



**United Nations Commission
on International Trade Law**

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

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.

* 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.

(3) The seller is not liable under subparagraphs (a) to (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 defines standards for determining whether goods delivered by the seller conform to the contract in terms of type, quantity, quality, and packaging, thereby defining the seller's obligations with respect to these crucial aspects of contractual performance. Two courts have stated that the unitary notion of conformity defined in article 35 displaces the concepts of "warranty" found in many domestic laws.¹

2. In general, a failure by the seller to deliver goods that meet the applicable requirements of article 35 constitutes a breach of the seller's obligations,² although it has been stated that a failure of goods to conform to the contract is not a breach if the non-conforming goods are equal in value and utility to conforming goods.³ A seller's breach of its obligations under article 35, furthermore, can in proper circumstances rise to the level of a fundamental breach of contract as defined in article 25 of the Convention, and thus justify the buyer in avoiding the contract under article 49 (1) of the Convention.⁴

Article 35 (1)

3. Article 35 (1) requires a seller to deliver goods that meet the specifications of the contract in terms of description, quality, quantity and packaging. Thus it has been found that a shipment of raw plastic that contained a lower percentage of a particular substance than that specified in the contract, and which as a result produced window blinds that did not effectively shade sunlight, did not conform to the contract, and the seller had therefore breached its obligations.⁵ It has also been found that a shipment of goods containing less than the quantity specified in the

¹ CLOUT case No. 256 [Tribunal Cantonal du Valais, Switzerland, 29 June 1998] (see full text of the decision); CLOUT case No. 219 [Tribunal Cantonal Valais, Switzerland, 28 October 1997] (see full text of the decision).

² See, e.g., CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995] (see full text of the decision), (stating that a fundamental breach of contract "can be caused by a delivery of goods that do not conform with the contract"); Landgericht Paderborn, Germany, 25 June 1996, Unilex (stating that the seller had breached its obligations by delivering goods that failed to conform to the technical specifications of the contract).

³ CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998].

⁴ CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995] (see full text of the decision); CLOUT case No. 79 [Oberlandesgericht Frankfurt a.M., Germany, 18 January 1994]. See also Tribunale di Busto Arsizio, Italy, 13 December 2001, published in *Rivista di Diritto Internazionale Privato e Processuale*, 2003, 150–155, also available on Unilex (delivery of a machine totally unfit for the particular use which 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, and therefore forming the basis for termination).

⁵ Landgericht Paderborn, Germany, 25 June 1996, Unilex.

contract lacks conformity under article 35 (1), with the court noting that a lack of conformity comprises both a lack of quality and a lack of quantity.⁶ A used car that had been licensed two years earlier than indicated in the car's documents and whose odometer did not state the full mileage on the car was found to be non-conforming under article 35 (1).⁷ On the other hand, one court has concluded that there was no violation of article 35 (1) when the seller delivered shellfish containing a high level of cadmium because the parties did not specify a maximum cadmium level in their agreement.⁸

4. In ascertaining, for purposes of article 35 (1), whether the contract requires goods of a particular quantity, quality or description, or requires that the goods be contained or packaged in a particular manner, one must refer to general rules for determining the content of the parties' agreement.⁹ In this connection, one court, on appeal of the decision concerning shellfish with high cadmium levels mentioned in the previous paragraph, found that the seller had not impliedly agreed to comply with recommended (but not legally mandatory) domestic standards for cadmium in shellfish existing in the buyer's country.¹⁰ The court reasoned that 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 the standards for resaleability in the buyer's country or to comply with public law provisions of the buyer's country governing resaleability.¹¹

Article 35 (2): Overview

5. Article 35 (2) states standards relating to the goods' quality, function and packaging that, while not mandatory, are presumed to be a part of sales contracts. In other words, these standards are implied terms that bind the seller even without affirmative agreement thereto. If the parties do not wish these standards to apply to their contract, they can (in the words of article 35) "agree[...] otherwise."¹² Unless the parties exercise their autonomous power to contract out the standards of article 35 (2), they are bound by them.¹³ An arbitral tribunal has found that an

⁶ CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997].

