, *Nederlands Internationaal Privaatrecht*, 2001, No. 278, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/010712n1.html>; Hoge Raad, Netherlands, 7 November 1997, available on the Internet at www.unilex.info/case.cfm?pid=1&do=case&id=333&step=FullText, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/971107n1.html>; CLOUT case No. 52 [Fovárosi Biróşág, Hungary, 24 March 1992], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/920324h1.html>; *Comision para la Proteccion del Comercio Exterior de Mexico*, Mexico, 29 April 1996 (*Conservas La Costena v. Lanin*), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/960429m1.html>; U.S. Court of Appeals for the Third Circuit, United States, 21 July 2010 (*Forestal Guarani, S.A. v. Daros International, Inc.*), available on the Internet at <http://cisgw3.law.pace.edu/cases/081007u1.html> (applying choice-of-law rules from forum state to determine which form requirements govern claim).

¹⁹The High Arbitration Court of the Russian Federation, Russian Federation, 16 February 1998, information available on the Internet at <http://cisgw3.law.pace.edu/cases/980216r1.html>; *Rechtbank van Koophandel Hasselt*, Belgium, 2 May 1995, available on the Internet at www.law.kuleuven.be/ipr/eng/cases/1995-05-02.html, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/950502b1.html>; CLOUT case No. 534 [Oberster Gerichtshof], Austria, 17 December 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/031217a3.html>; China International Economic & Trade Arbitration Commission, People's Republic of China, 6 September 1996, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/960906c1.html>; China International Economic & Trade Arbitration Commission, People's Republic of China, 31 December 1997, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/971231c1.html>; Vysshii Arbitrazhnyi Sud Rossyiskoi Federatsii, Russian Federation, 25 March 1997, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/970325r1.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 16 February 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040216r1.html>; U.S. District Court, Southern District of Florida, United States, 19 May 2008 (*Zhejiang Shaoxing Yongli Pringing and Dyeing Co., Ltd v. Microflock Textile Group Corporation*), available on the Internet at <http://cisgw3.law.pace.edu/cases/080519u2.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 9 June 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040609r1.html>.

Article 97

(1) Declarations made under this Convention at the time of signature are subject to confirmation upon ratification, acceptance or approval.

(2) Declarations and confirmations of declarations are to be in writing and be formally notified to the depositary.

(3) A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary. Reciprocal unilateral declarations under article 94 take effect on the first day of the month following the expiration of six months after the receipt of the latest declaration by the depositary.

(4) Any State which makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal is to take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

(5) A withdrawal of a declaration made under article 94 renders inoperative, as from the date on which the withdrawal takes effect, any reciprocal declaration made by another State under that article.

OVERVIEW

1. Article 97 provides the process for States to enter declarations to the Convention in accordance with those authorized under article 98 of the Convention (i.e., articles 92-96). Article 97 (2) requires that declarations and confirmations of declarations are to be in writing and formally notified to the depositary. Obligations and functions of the depositary are performed by: Depositary Functions of the Treaty Section, Office of Legal Affairs, United Nations, New York, NY 10017. See article 89 for further explanation of the depositary's functions and obligations as related to the Convention.

2. Article 97 (3) provides when a declaration takes effect. A declaration enters into force the date the Convention is deemed to enter into force in a State. However, when a notification of a declaration is submitted to the depositary after the Convention enters into force within a State, the declaration will take effect the first day of the month following six months after receipt of the declaration by the depositary. Article 97 (3) further provides that reciprocal unilateral declarations (under article 94) take effect on the first day of the month following the expiration of six months after the receipt of the latest declaration by the depositary.

3. In accordance with article 97 (4), a State has the right to withdraw any declaration. The requirements for withdrawal

identified in article 97 (4) are self-explanatory. Article 97 (5) explains the impact of a withdrawal of a declaration made under article 94, providing that the article 94 withdrawal renders inoperative any reciprocal declaration made by another State under that article (as from the date on which the withdrawal takes effect).

4. On 31 July 1992 the Government of Canada, in accordance with article 97 (4) of the Convention, withdrew its article 95 declaration with respect to British Columbia, which had been made upon accession.

5. The Republic of Estonia, in accordance with article 97 (4) of the Convention, withdrew its 9 March 2004 article 96 declaration made in its instrument of ratification. The declaration had stated: "in accordance with Articles 12 and 96 of the United Nations Convention on Contracts for the International Sale of Goods 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 of 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 the Republic of Estonia."

6. Court decisions and arbitral awards referring to article 97 have not been identified.

Article 98

No reservations are permitted except those expressly authorized in this Convention.

OVERVIEW

1. Article 98 limits reservations to the Convention by States to those specifically authorized under the Convention. Declarations authorized under the Convention are stated in articles 92, 93, 94, 95 and 96.¹ Article 97 provides for the administrative formalities of such declarations and withdrawal of such declarations.
2. Court decisions and arbitral awards referring to article 98 have not been identified.

Notes

¹States may also make declarations not expressly provided for in the Convention via Article 19 of the Vienna Convention on the Law of Treaties (1969); the legal effect of such declarations, however, is determined by general international law.

Article 99

(1) This Convention enters into force, subject to the provisions of paragraph (6) of this article, on the first day of the month following the expiration of 12 months after the date of deposit of the tenth instrument of ratification, acceptance, approval or accession, including an instrument which contains a declaration made under article 92.

(2) When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the tenth instrument of ratification, acceptance, approval or accession, this Convention, with the exception of the Part excluded, enters into force in respect of that State, subject to the provisions of paragraph (6) of this article, on the first day of the month following the expiration of 12 months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

(3) A State which ratifies, accepts, approves or accedes to this Convention and is a party to either or both the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods done at The Hague on 1 July 1964 (1964 Hague Formation Convention) and the Convention relating to a Uniform Law on the International Sale of Goods (1964 Hague Sales Convention) shall at the same time denounce, as the case may be, either or both the 1964 Hague Sales Convention and the 1964 Hague Formation Convention by notifying the Government of the Netherlands to that effect.

(4) A State party to the 1964 Hague Sales Convention which ratifies, accepts, approves or accedes to the present Convention and declares or has declared under article 92 that it will not be bound by Part II of this Convention shall at the time of ratification, acceptance, approval or accession denounce the 1964 Hague Sales Convention by notifying the Government of the Netherlands to that effect.

(5) A State party to the 1964 Hague Formation Convention which ratifies, accepts, approves or accedes to the present Convention and declares or has declared under article 92 that it will not be bound by Part III of this Convention shall at the time of ratification, acceptance, approval or accession denounce the 1964 Hague Formation Convention by notifying the Government of the Netherlands to that effect.

(6) For the purpose of this article, ratifications, acceptances, approvals and accessions in respect of this Convention by States parties to the 1964 Hague Formation Convention or to the 1964 Hague Sales Convention shall not be effective until such denunciations as may be required on the part of those States in respect of the latter two Conventions have themselves become effective. The depositary of this Convention shall consult with the Government of the Netherlands, as the depositary of the 1964 Conventions, so as to ensure necessary co-ordination in this respect.

OVERVIEW

1. This article provides rules for the time when the Convention enters into force.¹ The Convention was adopted on 11 April 1980 and, pursuant to article 99 (1) and (2), became effective on 1 January 1988, after the number of ratifying states reached ten on 11 December 1986.²

2. Court decisions and arbitral awards referring to article 99 are extremely rare.³

1964 HAGUE SALES CONVENTION AND THE 1964 HAGUE FORMATION CONVENTION

3. Articles 99 (3)-(5) require States that are parties to the 1964 Hague Formation Convention and the 1964 Hague

Sales Convention to denounce one or both of these Conventions at the time of ratifying, accepting, approving or acceding to the CISG.

