Article 35

(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.

(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

(a) Are fit for the purposes for which goods of the same description would ordinarily be used;

(b) Are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;

(c) Possess the qualities of goods which the seller has held out to the buyer as a sample or model;

(d) Are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

(3) The seller is not liable under subparagraphs *(a)* or *(d)* of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

INTRODUCTION

1. Article 35 of CISG states standards for determining whether goods delivered by the seller conform to the contract in terms of type, quantity, quality, and packaging. The provision thus defines the seller's obligations with respect to these crucial aspects of contractual performance. Courts have stated that the unitary notion of conformity defined in article 35 displaces the concepts of "warranty" found in some domestic laws,[1] and that, under the CISG, delivery of goods of a different type from those required by the contract ("aliud") constitutes delivery of goods that lack conformity.[2] It has also been stated that CISG provides the exclusive remedy for a lack of conformity in the goods, and that it thus pre-empts not only domestic law breach of contract claims, but also domestic law rules that invalidate a contract on the basis of mistake concerning the quality of the goods or on the basis of tort/delict for violation of a pre-contractual duty to provide information.[3]

2. In general, a failure by the seller to deliver goods that meet the applicable requirements of article 35 constitutes a breach of the seller's obligations,[4] although it has been stated that a failure of goods to conform to the contract is not a breach if the non-conforming goods are equal in value and utility to conforming goods.[5] Delivery of false documents relating to the origin of the goods has been found to be a violation of article 35.[6] Another court has stated: "Although the seller is obliged to deliver goods which conform in quantity, quality and to contractual specifications according to trade practices, differences in quantity and contractual requirements can only be regarded as non-conforming goods under article 35 CISG if the defects reach a certain level of seriousness. . . ."[7] A seller's breach of its obligations under article 35 can in proper circumstances rise to the level of a fundamental breach of contract as defined in article 25 of the Convention, thus justifying the buyer in avoiding the contract under article 49 (1) of the Convention.[8]

ARTICLE 35 (1)

3. Article 35 (1) requires a seller to deliver goods that meet the specifications of the contract in terms of description, quality, quantity and packaging. It has been found that a shipment of raw plastic that contained a lower percentage of a particular substance than that specified in the contract, and which as a result produced window blinds that did not effectively shade sunlight, did not conform to the contract, and the seller had therefore breached its obligations.[9] It has also been found that a shipment of goods containing less than the quantity specified in the contract breached article 35 (1), since the provision expressly states that a lack of "conformity" encompasses both a lack of quality in the goods delivered and a lack of quantity;[10] partial deliveries, however, were held not to violate article 35 (1) where the contract allowed them and the buyer had accepted them without complaint.[11] A used car that had been licensed two years earlier than indicated in the car's documents and whose odometer did not state the full mileage on the car was found to be non-conforming under article 35 (1).[12] And where a contract required that potting soil contain 40 kg of clay per cubic metre of potting soil, but the goods delivered contained a different proportion of clay, the court found a violation of article 35 (1).[13] Likewise, that agreed certificates issued by a Swiss federation of organic farmers for juice were

lacking was regarded as non-conformity of the juice itself under article 35 (1).[14] 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.[15]

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;[16] it has been held, however, that the question whether a seller waived time limitations in a contractual provision governing the quality of the goods was, pursuant to article 7 (2) CISG, governed by applicable domestic law.[17] In this connection, one court, on appeal of the decision concerning shellfish with high cadmium levels cited in the previous paragraph, found that the seller had not impliedly agreed to comply with recommended (but not legally mandatory) domestic standards for cadmium in the buyer's country.[18] As the court reasoned, the mere fact the seller was to deliver the shellfish to a storage facility located in the buyer's country did not constitute an implied agreement under article 35 (1) to meet that country's standards for resaleability, or to comply with its public law provisions governing resaleability.[19] It has also been held that a seller's previous deliveries to the buyer, some of which involved different kinds of goods and during which the goods had not been damaged, did not constitute an implied agreement concerning the packaging of the goods.[20]