⁷ CLOUT case No. 168 [Oberlandesgericht Köln, Germany, 21 March 1996].

⁸ CLOUT case No. 84 [Oberlandesgericht Frankfurt a.M., Germany, 20 April 1994].

⁹ Such general rules for determining the contents of the parties' agreement would include the general standards in the CISG relating to the meaning and contents of a contract for sale, including article 8 (standards for determining a party's intent) and article 9 (usages and practices to which the parties are bound).

¹⁰ CLOUT case no. 123 [Bundesgerichtshof, Germany, 8 March 1995] (see full text of the decision).

¹¹ *Id.*, (see full text of the decision).

¹² The parties' power to contract out of the implied standards of article 35 (2) (*i.e.*, to agree otherwise) is a specific application of the parties' power under article 6 to "derogate from or vary the effect of any of [the Convention's] provisions." See CLOUT case No. 229 [Bundesgerichtshof, Germany, 4 December 1996]. ("If the [buyer] has warranty claims against the seller—and of what kind—primarily depends upon the warranty terms and conditions of [seller], which became part of the contract. They have priority over the CISG provisions (CISG Art. 6.)" (see full text of the decision).

¹³ One court 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

agreement as to the general quality of goods did not derogate from article 35 (2) if the agreement contained only positive terms concerning the qualities that the goods would possess, and not negative terms relieving the seller of responsibilities.¹⁴ One court applied domestic law to invalidate a particular contract clause that attempted to exclude the seller's liability for a lack of conformity in the goods: the court held that the question of the validity of such a clause is an issue beyond the scope of the CISG, and is governed by the domestic law applicable under private international law rules.¹⁵

6. Article 35 (2) is comprised of four subparts. Two of the subparts (article 35 (2) (a) and article 35 (2) (d)) apply to all contracts unless the parties have agreed otherwise. The other two subparts (article 35 (2) (b) and article 35 (2) (c)) are triggered only if certain factual predicates are present. The standards stated in these subparts are cumulative—that is, the goods do not conform to the contract unless they meet the standards of all applicable subparts.

Article 35 (2) (a)

7. Article 35 (2) (a) requires the seller to deliver goods “fit for the purposes for which goods of the same description would ordinarily be used.” This standard was found to be violated when the seller delivered a refrigeration unit that broke down soon after it was first put into operation.¹⁶ It was also found violated when the seller delivered wine that had been diluted with 9 per cent water, causing domestic authorities to seize and destroy the wine,¹⁷ and when the seller delivered chaptalized wine.¹⁸ It was also found to be violated where the seller substituted a different component in a machine without notifying the buyer and without giving the buyer proper instructions for installation, and as a result the machine failed after three years of use, thus disappointing the buyer's expectation for “long, continuous operation of the [machine] without failure.”¹⁹

8. The standard of article 35 (2) (a), however, requires only that the goods be fit for the purposes for which they are ordinarily used. It does not require that the goods be perfect or flawless, unless perfection is required for the goods to fulfil their ordinary purposes.²⁰ One court has raised but not resolved the issue of whether

Oberlandesgericht Köln, Germany, 8 January 1997, Unilex, affirming in relevant part Landgericht Aachen, Germany, 19 April 1996.

¹⁴ CLOUT case No. 237 [Arbitration—Arbitration Institute of the Stockholm Chamber of Commerce 5 June 1998] (see full text of the decision).

¹⁵ CLOUT case No. 168 [Oberlandesgericht Köln, Germany, 21 March 1996]. See also *Supermicro Computer, Inc. v. Digitechnic, S.A.*, 145 F. Supp. 2d 1147 (N.D. Cal. 2001), wherein a United States District Court declined to hear a dispute that was already subject to litigation in France because resolving the matter would require the court to determine the validity of a warranty disclaimer clause under the CISG (145 F. Supp. 2d at 1151).