4. Article 99 (6) provides that the depositary of the CISG shall consult with the Government of the Netherlands, as the depositary of the 1964 Conventions, to ensure necessary coordination of effective denunciations as may be required on the part of the States in respect to the 1964 Conventions, before the ratification, acceptance, approval, and accession of the CISG by States.

5. The following states have filed denunciations of both the 1964 Hague Sales Convention and the 1964 Hague Formation Convention: Belgium,⁴ Germany,⁵ Israel,⁶ Italy,⁷ Luxembourg,⁸ and Netherlands.⁹

Notes

¹See the Digest for article 10,0 regarding the temporal applicability of the CISG to international contracts of sale.

²The People's Republic of China, Italy and the United States all ratified the Convention on 11 December 1986, making them the ninth, tenth and eleventh states to ratify the Convention.

³Arbitration Court of the International Chamber of Commerce, 1989 (Arbitral award No. 6076), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/896076i1.html>; CLOUT case No. 106 [Oberster Gerichtshof], Austria, 10 November 1994], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/941110a3.html>; Oberlandesgericht Dusseldorf, Germany, 21 April 2004, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/040421g3.html>; Monomeles Protodikio Thessalonikis, Greece, 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030001gr.html>; Polimeles Protodikio Athinon, Greece, 2009, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/094505gr.html>; CLOUT case No. 8 [Corte di Cassazione, Italy, 24 October 1988], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/881024i3.html>.

⁴Effective 4 December 1996.

⁵Effective 29 January 1990.

⁶Effective 27 November 2001.

⁷Effective 17 December 1986.

⁸Effective 12 February 1997.

⁹Effective 22 January 1991.

Article 100

(1) This Convention applies to the formation of a contract only when the proposal for concluding the contract is made on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph (1) (a) or the Contracting State referred to in subparagraph (1) (b) of article 1.

(2) This Convention applies only to contracts concluded on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph (1) (a) or the Contracting State referred to in subparagraph (1) (b) of article 1.

INTRODUCTION

1. The principle of non-retroactivity is established in article 100, placing temporal thresholds on the application of the Convention. Pursuant to article 100 (1), the rules on contract formation (Part II of the Convention, supplemented by Part I) are only applicable when the proposal for concluding the contract is made on or after the date when the Convention enters into force in the relevant State or States.¹ Under article 100 (2), the rules of the Convention regarding the rights and obligations of the parties (Part III of the Convention, supplemented by Part I) are applicable to contracts that are concluded on or after the date the Convention entered into force in the relevant State.² Both article 100 (1) and (2) refer to entry into force “in respect of the Contracting States referred to in subparagraph 1 (a) or the Contracting State referred to in subparagraph (1) (b) of article 1.” Under article 100 (1), for the formation rules of the Convention to apply the offer must be made after a State is considered a Contracting State per article 1 (1) (a) or 1 (1) (b).³ Under article 100 (2), for the Convention’s rules governing the rights and obligations of the parties to apply a contract must be concluded on or after the date a State is considered a Contracting State per article 1 (1) (a) or 1 (1) (b).⁴ Regardless of applicability under article 100, it has been held that parties have the discretion to opt in to the Convention at the time of a dispute.⁵

APPLICABILITY OF ARTICLE 100

2. The Convention has been held inapplicable where the contract of sale was concluded prior to the date the Convention entered into force in the countries relevant to the transaction.⁶

3. The Convention was held inapplicable in a case involving a contract between a seller from a non-Contracting State and a buyer from a State in which the Convention was not in force at the time the contract was concluded.⁷

4. The Convention was held inapplicable in a case involving a contract between a seller from a non-Contracting State and a buyer from a Contracting State that made an article 95 reservation. The Court held that article 100 supported non-applicability of the Convention because the Convention was not in force in the non-Contracting State at the conclusion of the contract.⁸

5. In one case a court held that, by virtue of Article 3 of the Convention of the Law Applicable to Contracts for the International Sale of Goods (Hague Conference June 1955), the CISG was applicable to a transaction even though the contract was concluded before the Convention’s entry into force in the State of the buyer, on the basis that it was the law of the seller.⁹

6. In another case, even though the parties concluded an international sale of goods contract that included a C&F clause before the Convention entered into force, and the parties did not display any intent to apply the Convention to the contract, the court applied the Convention.¹⁰ The court held that, under the C&F clause (which provides that the seller’s liability only extended to the time the goods were handed over to the first carrier), supplemented by article 67 CISG, the seller was not responsible for damage to the goods.

7. In one case the court declined to decide between the applicability of the Convention (seller’s law) and the 1964 Hague Sales Convention (buyer’s law) because the outcome would be the same under either law.¹¹

Notes

¹See the Digest for article 99 regarding the time for entry into force of the Convention.

²Hof van Beroep Antwerpen, Belgium, 18 June 1996, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/960618b1.html>; Rechtbank van Koophandel Veurne, Belgium, 19 March 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030319b1.html>; CLOUT case No. 143 [Fovarosi Birosg Budapest, Hungary, 21 May 1996], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/960521h1.html>; CLOUT case No. 188 [Tribunal Supremo, Spain, 3 March 1997 (Tana v. Naviera del O. v. Iberico)], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/970303s4.html>

(“The court noted that the CISG did not become part of Spanish law until after the dispute arose between the parties. Accordingly, and in view of the interpretation of articles 99 (2) and 100 (2) CISG, the court held that the CISG was not applicable to the dispute, which arose from a contract for the sale of goods concluded prior to the entry into force of the CISG in Spain.”); Arrondissementsrechtbank Arnhem, Netherlands, 3 September 1992 (S. Jacobs v. auto Opgenoort), English editorial remarks available on the Internet at <http://cisgw3.law.pace.edu/cases/920903n1.html> (“The court further held that CISG was not applicable as the contract had been concluded before 1 January, 1992, being the date of entry into force of CISG in the Netherlands (article 100 CISG)”).

³CLOUT case no. 2 [Oberlandesgericht Frankfurt, Germany, 17 September 1991], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/910917g1.html> (although Germany was not a Contracting State to the CISG at the time of contract formation, the CISG applied via the application of article 1 (1) (b)).

⁴Monomeles Protodikio Thessalonikis, Greece, 2003, English editorial analysis available on the Internet at <http://cisgw3.law.pace.edu/cases/030001gr.html> (“At the time of conclusion of the contract of sale the CISG applied in France, but not in Greece.... The CISG applied by virtue of article 1 (1) (b) thereof, since the private international law rules of France referred to the law of a Contracting State.”); CLOUT case No. 887 [Appellationsgericht Basel-Stadt, Switzerland, 22 August 2003], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030822s1.html> (as the Convention was not in force in one of the States, the applicability of the Convention was based on article 1 (1) (b), i.e., the rules of private international commercial law lead to the application of the law of a Contracting State).

⁵CLOUT case No. 191 [Cámara Nacional de Apelaciones en lo Comercial, Argentina, 31 October 1995], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/951031a1.html>.

