



General Assembly

Distr.: General
8 June 2004

Original: English

United Nations Commission
on International Trade Law

UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods*

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.

* 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.



Interpretation of the Convention

1. As national rules on the law of sales are subject to sharp divergences in approach and concept, it is important to avoid an interpretation of the Convention that is influenced by the concepts used in the legal system of the country of the forum.¹ It is for this reason that article 7, paragraph 1 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”.

2. In effect, according to some courts the reference to the Convention’s international character² is to be understood as preventing courts from resorting to an interpretation of the concepts used in the Convention that is based on national law;³ rather, courts should interpret the Convention “autonomously”.⁴ Nevertheless, there are courts that have stated that case law interpreting analogous domestic law provisions may also inform a court where the language of the relevant provisions of the Convention tracks that of the domestic law, even though the domestic law “is not per se applicable”.⁵ According to case law, reference to the Convention’s legislative history is admissible⁶ as well as to international scholarly writing.⁷

3. As far as the further obligation to promote uniform application of the Convention is concerned, it has been interpreted in the sense that courts should also

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

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

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

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

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

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

⁷ Oberster Gerichtshof, Austria, 13 April 2000, published on the Internet at <http://www.cisg.at/2_10000w.htm>.

take into account decisions rendered by foreign courts.⁸ In one case, one court quoted forty foreign court decisions as well as arbitral awards.⁹ In other cases, two courts quoted two foreign court decisions,¹⁰ while there are several cases in which one foreign court decision is referred to.¹¹ More recently, one court referred to 37 foreign court decisions and arbitral awards.¹²

4. What value foreign court decisions should have was dealt with by two courts both of which stated that foreign court decisions merely have persuasive, non-binding value.¹³

Observance of good faith in international trade

5. Article 7, paragraph 1 also requires that the Convention be interpreted in such a manner that the observance of good faith in international trade is promoted.¹⁴ Although an express reference to the good faith principle is to be found solely in the provision relating to the Convention's interpretation, there are numerous applications of that principle throughout the Convention. Among the manifestations of that principle are the rules contained in the following provisions:

- Article 16, paragraph 2 (b) on the non-revocability of an offer where it was reasonable for the offeree to rely upon the offer being held open and the offeree acted in reliance on the offer;
- Article 21, paragraph 2 on the status of a late acceptance which was sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time;
- Article 29, paragraph 2 in relation to the preclusion of a party from relying on a provision in a contract that modification or abrogation of the contract must be in writing;

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

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

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

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

¹² Trib. Rimini, Italy, 26 November 2002, *Giurisprudenza italiana*, 2003, 896 ff.

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

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

- Articles 37 and 46 on the rights of a seller to remedy non-conformities in the goods;
- Article 40 which precludes the seller from relying on the fact that notice of non-conformity has not been given by the buyer 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, paragraph 2, article 64, paragraph 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 take steps to preserve the goods.¹⁵

Gap-filling and general principles

6. Paragraph 2 makes sure that gaps, i.e. matters the Convention governs but which it does not expressly solve, are filled, if possible, without resorting to domestic law, but rather in conformity to the Convention's general principles. Only where no such general principles can be identified should one resort to the applicable national law.¹⁶ Matters the Convention does not govern at all are to be solved directly by having recourse to the applicable national law.¹⁷ As for the issues considered to fall outside the Convention's scope, they have been listed under the comments to article 4.

7. According to several courts, one of the general principles upon which the Convention is based is that of the "prevalence of party autonomy".¹⁸

¹⁵ 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.

¹⁶ See ICC International Court of Arbitration, Award No. 8611/HV/JK, published on the Internet at <http://www.jura.uni-freiburg.de/ipr1/cisg/>.