ARTICLE 35 (2): OVERVIEW

5. Article 35 (2) states standards relating to the goods' quality, function and packaging that, while not mandatory, are presumed to be a part of sales contracts. In other words, these standards are implied terms that bind the seller even without affirmative agreement thereto. If the parties do not wish these standards to apply to their contract, they may (in the words of article 35) "agree[...] otherwise."[21] Unless the parties exercise their autonomous power to contract out the standards of article 35 (2), they are bound by them.[22] Whether the parties agreed to contractual terms that excluded the seller's obligations under article 35 (2), it has been asserted, is governed by the Convention's rules on interpretation.[23] According to one court, the parties should be treated as having "agreed otherwise" where a seller of trucks made no promise as to the registerability of the trucks in the buyer's country and it was agreed that any risk that the trucks could not be registered there should lie with the buyer.[24] It has been held that an agreement as to the general quality of goods did not derogate from article 35 (2) if the agreement contained only positive terms concerning the qualities that the goods would possess, and not negative terms relieving the seller of responsibilities;[25] other decisions, however, suggest that an express article 35 (1) agreement concerning the quality of the goods excludes the implied quality obligations imposed by article 35 (2), even if the parties have not otherwise indicated that the article 35 (2) obligations are inapplicable.[26] Some decisions have applied domestic law to determine the validity of agreements to exclude a seller's obligations under article 35 (2).[27]

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

ARTICLE 35 (2) *(a)*

7. Article 35 (2) *(a)* requires the seller to deliver goods "fit for the purposes for which goods of the same description would ordinarily be used." This obligation has been equated with certain obligations imposed on sellers under domestic law.[28] It has been held that the standard of article 35 (2) *(a)* was violated when the seller delivered a refrigeration unit that broke down soon after it was first put into operation.[29] The standard was also found violated when the seller delivered wine that had been diluted with 9 per cent water, causing domestic authorities to seize and destroy the wine,[30] as well as when the seller delivered chaptalized wine.[31] It was also found violated where the seller substituted a different component in a machine without notifying the buyer and without giving the buyer proper instructions for installation; as a result, the machine failed after three years of use, thus disappointing the buyer's expectation for "long, continuous operation of the [machine] without failure."[32] The standard was also held violated where a dust ventilator diffused dust rather than removing it, and contained components that caused the ventilator to shut down prematurely;[33] where machinery failed to produce the intended product rapidly or reliably;[34] where "pocket ash trays" came equipped with excessively sharp and dangerous blades;[35] where the seller delivered coloured phenol that was not fit for all the ordinary purposes of the contractually-required "colourless phenol";[36] and where machinery for the production of textiles failed to produce a product of consistent weight.[37] According to a Supreme Court decision "Aardappelbescheidingsklei" ("potato separation sand") was not fit for the purpose of separating potatoes for French fries from others usable for animal feed only; the sand performed the separation but was contaminated with dioxin far beyond any allowed threshold and so were the treated unusable potatoes and the peelings of the usable potatoes which the buyer resold as animal feed which led to high dioxin levels in the milk.[38] It was no excuse that the potatoes could be washed and cleaned after separation.

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.[39] Thus it was held that plants which were generally fit to prosper, but which were not fit for the local climate where the buyer placed them, did not violate the requirements of article 35 (2) *(a)*.[40] Similarly, a court held that heavy oil was fit for use in the enterprise of the buyer although it caused problems due to the special kind of pumps the buyer used and of which the seller had no knowledge.[41] The court further held that the seller had no precontractual duty to inquire as to the specific purposes or circumstances of the buyer. The standard of article 35 (2) *(a)*

has been variously described as requiring goods of "average" quality, "marketable" quality, or "reasonable" quality.[42] It has also been stated that resaleability (tradability) of the goods is an aspect of their fitness for ordinary purposes under article 35 (2) *(a)*,[43] that foodstuff intended for human consumption must at least not be harmful to health, and that mere suspicion that the goods are harmful to health may give rise to a breach of article 35 (2) *(a)*.[44]