⁶Hof’s Hertogenbosch, the Netherlands, 27 November 1991, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/911127n1.html>; Arrondissementsrechtbank Arnhem, the Netherlands, 27 May 1993 (Hunfeld v. Vos), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/930527n1.html> (“On the basis of Article 100 of the CISG, this Convention is not applicable to the agreements that were concluded before 1 January 1992, and the Convention relating to a Uniform Law on the International Sale of Goods (hereinafter ULIS), which was in force until 1 January 1992, is applicable.”); CLOUT case No. 102 [Arbitration Court of the International Chamber of Commerce, 26 August 1989], available on the Internet at <http://cisgw3.law.pace.edu/cases/896281i1.html> (“The tribunal found that, pursuant to Article 100 (2) CISG, the Convention was not applicable, since the contract was concluded before the Convention entered into force in the countries involved (including France, the place of arbitration), even though those countries were parties to the Convention at the time of the issuance of the arbitral award.”); CLOUT case No. 8 [Corte di Cassazione, Italy, 24 October 1988 (Kretshmer v. Muratori Enzo)], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/881024i3.html>; Arrondissementsrechtbank Almelo, the Netherlands, 21 June 1989 (Societe Nouvelle des Papeteries v. Machinefabriek), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/890621n.html>; Hoge Raad, the Netherlands, 25 September 1992 (Societe Nouvelle des Papeteries v. Machinefabriek), English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/920925n1.html>; Gerechtshof Amsterdam, the Netherlands, 8 April, 1993 (Verwer v. Pex Handelsmij & Toshiba Deutschland), English editorial remarks available on the Internet at <http://cisgw3.law.pace.edu/cases/930408n1.html>; Arrondissementsrechtbank Arnhem, the Netherlands, 29 April 1993 (Groticke v. Neptunus Shipyard), English editorial remarks available on the Internet at <http://cisgw3.law.pace.edu/cases/930429n1.html>; Arrondissementsrechtbank Arnhem, the Netherlands, 27 May 1993 (Hunfeld v. Vos), English editorial remarks available on the Internet at <http://cisgw3.law.pace.edu/cases/930527n1.html>; Oberster Gerichtshof, Austria, 26 May 1994, English editorial remarks available on the Internet at <http://cisgw3.law.pace.edu/cases/940526a3.html>; Oberlandesgericht Karlsruhe, Germany, 11 February 1993, English editorial remarks available on the internet at <http://cisgw3.law.pace.edu/cases/930211g1.html>; Oberlandesgericht Koln, Germany, 16 October 1992, English editorial remarks available on the Internet at <http://cisgw3.law.pace.edu/cases/921016g1.html>; Oberlandesgericht Koln, Germany, 2 October 1992, English editorial remarks available on the Internet at <http://cisgw3.law.pace.edu/cases/921002g1.html>; CLOUT case No. 22 [Cámara Nacional de apelaciones en lo Comercial, Argentina, 15 March 1991]; Gerechtshof Arnhem, the Netherlands, 27 April 1991, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/990427n1.html>; Rechtbank van koophandel Hasselt, Belgium, 16 March 1994, Unilex (“The Court held that the deliveries made after the entry into force of CISG in the Netherlands were governed by CISG, as the Belgian rules of private international law led to the application of the law of the Netherlands, a contracting State (article 1 (1) (b) CISG), while only the deliveries made prior to that date were governed by the 1964 Hague Convention relating to a Uniform Law on the International Sale of Goods ULIS”); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 18 December 1998, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/981218r2.html> (the Convention was not considered applicable as it was not in force in one of the States at the time of the conclusion of the contract; however, it was considered “subsidiary law” under article 7 (2) because “its provisions are considered to be applicable to the relations between the parties as the rules making it pursuant to the Constitution of the Russian Federation [seller’s country] ... a component part of the legal system of Russia.”); Tribunal Cantonal Vaud, Switzerland, 14 March 1993, Unilex; CLOUT case No. 212 [Tribunal Cantonal Vaud, Switzerland, 14 March 1996]; Tribunal Cantonal Vaud, Switzerland, 29 April 1992, Unilex; Handelsgericht Zurich, Switzerland, 9 April 1991, Unilex.

⁷Arrondissementsrechtbank Arnhem, the Netherlands, 22 October 1992 (Streamline Building Products v. Albrecht), English editorial remarks available on the Internet at <http://cisgw3.law.pace.edu/cases/921022n1.html>; Arrondissementsrechtbank Arnhem, Netherlands, 15 April 1993 (J.A. Harris & Sons v. Nijmergsche Ijzergieterij), English editorial remarks available on the Internet at <http://cisgw3.law.pace.edu/cases/930415n1.html>.

⁸CLOUT case No. 616 [U.S. District Court, Southern District of Florida, United States, 22 November 2002 (Impuls v. Psion-Teklogix), available on the Internet at <http://cisgw3.law.pace.edu/cases/021122u1.html>.

⁹Rechtbank van Koophandel Ieper, 29 January 2001, English case outline available on the Internet at <http://cisgw3.law.pace.edu/cases/010129b1.html>.

¹⁰CLOUT case no. 191 [Cámara Nacional de Apelaciones en lo Comercial, Argentina, 31 October 1995], English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/951031a1.html>.

¹¹Rechtbank van koophandel Hasselt, Belgium, 21 January 1997, English case outline available on the Internet at <http://cisgw3.law.pace.edu/cases/970121b1.html>.

Article 101

(1) A Contracting State may denounce this Convention, or Part II or Part III of the Convention, by a formal notification in writing addressed to the depositary.

(2) The denunciation takes effect on the first day of the month following the expiration of 12 months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

OVERVIEW

1. Article 101 is self-explanatory. See also the discussion of the depositary's functions and obligations in the Digest for article 89 of the Convention, as well as article 77 (1) (*e*) of the Vienna Convention on the Law of Treaties (1969).
2. Court decisions and arbitral awards referring to article 101 have not been identified.

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.¹ 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

¹The depositary has published rectifications of the authentic Arabic and Russian text versions of the Convention: Depositary notification C.N.862.1998.TREATIES-5 of 19 February 1999 (procès-verbal of rectification of the authentic Arabic text); C.N.233.2000.TREATIES-2 of 27 April 2000 (rectification of the Russian authentic text); and C.N.1075.2000.TREATIES-5 of 1 December 2000 [rectification of the original of the Convention (Arabic authentic text)]. See Federal Arbitration Court for the Northwestern Circuit, Russian Federation, 3 June 2003, English translation available on the Internet at <http://cisgw3.law.pace.edu/cases/030603r1.html> (because the authentic Russian text of Article 68 CISG as adopted when the text of the Convention was approved did not contain the first sentence of Article 68, the court applied the Russian text as written and held that the risk in respect of goods sold in transit passed from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage).

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Oberster Gerichtshof, 10 November 1994	1 6 8 10 Part II 14 55 54 99	CLOUT case No. 106
Oberster Gerichtshof, 6 February 1996	1 2 7 8 9 11 Part II 14 19 26 29 41 54 60 Part III, Chap. IV 71 75 76 77 80	CLOUT case No. 176
Oberster Gerichtshof, 27 February 1996	53	
Oberster Gerichtshof, 26 May 1996	100	
Oberster Gerichtshof, 11 February 1997	2 6	CLOUT case No. 190
Oberster Gerichtshof, 20 March 1997	1 4 8 Part II 14 19	CLOUT case No. 189