¹⁶ CLOUT case No. 204 [Cour d'appel, Grenoble, France, 15 May 1996].

¹⁷ CLOUT case No. 170 [Landgericht Trier, Germany, 12 October 1995].

¹⁸ Cour de Cassation, France, 23 January 1996, Unilex.

¹⁹ CLOUT case No. 237 [Arbitration—Arbitration Institute of the Stockholm Chamber of Commerce, 5 June 1998] (see full text of the decision).

²⁰ ICC Arbitration Case No. 8247, June 1996, *International Court of Arbitration Bulletin*, vol. 11, p. 53 (2000) (microcrystalline chemicals that had solidified but could easily be re-transformed into crystals did not fail to conform to the contract); CLOUT case No. 252 [Handelsgericht des

article 35 (2) (a) requires goods of average quality, or goods of merely “marketable” quality.²¹

9. Several decisions have discussed whether conformity with article 35 (2) (a) is determined by reference to the quality standards prevailing in the buyer’s jurisdiction. According to one decision, the fact that the seller is to deliver goods to a particular jurisdiction and can infer that they will be marketed there is not sufficient to impose the standards of the importing jurisdiction in determining suitability for ordinary purposes under article 35 (2) (a).²² Thus the fact that mussels purchased and delivered to the buyer’s country contained cadmium levels exceeding the recommendations of the buyer’s country’s health regulations did not establish that the mussels failed to conform to the contract under article 35 (2) (a).²³ The court indicated that the standards in the importing jurisdiction would have applied if the same standards existed in the seller’s jurisdiction, or if the buyer had pointed out the standards to the seller and relied on the seller’s expertise.²⁴ The court raised but did not determine the question whether the seller would be responsible for complying with public law provisions of the importing country if the seller knew or should have known of those provisions because of “special circumstances”—e.g., if the seller maintained a branch in the importing country, had a long-standing business connection with the buyer, often exported into the buyer’s country, or promoted its products in the importing country.²⁵ A court from a

Kantons Zürich, Switzerland, 21 September 1998] (one misplaced line of text, which did not impede the legibility of the text, did not render an art exhibition catalogue non-conforming); CLOUT case No. 341 [Ontario Superior Court of Justice, Canada, 31 August 1999] (shipments containing a small percentage of defective picture frame mouldings did not fail to conform to the contract when the evidence indicated that shipments from any supplier would include some defective mouldings) (see full text of the decision).

- ²¹ CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995] (see full text of the decision). One court has stated that, to comply with article 35 (2) (a), goods must be of average quality, and not merely marketable; see Landgericht Berlin, Germany, 15 September 1994, Unilex. Compare Netherlands Arbitration Institute, Arbitral Award, No. 2319, 15 October 2002, Unilex (rejecting both average quality and merchantability tests, and applying a “reasonable quality” standard).
- ²² CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995] (“a foreign seller can simply not be required to know the not easily determinable public law provisions and/or administrative practices of the country to which he exports, and . . . the purchaser, therefore, cannot rationally rely upon such knowledge of the seller, but rather, the buyer can be expected to have such expert knowledge of the conditions in his own country or in the place of destination, as determined by him, and, therefore, he can be expected to inform the seller accordingly”). The court raised but did not resolve the issue of whether goods must meet the standards of the seller’s own jurisdiction in order to comply with article 35 (2) (a) (see full text of the decision).
- ²³ *Id.* Compare CLOUT case No. 343 [Landgericht Darmstadt, Germany, 9 May 2000], where a Swiss purchaser of video recorders complained that the German seller had only supplied instruction booklets in German and not in the other languages spoken in Switzerland. The court rejected the argument because the recorders had not been produced specially for the Swiss market and the buyer had failed to stipulate for instruction booklets in other languages.
- ²⁴ In a later decision involving vine wax that failed to protect vines grafted using the wax, the German Supreme Court found that the wax did not meet the requirements of article 35 (2) (a) because it “did not meet the industry standards—of which both parties were aware and which both parties applied...”. CLOUT case No. 272 [Oberlandesgericht Zweibrücken, Germany, 31 March 1998] (see full text of the decision).
- ²⁵ One court has concluded that, in the following circumstances, a Spanish seller of pepper agreed