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)*.[45] Thus the fact that mussels delivered to the buyer's country contained cadmium levels exceeding the recommendations of the health regulations of the buyer's country did not establish that the mussels failed to conform to the contract under article 35 (2) *(a)*.[46] 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.[47] 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.[48] A court from a different country, citing the aforementioned decision, refused to overturn an arbitral award that found a seller in violation of article 35 (2) *(a)* because it delivered medical devices that failed to meet safety regulations of the buyer's jurisdiction:[49] the court concluded that the arbitration panel acted properly in finding that the seller should have been aware of and was bound by the buyer's country's regulations because of "special circumstances" within the meaning of the opinion of the court that rendered the aforementioned decision. According to another decision, the fact that the seller had previously advertised and sold the good in the buyer's jurisdiction could have constituted "special circumstances" that would, under the approach in the aforementioned mussels case, oblige the seller to comply with regulations of the buyer's jurisdiction; in the particular case, however, the seller had made it clear to the buyer that the buyer was responsible for assuring regulatory compliance.[50] A different court has found that a seller of cheese was required to comply with the buyer's country's standards because it had had dealings with the buyer for several months, and therefore must have known that the cheese was destined for the market in the buyer's country;[51] the seller, therefore, violated its obligations under CISG article 35 when it delivered cheese that did not have its composition marked on the packaging, as required by the buyer's country's marketing regulations.

ARTICLE 35 (2) *(b)*

10. Article 35 (2) *(b)* requires that goods be fit for "any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract." This obligation has been equated with certain obligations imposed on sellers under domestic law.[52] A court has also found a violation of article 35 (2) *(b)* where machinery that the buyer had purchased to mass produce buyer's environmentally-friendly packaging for cassettes malfunctioned and did not produce the packaging "rapidly or reliably,"[53] and where inflatable arches used for advertising were not suitably safe.[54] On the other hand, where the goods were made to work properly one year after delivery, it was found that a seller had not violated its article 35 (2) *(b)* obligation.[55] It has been held that a buyer who proved that the goods failed to perform the particular purpose conveyed to the seller at the time the contract was concluded did not have to prove the cause of such failure in order to establish a breach of article 35 (2) *(b)*.[56]

11. The article 35 (2) *(b)* obligation arises only if one or more particular purposes were revealed to the seller by the time the contract was concluded. One court held that a seller violated article 35 (2) *(b)* when it delivered skin care products that did not maintain specified levels of vitamin A throughout their shelf life.[57] The court found that the buyer intended to purchase products with the specified vitamin levels, that "the special purpose . . . was known by the [seller] with sufficient clarity," and that "the buyer counted on the seller's expertise in terms of how the seller reaches the required vitamin A content and how the required preservation is carried out." Where a seller agreed during negotiations that the goods would meet safety standards applicable in the buyer's jurisdiction, a court held that article 35 (2) *(b)* obligated the seller to deliver goods that complied with those standards.[58] And where the seller agreed to deliver plants to a particular place, a court found that buyer had conveyed to the seller the particular purpose of using the plants at that place (although the court also found that the seller was not liable under article 35 (2) *(b)* because the buyer had not reasonably relied on the seller's skill and judgment).[59] Where the buyer's order described its requirements for the goods, furthermore, a court found that seller was obligated to meet those requirements under article 35 (2) *(b)*.[60] And where it was "crystal clear" that the buyer intended to use the goods—large, heavy and expensive globes—as long term advertising furniture for its offices, it was implied under article 35 (2) *(b)* that the goods would have an operational lifetime of at least three years.[61] On the other hand, where the contract contained no indication of the specific purpose for which the goods would be used, there was no obligation under article 35 (2) *(b)*.[62] And where the buyer revealed its particular purpose only to a travelling sales representative of the seller, a court has found that the requirements of article 35 (2) *(b)* were not satisfied.[63]

12. The requirements of article 35 (2) *(b)* do not apply if "the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement." A court has held that a buyer did not reasonably rely on the seller's skill and judgment where the buyer was itself an experienced importer of the goods.[64] And it has been held that a buyer is not deemed to have relied on the seller's skill and judgment where the buyer possessed skill concerning and knowledge of the goods equal to or greater than that of the seller.[65] With regard to the reliance element, one court has stated that in the usual case, a buyer cannot reasonably

rely on the seller's knowledge of the importing country's public law requirements or administrative practices relating to the goods, unless the buyer pointed such requirements out to the seller.[66] 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.[67] On the other hand, a court has held that the seller violated article 35 (2) *(b)* by delivering a child's play apparatus that did not comply with safety regulations of the buyer's jurisdiction.[68]