¹⁷ See, e.g., Cour d'appel Paris, 6 November 2001, published on the Internet at <http://witz.jura.uni-sb.de/CISG/decisions/061101v.htm>, expressly referring to article 7 of the Convention when stating that issues not governed by the Convention have to be solved by means of the applicable law; for a similar statement, see also Camara Nacional de Apelaciones en lo Comercial, Argentina, 24 April 2000, published on the Internet at <http://www.uc3m.es/uc3m/dpto/PR/dppr03/cisg/sargen10.htm> (stating the same); CLOUT case No. 333 [Handelsgericht des Kantons Aargau, Switzerland, 11 June 1999]; Rechtbank Zutphen, Netherlands, 29 May 1997, published on the Internet at <http://www.unilex.info/case.cfm?pid=1&do=case&id=353&step=FullText> (stating the same); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, award No. 38/1996, published in English on the Internet at <http://cisgw3.law.pace.edu/cases/970328r1.html>; Amtsgericht Mayen, Germany, 6 September 1995, published on the Internet at <http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/382.htm> (stating the same); CLOUT case No. 97 [Handelsgericht des Kantons Zürich, Switzerland, 9 September 1993] (stating the same) (see full text of the decision).

¹⁸ See Hof Beroep Gent, Belgium, 17 May, 2002, published on the Internet at <http://www.law.kuleuven.ac.be/int/tradelaw/WK/2002-05-17.htm>; Rechtbank Koophandel Ieper, Belgium, 29 January 2001, published on the Internet at <http://www.law.kuleuven.ac.be/int/tradelaw/WK/2001-01-29.htm>; Landgericht Stendal, Germany, 12 October 2000, *Internationales Handelsrecht*, 2001, 32; see also Trib. Rimini, Italy,

8. The principle of good faith has also been found to be one of the general principles upon which the Convention is based.¹⁹ In one case, that general principle has led a court to even state that an explicit declaration of avoidance of the contract was not necessary once the seller had refused to perform its obligations and that to insist on such a declaration would be against the principle of good faith, even though the Convention expressly requires a declaration of avoidance of contract.²⁰ In another case, a court justified the order to one party to pay damages on the basis that that party's conduct was "contrary to the principle of good faith in international trade laid down in article 7 CISG"; in doing so, the court also stated that the abuse of process violates the good faith principle.²¹

9. A more recent court decision referred to the general principle of good faith and stated that it leads to the parties having to both cooperate with each other and exchange the information relevant for the performance of their respective obligations.²²

10. According to some decisions, estoppel is also one of the general principles upon which the Convention is based; more specifically, it is a manifestation of the principle of good faith.²³ According to one court, however, estoppel is a matter the Convention is not concerned with.²⁴

26 November 2002, *Giurisprudenza italiana*, 2003, 896 ff.

¹⁹ See Hof Beroep Gent, Belgium, 17 May 2002, published on the Internet at <<http://www.law.kuleuven.ac.be/int/tradelaw/WK/2002-05-17.htm>>; Bundesgerichtshof, Germany, 9 January 2002, *Internationales Handelsrecht*, 2002, 17; Bundesgerichtshof, Germany, 31 October 2001, *Internationales Handelsrecht*, 2002, 14 ff.; CLOUT case No. 297 [Oberlandesgericht München, Germany, 21 January 1998] (see full text of the decision); CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998] (see full text of the decision); Corte d'Appello Milano, Italy, 11 December 1998, published on the Internet at <<http://www.unilex.info/case.cfm?pid=1&do=case&id=359&step=FullText>>; Compromex Arbitration, Mexico, 30 November 1998, published on the Internet at <<http://www.uc3m.es/cisg/rmexi3.htm>>; CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997]; Rechtbank Arnhem, 17 July 1997, published on the Internet at <<http://www.unilex.info/case.cfm?pid=1&do=case&id=355&step=FullText>>; Landgericht München, Germany, 6 May 1997, published on the Internet at <<http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/341.htm>> (stating the same); CLOUT case No. 337 [Landgericht Saarbrücken, Germany, 26 March 1996]; CLOUT case No. 166 [Arbitration - Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996] (see full text of the decision); CLOUT case No. 136 [Oberlandesgericht Celle, Germany, 24 May 1995] (see full text of the decision); ICC International Court of Arbitration, Award No. 8128/1995, Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, award No. VB/94124, published on the Internet at <<http://www.unilex.info/case.cfm?pid=1&do=case&id=217&step=FullText>>; CLOUT case No. 154 [Cour d'appel Grenoble, France, 22 February 1995]; *Renard Constructions v. Minister for Public Works*, Court of Appeal, New South Wales, Australia, 12 March 1992, published on the Internet at <<http://www.unilex.info/case.cfm?pid=1&do=case&id=57&step=FullText>>.