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Oberster Gerichtshof, 24 April 1997	4 8	
Oberster Gerichtshof, 26 April 1997	13	
Oberster Gerichtshof, 18 June 1997	1 Part II 14 18	CLOUT case No. 239
Oberster Gerichtshof, 8 September 1997	1	
Oberster Gerichtshof, 11 September 1997	1 63 64	CLOUT case No. 307
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Oberster Gerichtshof, 12 November 1999	1	
Oberster Gerichtshof, 9 March 2000	1 7 8 11	CLOUT case No. 424
Oberster Gerichtshof, 21 March 2000	1 4 6 9	CLOUT case No. 425
Oberster Gerichtshof, 13 April 2000	1 7 25 49	CLOUT case No. 426
Oberster Gerichtshof, 28 April 2000	1 Part III, Chap. V, Sect. II 64 74 75 76	CLOUT case No. 427
Oberster Gerichtshof, 7 September 2000	1 4 7 Part II 46 49	CLOUT case No. 428
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Oberster Gerichtshof, 5 July 2001	49	CLOUT case No. 535
Oberster Gerichtshof, 22 October 2001	4 6 7 9 54 57	CLOUT case No. 605
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Oberster Gerichtshof, 27 February 2003	9 35 40	CLOUT case No. 536
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Oberster Gerichtshof, 18 November 2003	57	
Oberster Gerichtshof, 17 December 2003	1 6 8 73 96	CLOUT case No. 534
Oberster Gerichtshof, 29 March 2004	57	
Oberster Gerichtshof, 21 April 2004	3 6 79	
Oberster Gerichtshof, 26 January 2005	1 6 8 10	
Oberster Gerichtshof, 23 May 2005	7 40 49 50	CLOUT case No. 747
Oberster Gerichtshof, 24 May 2005	6 27 39	CLOUT case No. 748
Oberster Gerichtshof, 21 June 2005	6 38 51 53	CLOUT case No. 749
Oberster Gerichtshof, 31 August 2005	8 9	CLOUT case No. 750
Oberster Gerichtshof, 8 September 2005	57	
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Oberster Gerichtshof, 25 January 2006	25 35 49	CLOUT case No. 752
Oberster Gerichtshof, 12 September 2006	42 43	CLOUT case No. 753

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Oberster Gerichtshof, 19 December 2007	39 40 45	
Oberster Gerichtshof, 3 April 2008	57	
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Oberster Gerichtshof, 2 April 2009	6 38 39	
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Oberlandesgericht Graz, 7 March 2002	8 9 19	CLOUT case No. 537
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Oberlandesgericht Wien, 1 June 2004	3 57	
Oberlandesgericht Graz, 29 July 2004	1 10 26 61 64 75	CLOUT case No.746
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Oberlandesgericht Linz, 23 March 2005	4 8 19	
Oberlandesgericht Linz, 1 June 2005	39	
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Oberlandesgericht Linz, 23 January 2006	6 8 12 36 69	
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Hof van Beroep, Gent, 31 January 2002	1	
Hof van Beroep Antwerpen, 14 February 2002	39	
Hof van Beroep, Gent, 15 May 2002	1 3 6 7 11 18 29 57	CLOUT case No. 1017
Hof van Beroep Gent, 2 December 2002	39	
Hof van Beroep Antwerpen, 16 December 2002	8	
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Hof van Beroep Ghent, 8 November 2004	14 19	
Hof van Beroep Gent, 24 November 2004	3	
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Hof van Beroep Antwerpen, 24 April 2006	6 9 11 34 53 75 77 78 85	
Hof van Beroep Antwerpen, 22 January 2007	35 38 75 77	
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Hof van Beroep Gent, 14 November 2008	3 6 38 39	
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Rechtbank van Koophandel, Hasselt, 16 March 1994	1 100	
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Tribunal de Commerce, Nivelles, 19 September 1995	1 4 Part II 19	
Rechtbank van Koophandel, Hasselt, 18 October 1995	1	
Rechtbank van Koophandel, Hasselt, 8 November 1995	1	
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Rechtbank van Koophandel, Kortrijk, 27 June 1997	38 39	
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Rechtbank van Koophandel, Hasselt, 19 September 2001	3	
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Rechtbank van Koophandel Hasselt, 6 March 2002	38 39	
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Rechtbank van Koophandel Hasselt, 16 January 2004	38	
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Rechtbank van Koophandel Hasselt, 20 September 2005	39 74 78	
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High People's Court of Shandong Province, 27 June 2005	35 36	
Shanghai High People's Court, 30 August 2005	53	
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Wuhan Intermediate People's Court of Hubei Province, 11 May 2004	53	
Shanghai Intermediate People's Court No. 1, 29 May 2005	53	
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China International Economic and Trade Arbitration Commission (CIETAC), 31 December 1989, case No. CISG 1989/02	71	
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China International Economic and Trade Arbitration Commission (CIETAC), 18 April 1991	76	
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China International Economic and Trade Arbitration Commission (CIETAC), 20 January 1993, case No. CISG 1993/04	76	
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China International Economic and Trade Arbitration Commission (CIETAC), 5 February 1996, case No. CISG 1996/07	77	
China International Economic and Trade Arbitration Commission (CIETAC), 5 February 1996, case No. CISG 1996/06	76	
China International Economic and Trade Arbitration Commission (CIETAC), 14 February 1996, case No. CISG 1996/09	53	CLOUT case No. 855
China International Economic and Trade Arbitration Commission (CIETAC), 15 February 1996, case No. CISG1996/10	59	CLOUT case No. 854
China International Economic and Trade Arbitration Commission (CIETAC), 8 March 1996, case No. CISG 1996/13	30 60	CLOUT case No. 680
China International Economic and Trade Arbitration Commission (CIETAC), 29 March 1996	72	
China International Economic and Trade Arbitration Commission (CIETAC), 30 April 1996, case No. CISG 1996/20	53	
China International Economic and Trade Arbitration Commission (CIETAC), 14 May 1996, case No. CISG 1996/23	53	
China International Economic and Trade Arbitration Commission (CIETAC), 16 May 1996, case No. CISG 1996/24	62	
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China International Economic and Trade Arbitration Commission (CIETAC), 18 September 1996, case No. CISG 1996/01	73	
China International Economic and Trade Arbitration Commission (CIETAC), 15 October 1996, case No. CISG 1996/46	53	
China International Economic and Trade Arbitration Commission (CIETAC), 11 November 1996, case No. CISG 1996/51	53	
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China International Economic and Trade Arbitration Commission (CIETAC), 15 December 1997, case No. CISG 1997/34	18	CLOUT case No. 715
China International Economic and Trade Arbitration Commission (CIETAC), 16 December 1997	72	CLOUT case No. 716
China International Economic and Trade Arbitration Commission (CIETAC), 19 December 1997, Case No. CISG 1997/36	29 47 49 51	CLOUT case No. 990
China International Economic and Trade Arbitration Commission (CIETAC), 31 December 1997	96	
China International Economic and Trade Arbitration Commission (CIETAC), 20 January 1998, case No. CISG 1998/01	77	
China International Economic and Trade Arbitration Commission (CIETAC), 26 November 1998, case No. CISG 1998/07	53	
China International Economic and Trade Arbitration Commission (CIETAC), 25 December 1998, case No. CISG 1998/10	55 76	CLOUT case No. 981
China International Economic and Trade Arbitration Commission (CIETAC), 25 December 1998, case No. CISG 1998/11	75	
China International Economic and Trade Arbitration Commission (CIETAC), 6 January 1999, case No. CISG 1999/04	53 54 61 64 77	CLOUT case No. 717
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China International Economic and Trade Arbitration Commission (CIETAC), 29 March 1999	96	CLOUT case No. 770
China International Economic and Trade Arbitration Commission (CIETAC), 5 April 1999, case No. CISG 1999/19	73	
China International Economic and Trade Arbitration Commission (CIETAC), 8 April 1999, case No. CISG 1999/21	25 53	CLOUT case No. 810
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China International Economic and Trade Arbitration Commission (CIETAC), 11 June 1999, case No. CISG 1999/29	61 62	
China International Economic and Trade Arbitration Commission (CIETAC), 30 June 1999, case No. CISG 1999/31	61 62	
China International Economic and Trade Arbitration Commission (CIETAC), 30 June 1999, case No. CISG 1999/30	76	CLOUT case No. 807
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China International Economic and Trade Arbitration Commission (CIETAC), 4 July 1999, case No. CISG 1999/28	25 34 49	CLOUT case No. 808
Supreme Court of the People's Republic of China, 20 July 1999	53 95	
China International Economic and Trade Arbitration Commission (CIETAC), 29 December 1999, Case No. CISG 1999/33	48	CLOUT case No. 806
China International Economic and Trade Arbitration Commission (CIETAC), 31 December 1999, case No. CISG 1999/32	59	CLOUT case No. 805
China International Economic and Trade Arbitration Commission (CIETAC), 31 December 1999, case No. CISG 1999/01	66 30	CLOUT case No. 683
China International Economic and Trade Arbitration Commission (CIETAC), 11 January 2000, case No. CISG 200/07	53	
China International Economic and Trade Arbitration Commission (CIETAC), 1 February 2000, case No. CISG 2000/01	76	