ARTICLE 35 (2) *(c)*

13. Article 35 (2) *(c)* states that, in order to conform to the contract, goods must "possess the qualities of goods which the seller has held out to the buyer as a sample or model." Several tribunals have found that delivered goods violated this provision.[69] Where a seller supplied a sample of the wood to be used to fabricate doors, however, a court found that the sample was too small to indicate to the buyer that the wood in the completed doors would be evenly coloured.[70] Article 35 (2) *(c)*, by its terms, applies if the seller has held out a sample or model to the buyer, unless the parties "have agreed otherwise." It has been stated that the goods must conform to a model only if there is an express agreement in the contract that the goods will do so.[71] On the other hand, it has been held that the provision applies even if it is the buyer rather than the seller that has provided the model, provided that the parties agreed that the goods should conform to the model.[72]

ARTICLE 35 (2) *(d)*

14. Article 35 (2) *(d)* supplements the last clause of article 35 (1), which requires that the goods be "contained or packaged in the manner required by the contract." One decision stated that article 35 (2) *(d)* applies where the parties have failed to provide for packaging requirements in their contract, and that the provision generally refers to packaging standards prevailing in the seller's country.[73] 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)*.[74] In another case, a seller of canned fruit was found to have violated article 35 where the containers were not adequate to prevent the contents from deteriorating after shipment.[75] Where marble panels were damaged during transport because of improper packaging, a court found that seller had breached article 35 (2) *(d)*.[76] Another decision held that, even though the buyer bore risk of loss while bottles were being transported by truck, the seller's breach of its obligation to package the goods adequately meant that the seller was responsible for damage that occurred during transport.[77]

ARTICLE 35 (3)

15. Article 35 (3) relieves the seller of responsibility for a lack of conformity under article 35 (2) to the extent that the buyer "knew or could not have been unaware" of the non-conformity at the time the contract was concluded.[78] Knowledge of a particular lack of conformity would relieve the seller of responsibility for that lack of conformity only and would not assist the seller in denying liability for loss resulting from another, unknown lack of conformity.[79] Article 35 (3) only relieves the seller of responsibility for non-conformity under article 35 (2) *(a)–(d)*. A lack of conformity under article 35 (1) (which requires the goods to be of "the quantity, quality and description required by the contract") is not subject to the rule of article 35 (3), although a buyer's awareness of defects at the time the contract is concluded should presumably be taken into account in determining what the parties' agreement required as to the quality of the goods.[80] It has been held that the seller bears the burden of proving the elements of article 35 (3).[81]

16. Under article 35 (3), a buyer has been held to have assumed the risk of defects in a used bulldozer that the buyer inspected and tested before purchasing.[82] 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."[83] The rule of article 35 (3), however, is not without limits.[84] 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.[85] Citing articles 40 and 7 (1), the court found that the Convention contains a general principle favouring even a very negligent buyer over a fraudulent seller.

BURDEN OF PROOF

17. A number of decisions have discussed which party bears the burden of proving that goods fail to conform to the contract under article 35.[86] Some decisions indicate that the seller bears that burden.[87] On the other hand, other tribunals have concluded that the buyer bears the burden of proving lack of conformity,[88] although decisions adopt different theories to reach that result. For example, some tribunals have applied domestic law to allocate the burden to the buyer as the party alleging a lack of conformity.[89] 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[90] and, according to at least one decision, an allocation to the seller of the burden to prove that the goods were conforming if the seller claims a right to the price for goods delivered.[91] Some decisions suggest that the burden of proof varies with the context. Thus it has been stated that the buyer bears the burden of proving a lack of conformity if it has taken delivery of the goods,[92] or if it has done so without giving immediate notice of non-conformity.[93] Similarly, it has been indicated that the seller bears the burden of proving that goods were conforming at

the time risk of loss passed, but the buyer bears the burden of proving a lack of conformity after the risk shifted if it has accepted the goods without immediately notifying the seller of defects.[94] It has been noted that authorities are in conflict over which party bears the burden of proof with respect to the reliance requirement in article 35 (2) *(b)*.[95] With respect to article 35 (3), it has been held that the seller bears the burden of proving the elements of an exemption from liability under this provision.[96]