²⁰ See CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997].

²¹ CLOUT case No. 154 [Cour d'appel Grenoble, France, 22 February 1995].

²² Bundesgerichtshof, Germany, 31 October 2001, *Internationales Handelsrecht*, 2002, 14 ff.

²³ See Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, award No. 302/1996, published in English on the Internet at <<http://cisgw3.law.pace.edu/cases/990727r1.html>>; CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997] (see full text of the decision); CLOUT case No. 94 [Arbitration-Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft -

11. Decisions opting for the existence of a general principle upon which the Convention is based in respect of the place of performance of monetary obligations are more numerous. Thus, in determining the place of payment of compensation due for non-conformity of the goods one court stated that “if the purchase price is payable at the place of business of the seller”, under article 57 of the Convention, then “this indicates a general principle valid for other monetary claims as well”.²⁵ In a comparable situation, another court, considering an action for restitution of an excess in the price received by the seller, stated that there was a general principle under which “payment is to be made at the creditor’s domicile, a principle that is to be extended to other international trade contracts under article 6.1.6 of the UNIDROIT Principles”.²⁶ The Supreme Court of another State, which had previously adopted the reverse principle, decided that the gap of the Convention in respect of the legal consequences of avoidance, particularly with regard to the performance of restitution obligations, were to be filled by means of a general principle of the Convention, according to which “the place for performance of restitution obligations should be determined by transposing the primary obligations—through a mirror effect—into restitution obligations”.²⁷ It should be noted, however, that there is also one decision which denies the existence of a general principle under the Convention on the basis of which to determine the place of performance for all monetary obligations.²⁸

12. As far as the currency of payment is concerned, one court observed that it is a question governed by, albeit not expressly settled in, the Convention.²⁹ The court first referred to the view that according to a general principle underlying CISG, the seller’s place of business governs all questions relating to payment, at least where the parties did not agree otherwise, and therefore also governs the question of currency. The court, however, also mentioned the view that the question cannot be solved by applying a general principle of the Convention but rather by the domestic law applicable. The Court did not choose between the alternatives since in the case at hand the result was the same (currency of the seller’s place of business).

13. According to some decisions,³⁰ the issue of burden of proof is a matter governed by, albeit not explicitly settled in, the Convention. Therefore, the issue is to be settled in conformity with the general principles on which the Convention is

Wien, 15 June 1994]; CLOUT case No. 93 [Arbitration-Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft - Wien, 15 June 1994] (see full text of the decision); Hof s’Hertogenbosch, Netherlands, 26 February 1992, *Nederlands Internationaal Privaatrecht*, 1992, No. 354.

²⁴ Rechtbank Amsterdam, Netherlands, 5 October 1994, *Nederlands Internationaal Privaatrecht*, 1995, No. 231.

²⁵ CLOUT case No. 49 [Oberlandesgericht Düsseldorf, Germany 2 July 1993].

²⁶ Cour d’appel Grenoble, 23 October 1993, *Revue critique de droit international privé*, 1997, 756.

²⁷ Oberster Gerichtshof, Austria, 29 June 1999, *Transportrecht-Internationales Handelsrecht*, 1999, 48.

²⁸ CLOUT case No. 312 [Cour d’appel Paris, France, 14 January 1998].

²⁹ Landgericht Berlin, Germany, 24 March 1998, published on the Internet at <<http://www.unilex.info/case.cfm?pid=1&do=case&id=440&step=FullText>>.