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China International Economic and Trade Arbitration Commission (CIETAC), 10 August 2000, case No. CISG 2000/04	75	
China International Economic and Trade Arbitration Commission (CIETAC), 29 September 2000, case No. CISG 2000/15	60 65	
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Oberlandesgericht Koblenz, 11 September 1998	1 38 39 40 44	CLOUT case No. 285
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Oberlandesgericht Hamburg, 5 October 1998	53	CLOUT case No. 279
Oberlandesgericht München, 21 October 1998	1 4 6 7 59	CLOUT case No. 297
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Oberlandesgericht Koblenz, 18 November 1999	1 38 39	CLOUT Case No. 359
Oberlandesgericht Hamburg, 26 November 1999	1 7 45 49 61 Part III, Chap. V, Sect. II 74 76 81 88	CLOUT case No. 348
Oberlandesgericht München, 3 December 1999	1 3 15 31	CLOUT case No. 430
Oberlandesgericht Dresden, 27 December 1999	1 6 8 53 54 71 78	
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Oberlandesgericht Stuttgart, 28 February 2000	1 3 Part II 14 57 78	
Oberlandesgericht Frankfurt a. M., 30 August 2000	1 6 8 14 18 54	CLOUT case No. 429
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Oberlandesgericht Schleswig, 22 August 2002	38 39 40 66 67	
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Oberlandesgericht Karlsruhe, 10 December 2003	4 29 53	CLOUT case No. 635
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Landgericht Trier, 12 October 1995	6 25 35 38 40 46 49 53 62 68 73 91	CLOUT case No. 170
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Landgericht Heilbronn, 15 September 1997	1 4 8 Part II 24 45 61 Part III, Chap. V, Sect. II 74 81	CLOUT case No. 345
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Landgericht Bayreuth, 11 December 1997	1	
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Cour d'appel de Paris, 10 November 1993	1 57	CLOUT case No. 156
Cour de cassation, 4 January 1995	1 14 19 86	CLOUT case No. 155

<i>Country</i>	<i>Article</i>	<i>Remarks</i>
Cour d'appel de Grenoble, 22 February 1995	1 7 25 49 61 64 73	CLOUT case No. 154
Cour d'appel de Grenoble, 26 February 1995	6 8 14 48 55	CLOUT case No. 151
Cour d'appel de Grenoble, 29 March 1995	29 57	CLOUT case No. 153
Cour d'appel de Paris, 6 April 1995	78 84	
Cour d'appel de Grenoble, 26 April 1995	1 3 25 46 49 78	CLOUT case No. 152
Cour d'appel de Grenoble, 13 September 1995	4 9 35 39	CLOUT case No. 202
Cour d'appel de Colmar, 26 September 1995	6	
Cour d'appel de Paris, 13 December 1995	Part II 18 19 23 35	CLOUT case No. 203
Cour de cassation, 23 January 1996	25 35 46 49	CLOUT case No. 150
Cour d'appel de Grenoble, 15 May 1996	1 35 36	CLOUT case No. 204
Cour d'appel de Grenoble, 23 October 1996	1 7 57	CLOUT case No. 205
Cour d'appel d'Aix-en-Provence, 21 November 1996	81 84	
Cour de cassation, 17 December 1996	1 6	CLOUT case No. 206
Cour d'appel de Paris, 15 October 1997	6 57	CLOUT case No. 223
Tribunal commercial Paris, France, 28 October 1997	1	

<i>Country</i>	<i>Article</i>	<i>Remarks</i>
Cour de cassation, 2 December 1997	1 31	CLOUT case No. 207
Tribunal Grande Instance Colmar, 18 December 1997	1	
Cour d'appel de Paris, 14 January 1998	1 7 57 81	CLOUT case No. 312
Tribunal commercial Besancon, 19 January 1998	1 79	
Cour de cassation, 27 January 1998	1 18	CLOUT case No. 224
Cour d'appel de Versailles, 29 January 1998	39 46 47 49	CLOUT case No. 225
Cour d'appel de Paris, 4 March 1998	1 30 31 35 45	CLOUT case No. 244
Cour d'appel de Paris, 18 March 1998	1 31 35 45	CLOUT case No. 245
Cour de cassation, 16 July 1998	1 18 19 31	CLOUT case No. 242
Cour de cassation, 5 January 1999	4 36	CLOUT case No. 241
Cour d'appel de Grenoble, 4 February 1999	1 25	CLOUT case No. 243
Cour d'appel de Paris, 21 May 1999	1	CLOUT case No. 314
Cour de cassation, 26 May 1999	1 25 38 39 46 49 81 84	CLOUT case No. 315
Cour d'appel de Grenoble, 21 October 1999	1 3 8 9 18 25 49 74 84	CLOUT case No. 313

<i>Country</i>	<i>Article</i>	<i>Remarks</i>
Tribunal Commercial Montargis, 6 October 2000	1	
Cour d'appel de Colmar, 24 October 2000	1 10	CLOUT case No. 400
Cour d'appel d'Orléans, 29 March 2001	1	CLOUT case No. 398
Cour d'appel de Colmar, 12 June 2001	1 2 53 77 79	CLOUT case No. 480
Cour d'appel de Paris, 14 June 2001	3 35 36 49	CLOUT case No. 481
Cour de cassation, 26 June 2001	1 6 57	
Cour d'appel de Paris, 6 November 2001	4 6 7 12 38 39	CLOUT case No. 482
Cour de cassation, 19 March 2002	42	CLOUT case No. 479
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Cour d'appel de Paris, 10 September 2003	4	CLOUT case No. 490
Court de cassation, 24 September 2003	35 36	CLOUT case No. 494
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Cour de cassation, 25 October 2005	6	
Tribunal de Grand Instance de Strasbourg, 22 December 2006	18	
Cour d'appel de Colmar, 26 February 2008	3	
Cour de cassation, 2 April 2008	93	CLOUT case No. 1030
Cour d'appel de Rennes, 27 May 2008	18 26	CLOUT case No. 1029
Cour de cassation, 7 October 2009	1	

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Cour de cassation, 3 November 2009	6 82	CLOUT case No. 1025
GERMANY		
Landgericht Aachen, 3 April 1989	1 38 39 53 59	CLOUT case No. 46
Landgericht München I, 3 July 1989	1 39	CLOUT case No. 3
Landgericht Stuttgart, 31 August 1989	53	CLOUT case No. 4
Oberlandesgericht Koblenz, 23 February 1990	1	
Amtsgericht Oldenburg in Holstein, 24 April 1990	1 33 47 59 74 78	CLOUT case No. 7
Landgericht Frankfurt, a. M., 2 May 1990	1 53	
Landgericht Hildesheim, 20 July 1990	1 53	
Landgericht Stuttgart, 31 August 1990	1 38 39 78	CLOUT case No. 4
Landgericht Hamburg, 26 September 1990	1 4 8 9 Part II 14 23 29 53 54 58 78	CLOUT case No. 5
Amtsgericht Ludwigsburg, 21 December 1990	1 53 59	
Landgericht Bielefeld, 18 January 1991	9 Part II 14 23 29 39 53 63 78	