EVIDENCE OF LACK OF CONFORMITY

18. Many decisions address evidentiary issues relating to a lack of conformity under article 35. Some decisions indicate that the question of proper proof of a violation of article 35 is a matter governed by applicable domestic law.[97] A seller's admission that the goods were non-conforming has been accepted as sufficient evidence.[98] Direct evidence that the standards of article 35 were violated has been adduced and accepted by courts in several instances.[99] Thus proof that glue used in shoes dissolved, leather cracked, seams and soles were partially loose, and leather material was too short constituted sufficient proof of lack of conformity.[100] And a showing that delivered wine had been seized and destroyed by authorities in the buyer's country because it had been diluted with water was accepted by the court as establishing that the wine did not conform with the contract for sale.[101] Similarly, a court has found that, once the buyer established that a refrigeration unit had broken down shortly after it was first put into operation, the seller was presumed to have violated article 35 (2) *(a)* and thus bore the burden of showing it was not responsible for the defects.[102] Testimony by witnesses with knowledge of the goods has been found sufficient to establish lack of conformity.[103] Independent expert opinion on lack of conformity has also been accepted[104]—and even required for the buyer to carry the burden of proof with regard to an alleged technical defect in complex goods[105]—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.[106]

19. On the other hand, it has been found that the early failure of a substituted part in a machine did not by itself establish that the machine was not in conformity with the contract, since the failure might have been due to improper installation.[107] 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.[108] 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.[109] A court has held that scratches and other minor damage did not prove that the seller breached a promise that cars would be in good condition and not involved in accidents.[110] Another court held, as an alternative ground for dismissing the buyer's claim, that the evidence did not establish whether the goods' non-conformities arose before or after risk of loss passed to the buyer.[111] It has also been found that a seller's offer to remedy any defects in the goods did not constitute an admission that the goods lacked conformity.[112]

JURISDICTIONAL ISSUES

20. For purposes of determining jurisdiction under article 5 (1) of the Brussels Convention, several courts have concluded that the conformity obligation imposed on the seller by CISG article 35 is not independent of the obligation to deliver the goods, and both obligations are performed at the same place.[113]

Notes

[1] CLOUT case No. 802 [Tribunal Supremo, Spain, 17 January 2008] (see full text of the decision); CLOUT case No. 256 [Tribunal cantonal du Valais, Switzerland, 29 June 1998] (see full text of the decision); CLOUT case No. 219 [Tribunal Cantonal du Valais, Switzerland, 28 October 1997] (see full text of the decision).

[2] CLOUT case No. 802 [Tribunal Supremo, Spain, 17 January 2008] (see full text of the decision); Landgericht Stuttgart, Germany, 4 June 2002, English translation available on the Internet at www.cisg.law.pace.edu; Amtsgericht Viechtach, Germany, 11 April 2002, English translation available on the Internet at www.cisg.law.pace.edu.

[3] Rechtbank van Koophandel Hasselt, Belgium, 19 April 2006 (Brugen Deuren BVBA v. Top Deuren VOF), English translation available on the Internet at www.cisg.law.pace.edu. But see CLOUT case No. 847 [U.S. District Court, District of Minnesota, United States, 31 January 2007] (Travelers Property Casualty Company of America et al. v. Saint-Gobain Technical Fabrics Canada Limited) (analysing the conformity of delivered goods under U.S. domestic sales law, even though CISG governed the transaction, because the parties had not argued on the basis of CISG and because the court believed that case law interpreting U.S. domestic sales could "inform" interpretation of CISG).

[4] See, for example, 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).

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

[6] CLOUT case No. 1022 [Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, 23 January 2008], English translation available on the Internet at www.cisg.law.pace.edu.

[7] Oberlandesgericht Düsseldorf, Germany, 21 April 2004, available on the Internet at www.cisg.law.pace.edu.

[8] For example, CLOUT case No. 724 [Oberlandesgericht Koblenz, Germany, 14 December 2006]; CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995] (see full text of the decision); CLOUT case No. 79 [Oberlandesgericht Frankfurt a.M., Germany, 18 January 1994]. See also Tribunale di Busto Arsizio, Italy, 13 December 2001, published in *Rivista di Diritto Internazionale Privato e Processuale*, 2003, 150–155, also available on Unilex (delivery of a machine totally unfit for the particular use made known to the seller and which was incapable of reaching the promised production level represented a "serious and fundamental" breach of the contract, because the promised production level had been an essential condition for the conclusion of the contract; the breach was therefore a basis for avoiding the contract).

[9] Landgericht Paderborn, Germany, 25 June 1996, Unilex.

