



**United Nations Commission
on International Trade Law**

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

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.

* 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.



1. The first sentence of article 4 lists the matters in respect of 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 while the second sentence contains a non-exhaustive list of issues with which it is not concerned, namely the validity of the contract or of any of its provisions or of 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 not dealt with in the Convention as this would have delayed the conclusion of the Convention.²

2. Matters not governed by the Convention have to be settled either in conformity of the applicable set of uniform rules³ or the applicable domestic law.⁴

Issues dealt with by the Convention

3. As far as the formation of contract is concerned, the Convention merely governs the issue of the objective requirements for the conclusion of the contract.⁵ The issue of whether a contract is validly formed, on the contrary, is subject to the applicable national rules, except for those issues in respect of which the Convention provides exhaustive rules.⁶ Thus, issues such as capacity to contract⁷ and the consequences of mistake, duress and fraud are left to the applicable domestic law.⁸ Where, however, one party errs in respect of the qualities of the goods to be delivered or the solvency of the other party, the rules of the applicable law give way to those of the Convention, since the Convention exhaustively deals with those issues.

4. Although article 4 does not list the issue of burden of proof as one with which the Convention is concerned, some courts⁹ (albeit not all)¹⁰ have concluded that the

¹ CLOUT case No. 241 [Cour de Cassation, France, 5 January 1999].
² See Report of the Working Group on the International Sale of Goods on the work of its ninth session (Geneva, 19-30 September 1977) (A/CN.9/142), reproduced in the UNCITRAL Yearbook, 1978, at p. 65, paras. 48-51, 66, 69.
³ See CLOUT case No. 202 [Cour d'appel Grenoble, France, 13 September 1995], stating that the assignment of receivables is not governed by the Convention and applying the 1988 UNIDROIT Convention on International Factoring as the assignment fell under its sphere of application (see full text of the decision).
⁴ See CLOUT case No. 97 [Handelsgericht des Kantons Zürich, Switzerland, 9 September 1993].
⁵ See CLOUT case No. 95 [Zivilgericht Basel-Stadt, Switzerland, 21 December 1992] (see full text of the decision).
⁶ See CLOUT case No. 47 [Landgericht Aachen, Germany, 14 May 1993] (see full text of the decision).
⁷ See Oberster Gerichtshof, Austria, 22 October 2001, available on the Internet at <http://www.cisg.at/1_4901i.htm>; CLOUT case No. 5 [Landgericht Hamburg, Germany, 26 September 1990].
⁸ See Schiedsgericht der Handelskammer Zürich, Switzerland, award No. 273/95, available on the Internet at <<http://www.unilex.info/case.cfm?pid=1&do=case&id=396&step=FullText>>.
⁹ See CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000]; CLOUT case No. 380 [Tribunale di Pavia, Italy, 29 December 1999]; CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999]; CLOUT case No. 196 [Handelsgericht des Kantons Zürich, Switzerland, 26 April 1995]; CLOUT case No. 97 [Handelsgericht des Kantons Zürich, Switzerland, 9 September 1993].
¹⁰ See CLOUT case No. 261 [Berzirksgericht der Sanne, Switzerland, 20 February 1997]; CLOUT case No. 103 [Arbitration—International Chamber of Commerce no. 6653 1993].

Convention also governs the issue of burden of proof.¹¹ This view is based upon the fact that the Convention includes at least one instance, article 79, expressly dealing with the burden of proof.¹² As the issue is therefore governed by the Convention, albeit not expressly settled in it, article 7 (2) requires the question to be settled in conformity with the general principles on which the Convention is based.¹³ As far as the allocation of the burden of proof is concerned, the following general principles have been identified: 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;¹⁴ any party claiming an exception has to prove the factual prerequisites of that exception.¹⁵

5. These principles have led courts to state that the buyer who asserts the non-conformity of the goods has to prove the non-conformity as well as the existence of a proper notice of non-conformity.¹⁶ Similarly, two courts decided that the buyer had to pay the price and was not entitled to damages or to avoidance of the contract for non-conformity of the goods, since it had not proved the non-conformity of the goods according to article 35.¹⁷ In one case, a court decided that the buyer had lost its right to rely upon the non-conformity, since it had not been able to prove to have given timely notice thereof to the seller.¹⁸

6. In two cases, the aforementioned general principles induced courts to state that under article 42, which provides that the seller has to deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property, of which the seller knew or could not have been unaware, the buyer had the burden of proving that the seller knew or could not have been unaware of the third party industrial or intellectual property rights.¹⁹

7. These general principles were also the basis for several decisions dealing with the issue of damages. In this respect, 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

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

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

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

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

¹⁵ Trib. Rimini, Italy, 26 November 2002, *Guirispudenza italiana*, 2003, 896 ff.