<i>Country</i>	<i>Article</i>	<i>Remarks</i>
Amtsgericht Frankfurt a. M., 31 January 1991	71 74	CLOUT case No. 51
Oberlandesgericht Frankfurt a. M., 13 June 1991	1 53 58 78	CLOUT case No. 1
Landgericht Stuttgart, 13 August 1991	7 27	
Landgericht Baden-Baden, 14 August 1991	1 19 35 39 51 61 74	CLOUT case No. 50
Oberlandesgericht Celle, 2 September 1991	1 Part II 15 53 Part III, Chap. V Sect. II 74 76 77	CLOUT case No. 318
Landgericht Frankfurt a. M., 16 September 1991	1 26 49 78	CLOUT case No. 6
Oberlandesgericht Frankfurt a. M., 17 September 1991	1 3 25 30 46 48 49 81 82 100	CLOUT case No. 2
Oberlandesgericht Koblenz, 27 September 1991	1 82	CLOUT case No. 316
Oberlandesgericht Köln, 27 November 1991	1	
Landgericht Baden-Baden, 13 January 1992	53 67	
Oberlandesgericht Koblenz, 16 January 1992	4 30	CLOUT case No. 226
Landgericht Saarbrücken, 23 March 1992	53	
Landgericht Mönchengladbach, 22 May 1992	38 39 59	

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Landgericht Heidelberg, 3 July 1992	1 53 78	
Landgericht Düsseldorf, 9 July 1992	53 80	
Landgericht Berlin, 16 September 1992	39	
Oberlandesgericht Hamm, 22 September 1992	1 Part II 18 19 61 64 71 Part III Chap. V, Sect. II 75 76 77 78	CLOUT case No. 227
Landgericht Berlin, 30 September 1992	72 75	
Oberlandesgericht Köln, 2 October 1992	100	
Landgericht Berlin, 6 October 1992	59 74 77	
Amtsgericht Zweibrücken, 14 October 1992	26 53 78	
Oberlandesgericht Köln, 16 October 1992	100	
Oberlandesgericht Karlsruhe, 20 November 1992	1 6 8 31 53 Part III, Chap. IV 66 67	CLOUT case No. 317
Landgericht Krefeld, 24 November 1992	15 81	
Landgericht Frankfurt a. M., 9 December 1992	39	
Oberlandesgericht Düsseldorf, 8 January 1993	1 6 38 39 50 51 53	CLOUT case No. 48

<i>Country</i>	<i>Article</i>	<i>Remarks</i>
Oberlandesgericht Saarbrücken, 13 January 1993	1 6 9 Part II 18 38 39 44 53	CLOUT case No. 292
Landgericht Verden, 8 February 1993	78	
Oberlandesgericht Karlsruhe, 11 February 1993	100	
Oberlandesgericht Düsseldorf, 12 March 1993	1 39	CLOUT case No. 310
Landgericht Landshut, 5 April 1993	39	
Amtsgericht Cloppenburg, 14 April 1993	2 53	
Landgericht Krefeld, 28 April 1993	72	
Landgericht Aachen, 14 May 1993	4 31 60 61 63 74 79	CLOUT case No. 47
Oberlandesgericht Düsseldorf, 2 July 1993	1 5 6 7 57 Part III, Chap. V Sect. II 74 95	CLOUT case No. 49
Landgericht Aachen, 28 July 1993	39 53	
Oberlandesgericht Koblenz, 17 September 1993	1 4 6 7 53 54 59 61 63 Part III, Chap. V, Sect. II 74 78	CLOUT case No. 281
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Oberlandesgericht Düsseldorf, 18 November 1993	53 80	
Landgericht Hannover, 1 December 1993	39 53 59 62	
Landgericht Memmingen, 1 December 1993	3 11	
Oberlandesgericht Düsseldorf, 14 January 1994	25 64 71 72 Part III, Chap. V Sect. II 74 75 76 77 78	CLOUT case No. 130
Oberlandesgericht Frankfurt a. M., 18 January 1994	25 35 46 49 53 58 59 60 78 81	CLOUT case No. 79
Kammergericht Berlin, 24 January 1994	1 4 7 53 54 78	CLOUT case No. 80
Oberlandesgericht Düsseldorf, 10 February 1994 [6 U 32/93]	1 38 39 53 78 81	CLOUT case No. 81
Oberlandesgericht Düsseldorf, 10 February 1994 [6 u 119/93]	25 45 46 40 51 53 74 78 82 83	CLOUT case No. 82

<i>Country</i>	<i>Article</i>	<i>Remarks</i>
Oberlandesgericht Köln, 22 February 1994	1 6 11 Part II 18 29 38 39 47	CLOUT case No. 120
Oberlandesgericht München, 2 March 1994	26 45 49 50 53 64 78 81	CLOUT case No. 83
Oberlandesgericht Frankfurt a. M., 4 March 1994	Part II 14 18 92	CLOUT case No. 121
Oberlandesgericht Frankfurt a. M., 20 April 1994	1 4 7 26 35 78	CLOUT case No. 84
Amtsgericht Charlottenburg, 4 May 1994	26 79 82 84	
Amtsgericht Nordhorn, 14 June 1994	4 Part II 48 62 78	
Landgericht Düsseldorf, 23 June 1994	38 39	
Landgericht Gießen, 5 July 1994	6 39 78	
Landgericht Frankfurt, 6 July 1994	1 4 7 9	
Landgericht Augsburg, 12 July 1994	53	
Landgericht Frankfurt, 13 July 1994	53	
Landgericht Kassel, 14 July 1994	78	
Landgericht Nürnberg-Fürth, 26 July 1994	57	

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Landgericht Düsseldorf, 25 August 1994	1 4 35 77 78	
Amtsgericht Mayen, 6 September 1994	1	
Landgericht Berlin, 15 September 1994	35 71 77	
Amtsgericht Mayen, 19 September 1994	4 7	
Amtsgericht Riedlingen, 21 October 1994	38 39 78	
Landgericht Oldenburg, 9 November 1994	2 3 46 78	
Oberlandesgericht Hamburg, 14 December 1994	61 69	
Oberlandesgericht Hamm, 27 January 1995	57	
Oberlandesgericht Oldenburg, 1 February 1995	Part II 48 49 81 84	CLOUT case No. 165
Landgericht München I, 8 February 1995	1 14 39	CLOUT case No. 131
Oberlandesgericht Hamm, 8 February 1995	4 8 Part II 24 27 53 74 78	CLOUT case No. 132
Oberlandesgericht München, 8 February 1995 [7 U 1720/94]	1 Part II 18 19 49 53 61 62 65 77 80 84	CLOUT case No. 133

<i>Country</i>	<i>Article</i>	<i>Remarks</i>
Oberlandesgericht München, 8 February 1995	3 6 38 39 44 77	CLOUT case No. 167
Bundesgerichtshof, 15 February 1995	4 26 49 53 72 80	CLOUT case No. 124
Landgericht Oldenburg, 15 February 1995	2 78	
Bundesgerichtshof, 8 March 1995	53 60	CLOUT case No. 123
Oberlandesgericht München, 8 March 1995	53 92	CLOUT case No. 134
Amtsgericht Wangen, 8 March 1995	1	
Landgericht München, 20 March 1995	4 7 39 53 61 78 81	
Oberlandesgericht Frankfurt a. M., 31 March 1995	14 18 19 59 62	CLOUT case No. 135
Landgericht Landshut, 5 April 1995	6 25 38 39 40	
Amtsgericht Alsfeld, 12 May 1995	1 2 14 53 59 62 74 77 78	CLOUT case No. 410
Oberlandesgericht Frankfurt a. M., 23 May 1995	14 15 18 19 39	CLOUT case No. 291