[10] CLOUT case No. 894 [Bundesgericht, Switzerland, 7 July 2004] (see full text of the decision); CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997].

[11] Hof van Beroep Antwerpen, Belgium, 24 April 2006 (GmbH Lothringer Gunther Grosshandelsgesellschaft für Bauelemente und Holzwerkstoffe v. NV Fepco International), Unilex.

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

[13] CLOUT case No. 941 [Hof Arnem, Belgium, 18 July 2006].

[14]Handelsgericht Kanton St. Gallen, Switzerland, 14 June 2012, *Internationales Handelsrecht* 2014, 16 = CISG-online No. 2468

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

[16] Polimeles Protodikio Athinon, Greece, 2009 (docket no. 4505/2009), English editorial analysis available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 1389 [Audiencia Provincial Madrid, Spain, 22 March 2007]. General rules for construing the parties' agreement include CISG provisions pertaining to the meaning and content of a contract for sale, including article 8 (standards for determining a party's intent) and article 9 (usages and practices to which the parties are bound). For decisions addressing trade usages and the seller's obligations under article 35 (1), see CLOUT case Nos 477 & 536 [Oberster Gerichtshof, Austria, 27 February 2003].

[17] CLOUT case No. 574 [U.S. District Court, Northern District of Illinois, United States, 29 January 2003].

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

[19] Ibid. (see full text of the decision). For other cases following the approach of this decision see CLOUT case No. 1256 [Court of Appeal Wellington, New Zealand, 22 July 2011] (Smallmon v. Transport Sales Ltd), [2012] 2 NZLR 109 at 121-123, [2011] NZCA 340 at [42]-[48]; High Court of New Zealand, 30 July 2010, available on the Internet at www.cisg.law.pace.edu; Rechtsbank Rotterdam, the Netherlands, 15 October 2008 (Eyroflam S.A. v. P.C.C. Rotterdam B.V.), abstract published in *European Journal of Commercial Contract Law*; Oberster Gerichtshof, Austria, 19 April 2007, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case no. 752 [Oberster Gerichthof, Austria, 25 January 2006]; Cour d'appel Versailles, France, 13 October 2005, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case no. 774 [Bundesgerichtshof, Germany, 2 March 2005] (see full text of the decision).

[20] CLOUT case No. 1236 [Oberlandesgericht Saarbrücken, Germany, 17 January 2007], English translation available on the Internet at www.cisg.law.pace.edu.

[21] 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 CISG provisions (CISG article 6).") (see full text of the decision).

[22] One court of first instance has held that machinery was sold "as is"—in effect, without the protections of article 35 (2) *(a)*—because it was second-hand, but the court of appeal chose not to rely on this approach and instead affirmed this portion of the lower court decision on other grounds. See Oberlandesgericht Köln, Germany, 8 January 1997, Unilex, affirming in relevant part Landgericht Aachen, Germany, 19 April 1996.

[23] U.S. District Court, Southern District of New York, United States, 23 August 2006 (TeeVee Toons, Inc. v. Gerhard Schubert GmbH), available on the Internet at www.cisg.law.pace.edu.

[24] CLOUT case No. 1256 [Court of Appeal Wellington, New Zealand, 22 July 2011] (Smallmon v. Transport Sales Ltd), [2012] 2 NZLR 109 at 128, [2011] NZCA 340 at [76].

[25] CLOUT case No. 237 [Arbitration Institute of the Stockholm Chamber of Commerce, Sweden, 5 June 1998] (see full text of the decision). Compare China International Economic and Trade Arbitration Commission, People's Republic of China, 13 April 2008, English translation available on the Internet at www.cisg.law.pace.edu (seller had an obligation under article 35 (1) to deliver goods conforming to the technical requirements of the contract as well as an obligation under article 35 (2) *(a)* to deliver goods fit for their ordinary purposes, both of which the seller violated); CLOUT case No. 999 [Ad Hoc Arbitral Tribunal, Denmark, 10 November 2000] (buyer of machine provided seller with specifications that products produced by the machine would have to meet, and seller "guaranteed" that the machine would function, but seller was also bound by the implied obligations in articles 35 (2) *(a)* and *(b)*).