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

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

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

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

the breach of contract and the damage as well as the foreseeability of the loss”.²⁰ In other cases, it was stated more generally that the party claiming damages has to prove the damage suffered.²¹

Validity of the contract and of usages

8. Although the Convention generally leaves issues concerning the validity of the contract to the applicable national law,²² in one respect the Convention provides rules which may contradict those on validity of the applicable national law.²³ Article 11 provides that a contract for the international sale of goods need not be concluded in or evidenced by writing and is not subject to any other requirement of form, while in some legal systems the form requirement for a contract for the sale of goods is considered to be an issue of validity of the contract.

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

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

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

²² See [Federal] Southern District Court for New York, 10 May 2002, 2002 U.S. Dist. LEXIS 8411 (*Geneva Pharmaceuticals Tech. Corp. v. Barr Labs. Inc.*), available on the Internet at <<http://cisgw3.law.pace.edu/cases/020510u1.html>>; [Federal] Northern District Court for California, 21 July 2001, 2001 U.S. Dist. LEXIS 16000, 2001 Westlaw 1182401 (*Asante Technologies, Inc. v. PMC-Sierra, Inc.*), available on the Internet at <<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/010727u1.html>>; Oberster Gerichtshof, Austria, 7 September 2000, available on the Internet at <http://www.cisg.at/8_2200v.htm>; Hof van Beroep Antwerpen, Belgium, 18 June 1996, available on the Internet at <<http://www.law.kuleuven.ac.be/int/tradelaw/WK/1996-06-18.htm>>.

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

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

²⁵ See Oberster Gerichtshof, Austria, 7 September 2000, available on the Internet at <http://www.cisg.at/8_2200v.htm>; Rechtbank Zutphen, Netherlands, 29 May 1997, *Nederlands Internationaal Privaatrecht*, 1998, No. 110; AG Nordhorn, Germany, 14 June 1994, available on

10. The validity of usages—which is not dealt with by the Convention,²⁶ but is left to the applicable domestic law²⁷—must be distinguished from the issue of how usages are to be defined, under which circumstances they are binding for the parties and what their relationship is with the rules set forth in the Convention; these issues are dealt with in article 9.²⁸

Effect on the property of the goods sold

11. The Convention makes clear that it does not govern the passing of property of the goods sold.²⁹ During the drafting process, it was not regarded possible to unify the rule on this point.³⁰ Thus, the effects on the property of the goods sold are left to the applicable national law to be determined by the rules of private international law of the forum.

12. The Convention does not deal with the validity of a retention of title clause either.³¹

Other issues not dealt with by the Convention

13. The Convention itself expressly lists a few examples of the issues it is not concerned with.³² There are many other issues not dealt with by the Convention. The following issues have been identified by courts as not being dealt with by the Convention: the validity of a choice of forum clause,³³ the validity of a penalty clause,³⁴ the validity of a settlement agreement,³⁵ the assignment of receivables,³⁶

the Internet at <http://www.jura.uni-freiburg.de/ipr1/cisg/>.

²⁶ See Oberster Gerichtshof, 21 March 2000, *Internationales Handelsrecht* 2001, 40 et seq.

²⁷ Id.