different country, citing the aforementioned decision, has upheld an arbitral award finding a seller in violation of article 35 (2) (a) because it delivered medical devices that failed to meet safety regulations of the buyer's jurisdiction²⁶: the court concluded that the arbitration panel acted properly in finding that the seller should have been aware of and was bound by the buyer's country's regulations because of "special circumstances" within the meaning of the opinion of the court that rendered the aforementioned decision. A different court has found that a seller of cheese was required to comply with the buyer's country's standards because it had had dealings with the buyer for several months, and therefore must have known that the cheese was destined for the market in the buyer's country²⁷; 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 the goods be fit for "any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract." The article 35 (2) (b) obligation arises only if one or more particular purposes were revealed to the seller by the time the contract was concluded. In addition, the requirements of article 35 (2) (b) do not apply if "the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement." With regard to the latter reliance element, one court has stated that in the usual case, a buyer cannot reasonably rely on the seller's knowledge of the importing country's public law requirements or administrative practices relating to the goods, unless the buyer pointed such requirements out to the seller.²⁸ The court therefore found that mussels with cadmium levels exceeding the recommendations of German health regulations did not violate the requirements of article 35 (2) (b) where there was no evidence that the buyer had mentioned the regulations to the seller. By so holding, the court affirmed the decision of a lower court that the seller had not violated article 35 (2) (b) because there was no evidence that the parties implicitly agreed to comply with the buyer's country's health recommendations.²⁹ On the other hand, one court has found that a seller violated article 35 (2) (b) when it delivered skin care products that did not maintain specified

that the goods had to comply with German food safety laws: the seller had a long-standing business relationship with the German buyer; the seller regularly exported into Germany; and in a previous contract with the buyer the seller had agreed to special procedures for ensuring compliance with German food safety laws; Landgericht Ellwangen, Germany, 21 August 1995, Unilex. The court, citing article 35 (1), found that pepper products containing ethylene oxide at levels exceeding that permitted by German food safety laws did not conform to the contract; it therefore ruled in favour of the buyer, who had argued (presumably on the basis of article 35 (2) (a)) that the pepper products "were not fit for the purposes for which the goods would ordinarily be used and not fit to be sold in Germany."

²⁶ CLOUT case No. 418 [Federal District Court, Eastern District of Louisiana, United States, 17 May 1999].

²⁷ CLOUT case No. 202 [Cour d'appel, Grenoble, France 13 September 1995].

²⁸ CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995].

²⁹ CLOUT case No. 84 [Oberlandesgericht Frankfurt a.M., Germany, 20 April 1994], opinion described in CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995].

levels of vitamin A throughout their shelf life.³⁰ The court found that the buyer intended to purchase products with the specified vitamin levels, that “the special purpose . . . was known by the [seller] with sufficient clarity,” and that “the buyer counted on the seller’s expertise in terms of how the seller reaches the required vitamin A content and how the required preservation is carried out.”

Article 35 (2) (c)

11. Article 35 (2) (c) requires that, in order to conform to the contract, goods must “possess the qualities of goods which the seller has held out to the buyer as a sample or model.” Several courts have found that delivered goods violated this provision.³¹ Article 35 (2) (c), by its terms, applies if the seller has held out a sample or model to the buyer, unless the parties “have agreed otherwise.” One court has nevertheless indicated that the goods must conform to a model only if there is an express agreement in the contract that the goods will do so.³² On the other hand, it has been held that the section will apply if it is the buyer rather than the seller that has provided the model, provided that the parties agreed that the goods should conform to the model.³³

Article 35 (2) (d)