[26] Landgericht Aschaffenburg, Germany, 20 April 2006, English translation available on the Internet at www.cisg.law.pace.edu ("Article 35 (2) CISG only applies if the parties have not themselves expressly or impliedly stipulated the required performance conforming to their contract, or when such duty to perform in the sense of article 35 (1) has not been sufficiently specified"); CLOUT case No. 1452 [Supreme Court, Czech Republic, 29 March 2006], English translation available on the Internet at www.cisg.law.pace.edu (where the parties' contract specified "ADOS type carpets," article 35 (2) *(b)* did not apply because the parties had agreed on the quality requirements for the carpet). See also Tribunale di Forlí, Italy, 16 February 2009, English translation available on the Internet at www.cisg.law.pace.edu; Polimeles Protodikio Athinon, Greece, 2009 (docket no. 4505/2009), English translation available on the Internet at www.cisg.law.pace.edu; Tribunale di Forlí, Italy, 11 December 2008, English translation available on the Internet at www.cisg.law.pace.edu; Oberlandesgericht Koblenz, Germany, 21 November 2007, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 938 [Kantonsgericht Zug, Switzerland, 30 August 2007], English translation available on the Internet at www.cisg.law.pace.edu; Landgericht Coburg, Germany, 12 December 2006, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 752 [Oberster Gerichthof, Austria, 25 January 2006] (see full text of decision); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce

and Industry, Russian Federation, 2 February 2004, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 892 [Kantonsgericht Schaffhausen, Switzerland, 27 January 2004].

[27] CLOUT case No. 168 [Oberlandesgericht Köln, Germany, 21 March 1996]; U.S. District Court, Western District of Pennsylvania, United States, 25 July 2008 (Norfolk Southern Railway Company v. Power Source Supply, Inc.), available on the Internet at www.cisg.law.pace.edu. See also CLOUT case No. 617 [U.S. District Court, Northern District of California, United States, 30 January 2001] (Supermicro Computer, Inc. v. Digitechnic), wherein a United States trial court declined to hear a dispute that was already subject to litigation in France because resolving the matter would require the court to determine the validity of a warranty disclaimer clause under CISG.

[28] Supreme Court of New South Wales, Australia, 30 January 2012 (Fryer Holdings Pty Ltd (in liq.) v. Liaoning MEC Group Co. Ltd) [2012] NSWSC 18 at [19]-[20] (equating article 35 (2) *(a)* with the implied term of merchantable quality under Australian domestic law); U.S. District Court, Western District of Pennsylvania, United States, 25 July 2008 (Norfolk Southern Railway Company v. Power Source Supply, Inc.), available on the Internet at www.cisg.law.pace.edu (equating article 35 (2) *(a)* with the implied warranty of merchantability" under U.S. domestic law); Supreme Court of Victoria, Australia, 24 April 2003 (Playcorp Pty Ltd v. Taiyo Kogyo Limited), available on the Internet at www.cisg.law.pace.edu (equating article 35 (2) *(a)* with sellers' obligations under Australian domestic law); Supreme Court of Western Australia, Australia, 17 January 2003 (Ginza Pty Ltd v. Vista Corporation Pty Ltd), available on the Internet at www.cisg.law.pace.edu (equating article 35 (2) *(a)* with sellers' obligations under Australian domestic law); China International Economic and Trade Arbitration Commission, People's Republic of China,18 July 2002, English translation available on the Internet at www.cisg.law.pace.edu (equating article 35 (2) *(a)* with sellers' obligations under Chinese domestic law).

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

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

[31] Cour de cassation, France, 23 January 1996, Unilex.

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

[33] Oberlandesgericht München, Germany, 17 November 2006, English translation available on the Internet at www.cisg.law.pace.edu.

[34] U.S. District Court, Southern District of New York, United States, 23 August 2006 (TeeVee Toons, Inc. v. Gerhard Schubert GmbH), available on the Internet at www.cisg.law.pace.edu.

[35] Bundesgericht, Switzerland, 10 October 2005, Unilex.

[36] Hovioikeus/hovrätt Helsinki, Finland, 31 May 2004 (Crudex Chemicals Oy v. Landmark Chemicals S.A.), English editorial analysis available on the Internet at www.cisg.law.pace.edu.

[37] Court of Arbitration of the International Chamber of Commerce, 2002 (Arbitral award No. 10377), *Yearbook Commercial Arbitration*, vol. 31, p. 72 (2006).