³⁰ See CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000]; CLOUT case No. 380 [Tribunale di Pavia, Italy, 29 December 1999]; CLOUT case No. 196 [Handelsgericht des Kantons Zürich, Switzerland, 26 April 1995] (see full text of the decision); CLOUT case No. 97 [Handelsgericht des Kantons Zürich, Switzerland, 9 September 1993].

based.³¹ According to various decisions, it is article 79, paragraph 1³² and, at least according to one court decision, article 2 (a) that evidence general principles of the Convention in respect of this issue. These general principles have been summarized as follows: the party which wants to derive beneficial legal consequences from a legal provision has to prove the existence of the factual prerequisites of the provision,³³ any party claiming an exception has to prove the factual prerequisites of that exception.³⁴ It must be noted, however, that according to some courts, the issue of burden of proof is one not governed by the Convention, which is why domestic law is supposed to be applied to that issue.³⁵

14. According to some arbitral tribunals, the Convention is also based upon the principle of full compensation.³⁶ One court restricted this general principle to cases in which, as a result of a breach of contractual obligations, a contract is declared void.³⁷

15. Several tribunals expressly stated that the principle of informality, laid down in article 11, also constitutes a general principle upon which the Convention is based;³⁸ from this principle it follows, among other things, that the parties are also free to modify or terminate their contract in any form be it either in writing or orally or in any other form. Even an implied termination of the contract has been held possible;³⁹ furthermore, it has been held that a written contract may be orally changed.⁴⁰

16. The dispatch principle appears to be the general principle of the Convention concerning communications after the parties have concluded their contract.

³¹ See CLOUT case No. 97 [Handelsgericht des Kantons Zürich, Switzerland, 9 September 1993].

³² CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000]; Bundesgerichtshof, Germany, 9 January 2002, Unilex; CLOUT case No. 380 [Tribunale di Pavia, Italy, 29 December 1999].

³³ For references to this principle, see CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000]; Landgericht Frankfurt, 6 July 1994, published on the Internet at <http://www.jura.uni-freiburg.de/ipr1/cisg/>; CLOUT case No. 107 [Oberlandesgericht Innsbruck, Austria, 1 July 1994] (see full text of the decision).

³⁴ See CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000].

³⁵ See CLOUT case No. 261 [Berzirksgericht der Sanne, Switzerland, 20 February 1997]; CLOUT case No. 103 [Arbitration-International Chamber of Commerce no. 6653 1993]; in one case, a state court referred to the problem of whether the Convention is based upon a particular general principle in respect of the issue of burden of proof or whether the issue is one not governed by the Convention, but left the issue open; see CLOUT case No. 253 [Cantone del Ticino Tribunale d'appello, Switzerland, 15 January 1998].

³⁶ Oberster Gerichtshof, Austria, 9 March 2000, published on the Internet at http://www.cisg.at/6_31199z.htm; CLOUT cases Nos. 93 [Arbitration-Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft - Wien, 15 June 1994] and 94 [Arbitration-Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft - Wien, 15 June 1994].

³⁷ Oberster Gerichtshof, Austria, 9 March 2000, published on the Internet at http://www.cisg.at/6_31199z.htm.

³⁸ See Compromex Arbitration, Mexico, 16 July 1996, published on the Internet at <http://www.uc3m.es/cisg/rmexi2.htm>; Compromex Arbitration, Mexico, 29 April 1996, published on the Internet at <http://www.unilex.info/case.cfm?pid=1&do=case&id=258&step=FullText>.

³⁹ Oberster Gerichtshof, Austria, 29 June 1999, *Zeitschrift für Rechtsvergleichung*, 2000, 33.

⁴⁰ CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (see full text of the decision).