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Oberlandesgericht Celle, 24 May 1995	6 7 25 47 49 78 81 84	CLOUT case No. 136
Landgericht München, 29 May 1995	1 6 Part II	
Oberlandesgericht Hamm, 9 June 1995	4 6 7 45 46 48 53 73	CLOUT case No. 125
Landgericht Kassel, 22 June 1995	1 53 78 79	
Amtsgericht München, 23 June 1995	80	
Oberlandesgericht München, 28 June 1995	57	
Oberlandesgericht Frankfurt a. M., 5 July 1995	1 9 Part II	CLOUT case No. 276
Landgericht Koblenz, 7 July 1995	53	
Landgericht Aachen, 20 July 1995	7 74 78	
Oberlandesgericht Rostock, 27 July 1995	1 Part II 53 58 74 78 92	CLOUT case No. 228
Oberlandesgericht Stuttgart, 21 August 1995	4 7 39 53	CLOUT case No. 289
Landgericht Ellwangen, 21 August 1995	1 35 38 39 47 53 73 79 82	

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Amtsgericht Mayen, 6 September 1995	7	
Oberlandesgericht Nürnberg, 20 September 1995	64	
Landgericht Kassel, 21 September 1995	54 63 64	
Oberlandesgericht München, 22 September 1995	57	CLOUT case No. 286
Amtsgericht Kehl, 6 October 1995	Part II 19 24 27 39 59 78	
Landgericht Düsseldorf, 11 October 1995	2 4 Part III, Chap. V Sect. V 81 82 83	
Landgericht Trier, 12 October 1995	6 25 35 38 40 46 49 53 62 68 73 91	CLOUT case No. 170
Landgericht Hamburg, 23 October 1995	1	
Landgericht Köln, 16 November 1995	1 2	
Landgericht Siegen, 5 December 1995	1 57	
Landgericht Marburg, 12 December 1995	39 59	
Landgericht Krefeld, 19 December 1995	57	
Landgericht Bochum, 24 January 1996	39	CLOUT case No. 411
Landgericht München, 25 January 1996	39	
Amtsgericht Augsburg, 29 January 1996	39 78	

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Landgericht Kassel, 15 February 1996	1 6 8 18 27 39 53 59 74	CLOUT case No. 409
Landgericht Oldenburg, 28 February 1996	Part II 14 15 16 17 53	
Landgericht Düsseldorf, 5 March 1996	50	
Landgericht Bad Kreuznach, 12 March 1996	1	
Oberlandesgericht Frankfurt a. M., 15 March 1996	6 14 53	
Arbitral Tribunal of the Hamburg Chamber of Commerce, 21 March 1996 (and 21 June 1996)	1 6 7 8 45 53 61 73 Part III, Chap. V Sect. II 74 76 77 78 79 80 81 83	CLOUT case No. 166
Landgericht Saarbrücken, 26 March 1996	1 3 7 38 39	
Landgericht Oldenburg, 27 March 1996	1 33 53	
Bundesgerichtshof, 3 April 1996	1 7 25 34 46 49 58 69 72	CLOUT case No. 171

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Landgericht Duisburg, 17 April 1996	1 4 7 Part II 38 39 53 54	
Landgericht Aachen, 19 April 1996	1 35 65	
Oberlandesgericht Köln, 21 May 1996	1 7 35 40 45 74	CLOUT case No. 168
Landgericht Hamburg, 17 June 1996	1 54	
Amtsgericht Bottrop, 25 June 1996	1 78	
Landgericht Paderborn, 25 June 1996	1 35 38 39 74	
Oberlandesgericht Düsseldorf, 11 July 1996	1 4 7 53 61 74	
Landgericht Bielefeld, 2 August 1996	61 62 74 78	CLOUT case No. 376
Oberlandesgericht Düsseldorf, 13 September 1996	1	
Landgericht Heidelberg, 2 October 1996	1	
Amtsgericht Koblenz, 12 November 1996	1 62 74 78	
Bundesgerichtshof, 4 December 1996	1 6 35 38 39 64 81	CLOUT case No. 229
Landgericht München, 9 December 1996	1 53	

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Bundesgerichtshof, 11 December 1996	1 8 31 45	CLOUT case No. 268
Oberlandesgericht Köln, 8 January 1997	1 6 31 61 71 74 77 80	CLOUT case No. 311
Oberlandesgericht Koblenz, 31 January 1997	1 8 14 25 35 39 46 48 49 50 53 74 78 80	CLOUT case No. 282
Bundesgerichtshof, 5 February 1997	61	
Oberlandesgericht Hamburg, 28 February 1997	7 25 47 49 75 77 79	CLOUT case No. 277
Amtsgericht Berlin-Tiergarten, 13 March 1997	61	CLOUT case No. 296
Landgericht Frankenthal, 17 April 1997	1	
Oberlandesgericht Düsseldorf, 24 April 1997	1 4 7 25 47 49 51 53 59 71 78	CLOUT case No. 275
Landgericht München, 6 May 1997	1 4 7 53	
Landgericht Paderborn, 10 June 1997	1 68 69	

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Landgericht Hamburg, 19 June 1997	1	
Landgericht München, 23 June 1997	1	
Oberlandesgericht Karlsruhe, 25 June 1997	1 4 6 7 Part II 38 39 40 44 80	CLOUT case No. 230
Bundesgerichtshof, 25 June 1997	1 26 38 39 48 51 61 74 77 81 82	CLOUT case No. 235
Oberlandesgericht Hamburg, 4 July 1997	14 47 76 79	
Oberlandesgericht München, 9 July 1997	1 4 6 8 39 44 50 53 57 59 62 Part III, Chap. V Sect. II 74 80	CLOUT case No. 273
Oberlandesgericht Köln, 9 July 1997	1 Part III, Chap. IV 59 61 62 66 67 69	CLOUT case No. 283
Oberlandesgericht München, 9 July 1997	1 3 6 57	CLOUT case No. 287
Landgericht Saarbrücken, 18 July 1997	1	

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Bundesgerichtshof, VIII ZR 134/96, 23 July 1997	1 6 14 45 53 54	CLOUT case No. 236
Bundesgerichtshof, 23 July 1997	6	CLOUT case No. 231
Landgericht Göttingen, 31 July 1997	1 53	
Oberlandesgericht Köln, 21 August 1997	1 38 39 57 77 81	CLOUT case No. 284
Landgericht Heilbronn, 15 September 1997	1 4 8 Part II 24 45 61 Part III, Chap. V, Sect. II 74 81	CLOUT case No. 345
Landgericht Hagen, 15 October 1997	1 4 7 53	
Landgericht Erfurt, 28 October 1997	1 53	
Oberlandesgericht Hamm, 5 November 1997	1 50 53 81	CLOUT case No. 295
Landgericht Bayreuth, 11 December 1997	1	
Oberlandesgericht München, 21 January 1998	53 58	CLOUT case No. 288
Oberlandesgericht München, 28 January 1998	1 53 61 Part III, Chap. V, Sect. II 74 81	CLOUT case No. 288
Landgericht Bückeberg, 3 February 1998	1	