12. Article 35 (2) (d) supplements the last clause of article 35 (1), which requires that the goods be “contained or packaged in the manner required by the contract.” Several cases have found that improperly packaged goods failed to conform to the contract under article 35 (2) (d). Where a seller sold cheese that it knew would be resold in the buyer’s country, and the cheese was delivered in packaging that did not comply with that country’s food labelling regulations, the goods were deemed non-conforming under article 35 (2) (d).³⁴ In another case, a seller of canned fruit was

³⁰ Helsinki Court of First Instance, Finland, 11 June 1995, affirmed by Helsinki Court of Appeal, Finland, 30 June 1998, English translation available on the Internet at (<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/980630f5.html>); see also Tribunale di Busto Arsizio, Italy, 13 December 2001, published in *Rivista di Diritto Internazionale Privato e Processuale*, 2003, 150–155, also available on Unilex.

³¹ CLOUT case No. 79 [Oberlandesgericht Frankfurt a.M., Germany, 18 January 1994] (holding that the goods (shoes) failed to conform to a sample supplied by the seller, but that the lack of conformity was not shown to be a fundamental breach) (see full text of the decision); CLOUT case No. 138 [Federal Court of Appeals for the Second Circuit, United States, 6 December 1993, 3 March 1995] (finding that air conditioner compressors delivered by the seller did not conform to the contract, and that such lack of conformity constituted a fundamental breach: “The agreement between Delchi and Rotorex was based upon a sample compressor supplied by Rotorex and upon written specifications regarding cooling capacity and power consumption . . . The president of Rotorex . . . conceded in a May 17, 1988 letter to Delchi that the compressors supplied were less efficient than the sample . . .”) (see full text of the decision).

³² Landgericht Berlin, Germany, 15 September 1994, Unilex.

³³ CLOUT case No. 175 [Oberlandesgericht Graz, Austria, 9 November 1995] (see full text of the decision).

³⁴ CLOUT case No. 202 [Cour d’appel, Grenoble, France, 13 September 1995] (see full text of the decision).

found to have violated article 35 where the containers were not adequate to prevent the contents from deteriorating after shipment.³⁵

Article 35 (3)

13. Article 35 (3) relieves the seller of responsibility for a lack of conformity under article 35 (2) to the extent that the buyer “knew or could not have been unaware” of the non-conformity at the time the contract was concluded.³⁶ Under this provision, a buyer has been held to have assumed the risk of defects in a used bulldozer that the buyer inspected and tested before purchasing.³⁷ One court has stated that, under article 35 (3), a buyer who elects to purchase goods despite an obvious lack of conformity must accept the goods “as is.”³⁸ The rule of article 35 (3), however, is not without limits. Where a seller knew that a used car had been licensed two years earlier than indicated in the car’s documents and knew that the odometer understated the car’s actual mileage but did not disclose these facts to the buyer, the seller was liable for the lack of conformity even if the buyer (itself a used car dealer) should have detected the problems.³⁹ Citing articles 40 and 7 (1), the court found that the Convention contains a general principle favouring even a very negligent buyer over a fraudulent seller.

Burden of proof

14. A number of decisions have discussed who bears the burden of proving that goods fail to conform to the contract under article 35. One court has twice indicated that the seller bears that burden.⁴⁰ On the other hand, several tribunals have concluded that the buyer bears the burden of proving lack of conformity, although the decisions adopt different theories to reach that result. For example, after noting that the CISG does not expressly address the burden of proof issue, one arbitral tribunal applied domestic law to allocate the burden to the buyer as the party

³⁵ *Conservas La Costella S.A. de C.V. v. Lanín San Luis S.A. & Agroindustrial Santa Adela S.A.*, Arbitration Proceeding before Compromex (Comisión para la Protección del Comercio Exterior de México), Mexico, 19 April 1996, Unilex. The Compromex decision did not specifically cite CISG article 35 (2) (d).