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

²⁹ See also [Federal] Northern District for Illinois, 2002 Westlaw 655540 (*Usinor Industeel v. Leeco Steel Products, Inc.*), available on the Internet at <http://cisgw3.law.pace.edu/cases/020328u1.html>

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

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

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

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

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

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

³⁶ See Oberster Gerichtshof, Austria, 7 September 2000, available on the Internet at <http://www.cisg.at/8_2200v.htm>; Oberster Gerichtshof, Austria, 25 June 1998, *Zeitschrift für Rechtsvergleichung*, 2000, 77; CLOUT case No. 269 [Bundesgerichtshof, Germany, 12 February

the assignment of contract,³⁷ set-off³⁸ (at least where the receivables do not all arise from contracts governed by the Convention),³⁹ the statute of limitations,⁴⁰ the issue of whether a court has jurisdiction⁴¹ and, generally, any other issue of procedural law,⁴² the assumption of debts,⁴³ the acknowledgement of debts,⁴⁴ the effects of the

1998] (see full text of the decision); CLOUT case No. 334 [Obergericht des Kantons Thurgau, Switzerland, 19 December 1995]; Trib. Comm. Nivelles, Belgium, 19 September 1995, Unilex; CLOUT case No. 132 [Oberlandesgericht Hamm, Germany, 8 February 1995]; BG Arbon, Switzerland, 9 December 1994, Unilex.

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

³⁸ See 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. 273 [Oberlandesgericht München, Germany, 9 July 1997] (see full text of the decision); CLOUT case No. 275 [Oberlandesgericht Düsseldorf, Germany, 24 April 1997] (see full text of the decision); CLOUT case No. 169 [Oberlandesgericht Düsseldorf, Germany, 11 July 1996]; Landgericht Duisburg, Germany, 17 April 1996, available on the Internet at <http://www.jura.uni-freiburg.de/ipr1/cisg/>; CLOUT case No. 289 [Oberlandesgericht Stuttgart, Germany, 21 August 1995]; Landgericht München, Germany, 20 March 1995, available on the Internet at <http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/164.htm>; Rechtbank Middelburg, Netherlands, 25 January 1995, *Nederlands Internationaal Privaatrecht*, 1996, No. 127; Amtsgericht Mayen, Germany, 19 September 1994, available on the Internet at <http://www.jura.uni-freiburg.de/ipr1/cisg/>; CLOUT case No. 281 [Oberlandesgericht Koblenz, Germany, 17 September 1993]; CLOUT case No. 125 [Oberlandesgericht Hamm, Germany, 9 June 1995]; Rechtbank Roermond, Netherlands, 6 May 1993, Unilex; CLOUT case No. 99 [Rechtbank Arnhem, Netherlands, 25 February 1993].

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

⁴⁰ See Rechtbank van Koophandel Ieper, 29 January 2001, available on the Internet at <http://www.law.kuleuven.ac.be/int/tradelaw/WK/2001-01-29.htm>; Oberster Gerichtshof, Austria, 7 September 2000, available on the Internet at http://www.cisg.at/8_2200v.htm; CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (see full text of the decision); CLOUT case No. 297 [Oberlandesgericht München, Germany, 21 January 1998] (see full text of the decision); Oberster Gerichtshof, Austria, 25 June 1998, *Zeitschrift für Rechtsvergleichung*, 2000, 77; CLOUT case No. 345 [Landgericht Heilbronn, Germany, 15 September 1997]; CLOUT case No. 249 [Cour de Justice Genève, Switzerland, 10 October 1997]; Landgericht Düsseldorf, Germany, 11 October 1995, available on the Internet at <http://www.jura.uni-freiburg.de/ipr1/cisg/>; CLOUT case No. 125 [Oberlandesgericht Hamm, Germany, 9 June 1995]; ICC Court of Arbitration, award No. 7660/KJ, *ICC Court of Arbitration Bulletin*, 1995, 69 ff.

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

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

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

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

contract on third parties⁴⁵ as well as the issue of whether one is jointly liable.⁴⁶ According to some courts, the Convention does not deal with tort claims.⁴⁷

14. One court has found that estoppel is not dealt with by the Convention,⁴⁸ however other courts have concluded that estoppel should be regarded as a general principle of the Convention.⁴⁹ Furthermore, one 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.⁵⁰

15. According to some courts, the issue of the currency of payments is not dealt with by the Convention and, in the absence of a choice by the parties,⁵¹ is left to the applicable domestic law.⁵² According to one court, the issue of the currency of payment is, absent an agreement of the parties, to be determined by resorting to the currency of the place of payment to be determined on the basis of article 57.⁵³

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

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

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

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

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

⁵⁰ [Federal] Northern District for Illinois, 2002 Westlaw 655540 (*Usinor Industeel v. Leeco Steel Products, Inc.*), available on the Internet at <http://cisgw3.law.pace.edu/cases/020328u1.html>.

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

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

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