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Bundesgerichtshof, 12 February 1998	1 4	CLOUT case No. 269
Oberlandesgericht München, 11 March 1998	1 4 7 Part II 18 19 38 39 40 53	CLOUT case No. 232
Landgericht Berlin, 24 March 1998	1 3 4 7 53 59 62	
Oberlandesgericht Zweibrücken, 31 March 1998	1 Part II 35 79	CLOUT case No. 272
Landgericht Aurich, 8 May 1998	1 53	
Oberlandesgericht Jena, 26 May 1998	1 5 38 39 44 Part III, Chap. V Sect. II 74 95	CLOUT case No. 280
Oberlandesgericht Saarbrücken, 3 June 1998	1 38 39 53	CLOUT case No. 290
Oberlandesgericht Hamm, 23 June 1998	1 4 6 31 33 Part III, Chap. IV 53 66 68 69 71	CLOUT case No. 338
Oberlandesgericht Dresden, 9 July 1998	9 Part II 18	CLOUT case No. 347
Landgericht Erfurt, 29 July 1998	1 39 53 62 74	CLOUT case No. 344

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Oberlandesgericht Bamberg, 19 August 1998	1	
Oberlandesgericht Koblenz, 11 September 1998	1 38 39 40 44	CLOUT case No. 285
Oberlandesgericht Oldenburg, 22 September 1998	1 30 31 53 Part III, Chap. IV 66 69	CLOUT case No. 340
Landgericht Regensburg, 24 September 1998	1 39 48	CLOUT case No. 339
Oberlandesgericht Hamburg, 5 October 1998	53	CLOUT case No. 279
Oberlandesgericht München, 21 October 1998	1 4 6 7 59	CLOUT case No. 297
Oberlandesgericht Celle, 11 November 1998	1 57	CLOUT case No. 274
Landgericht Bielefeld, 24 November 1998	57	CLOUT case No. 363
Bundesgerichtshof, 25 November 1998	1 6 8 38 39 40 44 80	CLOUT case No. 270
Landgericht Mainz, 26 November 1998	1 3 45 46	CLOUT case No. 346
Schiedsgericht der Hamburger freundschaftlichen Arbitrage, 29 December 1998	1 6 26 45 47 63 72 73 81 84 85 87 88	CLOUT case No. 293

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Oberlandesgericht Bamberg, 13 January 1999	1 26 74 75	CLOUT case No. 294
Landgericht Zwickau, 19 March 1999	1 7 8 9 78	
Landgericht Berlin, 24 March 1999	4	
Bundesgerichtshof, 24 March 1999	1 7 35 77 79	CLOUT case No. 271
Landgericht Flensburg, 24 March 1999	31 36 50 53 57 Part III, Chap. IV 66 74 78	CLOUT case No. 377
Oberlandesgericht Naumburg, 27 April 1999	1 Part II 19 27 33 47 75 92	CLOUT case No. 362
Landgericht Berlin, 25 May 1999	58	
Amtsgericht Stendal, 12 October 1999	1 53	
Oberlandesgericht Braunschweig, 28 October 1999	Part II 57 58 61 64 77 85 88	CLOUT case No. 361
Bundesgerichtshof, 3 November 1999	1 38 39	CLOUT case No. 319
Oberlandesgericht Koblenz, 18 November 1999	1 38 39	CLOUT case No. 359

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Oberlandesgericht Hamburg, 26 November 1999	1	CLOUT case No. 348
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	Sect. II	
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	Landgericht Köln, 30 November 1999	
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Oberlandesgericht München, 3 December 1999	1	CLOUT case No. 430
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Oberlandesgericht Dresden, 27 December 1999	1	
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Hanseatisches Oberlandesgericht Hamburg, Germany, 26 January 2000	1	
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Oberlandesgericht Stuttgart, 28 February 2000	1	
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	Part II	
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Landgericht München, 6 April 2000	18	
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Amtsgericht Duisburg, 13 April 2000	1	CLOUT case No. 360
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	Landgericht Darmstadt, 9 May 2000	
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Oberlandesgericht Frankfurt a. M., 30 August 2000	1 6 8 14 18 54	CLOUT case No. 429
Landgericht Memmingen, 13 September 2000	8 53 57	
Landgericht Stendal, 12 October 2000	1 6 7 50 51 53 58 59 71 78	CLOUT case No. 432
Oberlandesgericht Köln, 13 November 2000	1	
Landgericht München, 16 November 2000	3 53	
Oberlandesgericht Oldenburg, 5 December 2000	1	CLOUT case No. 431
Landgericht Trier, 7 December 2000	1 57	
Landgericht Stendal, 10 December 2000	78	
Amtsgericht Hamburg-Altona, 14 December 2000	7	
Saarländisches Oberlandesgericht, Saarbrücken, 14 February 2001	3	
Landgericht Flensburg, 19 January 2001	1 53 57 92	
Landgericht Hamburg, 31 January 2001	53	
Oberlandesgericht Stuttgart, 28 February 2001	10	
Oberlandesgericht Stuttgart, 12 March 2001	83	
Oberlandesgericht Köln, 28 May 2001	4 53	
Landgericht Darmstadt, 29 May 2001	71 73	

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Landgericht Trier, 28 June 2001	53	
Oberlandesgericht Köln, 16 July 2001	8 31	CLOUT case No. 607
Landgericht Braunschweig, 30 July 2001	75	
Landgericht München, 30 August 2001	61	
Oberlandesgericht Rostock, 10 October 2001	6 53 55	
Bundesgerichtshof, 31 October 2001	1 2 4 7 8 Part II	CLOUT case No. 445
Oberlandesgericht Hamm, 12 November 2001	2 7 8 11 54 59	
Landgericht Hamburg, 21 December 2001	3 21 62 75	
Bundesgerichtshof, 9 January 2002	4 7 19 74 79	
Landgericht München, 20 February 2002	2 39 40 58 76	
Landgericht München, 27 February 2002	3 35 39 53 62	
Amtsgericht Viechtach, 11 April 2002	35 38 61	
Landgericht Stuttgart, 4 June 2002	35	
Landgericht Saarbrücken, 2 July 2002	2 6 38 39	

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Oberlandesgericht Zweibrücken, 26 July 2002	4 6	
Landgericht Freiburg, 22 August 2002	4 30 41 79	
Oberlandesgericht Schleswig, 22 August 2002	38 39 40 66 67	
Landgericht München, 30 August 2002	53	
Landgericht Göttingen, 20 September 2002	57 61 63	
Oberlandesgericht Rostock, 25 September 2002	39 40 52	
Bundesgerichtshof, 2 October 2002	2	
Oberlandesgericht Koblenz, 4 October 2002	19 31	
Oberlandesgericht Köln, 14 October 2002	25	
Oberlandesgericht Schleswig-Holstein, 29 October 2002	1 2 8 67 69	
Oberlandesgericht München, 13 November 2002	34 39 44	
Landgericht Saarbrücken, 25 November 2002	2	
Oberlandesgericht Karlsruhe, 19 December 2002	26 31 Part III, Chap. IV 46 49 82 84 86	CLOUT case No. 594
Landgericht Nürnberg-Fürth, 27 February 2003	57 58	
Oberlandesgericht Karlsruhe, 6 March 2003	39	CLOUT case No. 593
Landgericht Giessen, 18 March 2003	53 62 67	

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Landgericht Berlin, 21 March 2003	38 39 53 74 78	CLOUT case No. 634
Landgericht Köln, 25 March 2003	6 46 53 67 78	
Landgericht Hamburg, 11 June 2003	10 53 78	
Landgericht Tübingen, 18 June 2003	39 78	
Landgericht Mönchengladbach, 15 July 2003	4 7 78	
Oberlandesgericht Düsseldorf, 25 July 2003	4 7 8 19 53	
Landgericht Bielefeld, 15 August 2003	38 39 53 62 78	
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