³⁶ Note that 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) (requiring the goods to be of “the quantity, quality and description required by the contract”) is not subject to the rule of article 35 (3). Nevertheless, a buyer’s awareness of defects at the time the contract is concluded should presumably be taken into account in determining what the parties’ agreement requires as to the quality of the goods. Secretariat Commentary to (then) Article 33 of the Convention, p. 32, para. 14.

³⁷ CLOUT case No. 219 [Tribunal Cantonal Valais, Switzerland, 28 October 1997]. After the buyer inspected the bulldozer, the parties agreed that the seller would replace three specific defective parts. The seller replaced the parts before delivering the machine, but the buyer then complained of other defects. (see full text of the decision)

³⁸ CLOUT case No. 256 [Tribunal Cantonal du Valais, Switzerland, 29 June 1998] (see full text of the decision).

³⁹ CLOUT case No. 168 [Oberlandesgericht Köln, Germany, 21 March 1996].

⁴⁰ *Rechtbank van koophandel Kortrijk*, Belgium, 6 October 1997, Unilex; *Rechtbank van koophandel Kortrijk*, Belgium, 16 December 1996, available on the Internet at (<http://www.law.kuleuven.ac.be/int/tradelaw/WK/1996-12-16.htm>).

alleging a lack of conformity.⁴¹ Other courts have concluded that the Convention itself, although it does not expressly answer the burden of proof question, contains a general principle that the party who is asserting or affirming a fact bears the burden of proving it, resulting in an allocation of the burden to a buyer who asserts that goods did not conform to the contract.⁴² Some decisions suggest that the burden of proof varies with the context. Thus, one court has stated that the buyer bears the burden of proving a lack of conformity if it has taken delivery of the goods without giving immediate notice of non-conformity.⁴³ Similarly, another court has indicated that the seller bears the burden of proving that goods were conforming at the time risk of loss passed, but the buyer bears the burden of proving a lack of conformity after the risk shifted if it has accepted the goods without immediately notifying the seller of defects.⁴⁴

Evidence of lack of conformity

15. Several decisions address evidentiary issues relating to a lack of conformity under article 35. Direct evidence that the standards of article 35 were violated has been adduced and accepted by courts in several instances. Thus a showing that delivered wine had been seized and destroyed by authorities in the buyer's country because it had been diluted with water was accepted by the court as establishing that the wine did not conform with the contract for sale.⁴⁵ Similarly, one court has found that, once the buyer established that a refrigeration unit had broken down shortly after it was first put into operation, the seller was presumed to have violated article 35 (2) (a) and thus bore the burden of showing it was not responsible for the defects.⁴⁶ Expert opinion has also been accepted as establishing a lack of

⁴¹ CLOUT case No. 103 [Arbitration—International Chamber of Commerce No. 6653 1993]. A Swiss court has acknowledged the view that the burden of proving a lack of conformity should be allocated by applying domestic law, but it neither adopted nor rejected this approach because the contrary view led to the same result (buyer bore the burden). CLOUT case No. 253 [Cantone del Ticino Tribunale d'appello, Switzerland, 15 January 1998].

⁴² CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (containing an extended discussion of the issue). To the same general effect, see CLOUT case No. 97 [Handelsgericht des Kantons Zürich, Switzerland, 9 September 1993]. One court has noted the view that the Convention contains a general principle allocating the burden to the buyer, but it neither adopted nor rejected this approach because the contrary view led to the same result (buyer bore the burden). CLOUT case No. 253 [Cantone del Ticino Tribunale d'appello, Switzerland, 15 January 1998]; see also Netherlands Arbitration Institute, Arbitral Award, No. 2319, 15 October 2002, Unilex. Without expressly discussing the issue, several decisions appear to have impliedly adopted the view that the CISG allocated the burden of proving lack of conformity to the buyer. See CLOUT case No. 107 [Oberlandesgericht Innsbruck, Austria, 1 July 1994] (buyer failed to prove that the goods did not conform to the contract); Landgericht Düsseldorf, Germany, 25 August 1994, Unilex (buyer failed to prove lack of conformity).