According to the principle a notice, request or other communication becomes effective as soon as the declaring party releases it from its own sphere by an appropriate means of communication. This rule applies to the notice of non-conformity or of third-party claims (arts. 39, 43), to requests of specific performance (art. 46), price reduction (art. 50), damages (art. 45, para. 1 (b)) or interest (art. 78), to the declaration of avoidance (arts. 49, 64, 72, 73), to the fixing of an additional period for performance (arts. 47, 63) and other notices as in article 32, paragraph 1, article 67, paragraph 2 or article 88. As stated in case law, as a general principle for Part III of the Convention, the dispatch principle applies as well to any other communication the parties may have provided for in their contract unless they have agreed that the communication has to be received to be effective.⁴¹

17. The mitigation principle set forth in article 77, pursuant to which 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, in order to avoid entitling the party in breach to be able to claim a reduction in the damages in the amount by which the loss should have been mitigated, has also been considered a general principle upon which the Convention is based.⁴²

18. Another general principle, recognized by case law, is that unless otherwise agreed, the parties are bound by 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.⁴³

19. One court suggested that the issue of set-off was governed, albeit not expressly settled, in the Convention, and that the Convention contained a general principle within the meaning of article 7, paragraph 2 that permitted reciprocal claims arising under the Convention (here, the buyer's claims for damages and the seller's claim for the balance of the sale proceeds) to be offset.⁴⁴ According to other courts, however, the issue of set-off is not governed at all by the Convention.⁴⁵

⁴¹ Landgericht Stuttgart, Germany, 13 August 1991, published on the Internet at <<http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/33.htm>> (according to the contract the notice of non-conformity had to be by registered letter. The court held that that meant that the notice had to be received by the other party. Moreover, the declaring party had also to prove that the notice had been received by the other party). See also CLOUT case No. 305 [Oberster Gerichtshof, Austria, 30 June 1998].

⁴² Landgericht Zwickau, 19 March 1999, published on the Internet at <<http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/519.htm>>; ICC Court of Arbitration, award No. 8817, published on the Internet at <<http://www.unilex.info/case.cfm?pid=1&do=case&id=398&step=FullText>>; see also Trib. Rimini, Italy, 26 November 2002, *Giurisprudenza italiana*, 2003, 896 ff.

⁴³ Rechtbank Koophandel Ieper, Belgium, 29 January 2001, published on the Internet at <<http://www.law.kuleuven.ac.be/int/tradelaw/WK/2001-01-29.htm>>.

⁴⁴ CLOUT case No. 348 [Oberlandesgericht Hamburg, Germany, 26 November 1999].

⁴⁵ See Oberster Gerichtshof, 22 October 2001, *Internationales Handelsrecht*, 2002, 27; CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (see full text of the decision); Amtsgericht Duisburg, Germany, 13 April 2000, *Internationales Handelsrecht*, 2001, 114 f.; CLOUT case No. 232 [Oberlandesgericht München, Germany, 11 March 1998]; CLOUT case No. 259 [Kantonsgericht Freiburg, Switzerland, 23 January 1998]; Landgericht Hagen, Germany, 15 October 1997, available on the Internet at <http://www.jura.uni-freiburg.de/ipr1/cisg/>; Landgericht München, Germany, 6 May 1997, available on the Internet at <<http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/341.htm>>; CLOUT case No. 275 [Oberlandesgericht Düsseldorf, Germany, 24 April 1997] (see full text of the decision); CLOUT

20. An arbitral tribunal stated that the entitlement to interest on all sums in arrears also constitutes a general principle of the Convention.⁴⁶ According to some tribunals, the Convention is based upon the general principle pursuant to which the entitlement to interest does not require a formal notice to the debtor in default.⁴⁷ There are, however, decisions that state that a formal notice must be given to the debtor before one is entitled to interest on sums in arrears.⁴⁸

21. Commentators have also suggested that the Convention is based upon the *favor contractus* principle, pursuant to which one should adopt those solutions that favor the contract's existence rather than its avoidance. This view appears to have been adopted by two courts; one court expressly referred to the principle of *favor contractus*,⁴⁹ whereas the other court stated that the avoidance of the contract merely constitutes an "*ultima ratio*" remedy.⁵⁰