⁴³ CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995] (see full text of the decision). One court has found that, because it was shown that a refrigeration unit had broken down soon after it was first put into operation, the seller bore the burden of proving that it was not responsible for the defect. CLOUT case No. 204 [Cour d'appel, Grenoble, France, 15 May 1996].

⁴⁴ CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998].

⁴⁵ CLOUT case No. 170 [Landgericht Trier, Germany, 12 October 1995] (see full text of the decision).

⁴⁶ CLOUT case No. 204 [Cour d'appel, Grenoble, France 15 May 1996].

conformity,⁴⁷ although the results of an investigation into the quality of the goods have been held insufficient to establish a lack of conformity where the buyer ignored a trade usage requiring that the seller be permitted to be present at such investigations.⁴⁸ On the other hand, it has been found that the early failure of a substituted part in a machine did not by itself establish that the machine was not in conformity with the contract, since the failure might have been due to improper installation.⁴⁹ Furthermore, a buyer's failure to complain of obvious defects at the time the goods were received has been taken as affirmative evidence that the goods conformed to the contract.⁵⁰ In another case, deliveries of allegedly non-conforming chemicals had been mixed with earlier deliveries of chemicals; thus, even though the buyer showed that glass produced with the chemicals was defective, it could not differentiate which deliveries were the source of the defective chemicals; and since the time to give notice of non-conformity for the earlier deliveries had expired, the buyer failed to prove a lack of conformity.⁵¹ Finally, it has been found that a seller's offer to remedy any defects in the goods did not constitute an admission that the goods lacked conformity.⁵²

Jurisdictional issues

16. For purposes of determining jurisdiction under article 5 (1) of the Brussels Convention, several courts have concluded that the conformity obligation imposed on the seller by CISG article 35 is not independent of the obligation to deliver the goods, and both obligations are performed at the same place.⁵³

⁴⁷ CLOUT case No. 50 [Landgericht Baden-Baden, Germany, 14 August 1991] (see full text of the decision). But see CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] where the court rejected expert opinion evidence offered by the seller because under Italian civil procedure law only an expert appointed by the court can offer such an opinion (see full text of the decision). For cases in which courts appointed experts to evaluate the conformity of the goods, see CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995] (reporting that the trial court had obtained an expert opinion of public health authorities on the cadmium level in mussels) (see full text of the decision); CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999] (expert opinion that damage to vines was caused by defective vine wax) (see full text of the decision); Rechtbank van Koophandel, Kortrijk, Belgium, 6 October 1997, Unilex (appointing judicial expert to determine the conformity of yarn); Rechtbank van Koophandel, Kortrijk, Belgium, 16 December 1996, available on the Internet at (<http://www.law.kuleuven.ac.be/int/tradelaw/WK/1996-12-16.htm>).

⁴⁸ Helsinki Court of Appeal, Finland, 29 January 1998, available on the Internet at (<http://www.utu.fi/oik/tdk/xcisg/tap4.html#engl>).

⁴⁹ CLOUT case No. 237 [Arbitration—Arbitration Institute of the Stockholm Chamber of Commerce, 5 June 1998] (see full text of the decision).

⁵⁰ CLOUT case No. 341 [Ontario Superior Court of Justice, Canada, 31 August 1999] (see full text of the decision).

⁵¹ CLOUT case No. 50 [Landgericht Baden-Baden, Germany, 14 August 1991] (see full text of the decision).

⁵² CLOUT case No. 97 [Handelsgericht des Kantons Zürich, Switzerland, 9 September 1993] (see full text of the decision).

⁵³ CLOUT case No. 245 [Cour d'appel, Paris, France, 18 March 1998]; CLOUT case No. 244 [Cour d'appel, Paris, France, 4 March 1998]; CLOUT case No. 203 [Cour d'appel, Paris, France, 13 December 1995].