22. Several decisions have identified article 40 as embodying a general principle of the Convention applicable to resolve unsettled issues under the Convention. 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".⁵¹ 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, paragraph 2. In another decision, a court derived from article 40 a general principle of the Convention that even a very negligent buyer deserves more protection than a fraudulent seller, and then applied the principle to find that a seller could not escape liability under article 35,

case No. 169 [Oberlandesgericht Düsseldorf, Germany, 11 July 1996] (see full text of the decision); Landgericht Duisburg, Germany, 17 April 1996, available on the Internet at <http://www.jura.uni-freiburg.de/ipr1/cisg/>; CLOUT case No. 289 [Oberlandesgericht Stuttgart, Germany, 21 August 1995]; Landgericht München, Germany, 20 March 1995, available on the Internet at <http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/164.htm>; Rechtbank Middelburg, Netherlands, 25 January 1995, *Nederlands Internationaal Privaatrecht*, 1996, No. 127; Amtsgericht Mayen, Germany, 19 September 1994, available on the Internet at <http://www.jura.uni-freiburg.de/ipr1/cisg/>; CLOUT case No. 281 [Oberlandesgericht Koblenz, Germany, 17 September 1993]; CLOUT case No. 125 [Oberlandesgericht Hamm, Germany, 9 June 1995]; Rechtbank Roermond, Netherlands, 6 May 1993, Unilex; CLOUT case No. 99 [Rechtbank Arnhem, Netherlands, 25 February 1993].

⁴⁶ ICC Court of Arbitration, award No. 8908, published on the Internet at <http://www.unilex.info/case.cfm?pid=1&do=case&id=401&step=FullText>.

⁴⁷ 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).

⁴⁸ Arbitral Tribunal at the Bulgarian Chamber of Commerce and Industry, award No. 11/1996, published on the Internet at <http://www.unilex.info/case.cfm?pid=1&do=case&id=420&step=FullText>; Landgericht Zwickau, Germany, 19 March 1999, published on the Internet at <http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/519.htm>.

⁴⁹ CLOUT case No. 248 [Schweizerisches Bundesgericht, Switzerland, 28 October 1998] (see full text of the decision).

⁵⁰ Oberster Gerichtshof, Austria, 7 September 2000, published on the Internet at http://www.cisg.at/8_2200v.htm.

⁵¹ CLOUT case No. 237 [Arbitration - Arbitration Institute of the Stockholm Chamber of Commerce, 5 June 1998] (see full text of the decision).

paragraph (3)⁵² for misrepresenting the age and mileage of a car even if the buyer could not have been unaware of the lack of conformity.⁵³

23. One arbitral tribunal,⁵⁴ when having to decide what rate of interest to apply to the sums in arrears, applied the average bank short-term lending rate to prime borrowers, being the solution adopted both by article 7.4.9 of the UNIDROIT Principles of International Commercial Contracts and by article 4.507 of the Principles of European Contract Law; the arbitral tribunal adopted that solution on the grounds that such rules had to be considered general principles on which the Convention is based. In other cases,⁵⁵ arbitral tribunals referred to the UNIDROIT Principles of International Commercial Contracts to find corroboration of the results reached by applying the rules of the Convention; one State court also referred to the UNIDROIT Principles of International Commercial Contracts to corroborate a solution adopted on the basis of the Convention.⁵⁶ Furthermore, according to a State court, the UNIDROIT Principles can also help to determine the exact meaning of general principles upon which the CISG is based.⁵⁷

⁵² 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”.

⁵³ CLOUT case No. 168 [Oberlandesgericht Köln, Germany, 21 March 1996].

⁵⁴ See ICC Court of Arbitration, award No. 8128, published on the Internet at <<http://www.unilex.info/case.cfm?pid=1&do=case&id=207&step=FullText>>.

⁵⁵ ICC Court of Arbitration, award No. 9117, published on the Internet at <<http://www.unilex.info/case.cfm?pid=1&do=case&id=399&step=FullText>>; ICC Court of Arbitration, award No. 8817, published on the Internet at <<http://www.unilex.info/case.cfm?pid=1&do=case&id=398&step=FullText>>.

⁵⁶ CLOUT case No. 205 [Cour d’appel Grenoble, France, 23 October 1996] (see full text of the decision).

⁵⁷ See Rechtbank Zwolle, Netherlands, 5 March 1997, published on the Internet at <<http://www.unilex.info/case.cfm?pid=1&do=case&id=332&step=FullText>>.