[38] Bundesgerichtshof, Germany, 26 September 2012, *Internationales Handelsrecht* 2012, 231 = CISG-online No. 2348.

[39] Rechtbank van Koophandel Hasselt, Belgium, 28 June 2006 (Drukkerij Moderna NV v. IVA Groep BV), English summary available on the Internet at www.cisg.law.pace.edu (minor damage to goods did not render them unfit for the purposes for which they would ordinarily be used); Court of Arbitration of the International Chamber of Commerce, June 1996 (Arbitral award No. 8247), *International Court of Arbitration Bulletin*, vol. 11, p. 53 (2000) (microcrystalline chemicals that had solidified but could easily be re-transformed into crystals did not fail to conform to the contract); CLOUT case No. 252 [Handelsgericht des Kantons Zürich, Switzerland, 21 September 1998] (one misplaced line of text, which did not interfere with the comprehensibility of the text, did not render an art exhibition catalogue non-conforming); CLOUT case No. 341 [Ontario Superior Court of Justice, Canada, 31 August 1999] (shipments containing a small percentage of defective picture frame mouldings did not fail to conform to the contract when the evidence indicated that shipments from any supplier would include some defective mouldings) (see full text of the decision).

[40] Landgericht Coburg, Germany, 12 December 2006, English translation available on the Internet at www.cisg.law.pace.edu.

[41] OLG Graz 19 June 2013, *Internationales Handelsrecht* 2014, 191 = CISG-online No. 2461.

[42] Landgericht Coburg, Germany, 12 December 2006, English translation available on the Internet at www.cisg.law.pace.edu (goods that meet the expectation of the average user); Supreme Court of Western Australia, Australia, 17 January 2003 (Ginza Pty Ltd v. Vista Corporation Pty Ltd), available on the Internet at www.cisg.law.pace.edu (merchantability standard); Netherlands Arbitration Institute, the Netherlands, 15 October 2002 (Arbitral award, No. 2319), Unilex (reasonable quality rather than average or merchantable quality); CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995] (see full text of the decision) (either average or marketable quality); Landgericht Berlin, Germany, 15 September 1994, Unilex (average quality, not merely marketable quality).

[43] CLOUT case No. 774 [Bundesgerichtshof, Germany, 2 March 2005]. See also CLOUT case No. 1097 [China International Economic and Trade Arbitration Commission, People's Republic of China, 3 June 2003], English translation available on the Internet at www.cisg.law.pace.edu (the fact that the goods were not resalable, even at a discounted price, established a violation of article 35 (2) *(a)*); Rechtbank van Koophandel Mechelen, Belgium, 18 January 2002, Unilex (article 35 (2) *(a)* required that goods be fit for resale).

[44] CLOUT case No. 774 [Bundesgerichtshof, Germany, 2 March 2005].

[45] 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). For other cases following the approach of this decision see High Court of New Zealand, 30 July 2010, available on the Internet at www.cisg.law.pace.edu; Rechtsbank Rotterdam, the Netherlands, 15 October 2008 (Eyroflam S.A. v. P.C.C. Rotterdam B.V.), abstract published in *European Journal of Commercial Contract Law*; Oberster Gerichtshof, Austria, 19 April 2007, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 752 [Oberster Gerichthof, Austria, 25 January 2006]; Cour d'appel Versailles, France, 13 October 2005, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 774 [Bundesgerichtshof, Germany, 2 March 2005] (see full text of the decision).

[46] Ibid. 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.

[47] 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).

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

[49] CLOUT case No. 418 [U.S. District Court, Eastern District of Louisiana, United States, 17 May 1999].

[50] CLOUT case No. 1256 [Court of Appeal Wellington, New Zealand, 22 July 2011] (Smallmon v. Transport Sales Ltd), [2012] 2 NZLR 109 at 125-126, [2011] NZCA 340 at [62]-[64]; High Court of New Zealand, 30 July 2010, available on the Internet at www.cisg.law.pace.edu.

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

[52] U.S. District Court, Southern District of Ohio, United States, 3 April 2009 (Miami Valley Paper LLC v. Lebbing Engineering & Consulting GmbH), available on the Internet at www.cisg.law.pace.edu (equating article 35 (2) *(b)* with the "implied warranty of fitness for particular purposes" under U.S. domestic sales law); U.S. District Court, Western District of Pennsylvania, United States, 25 July 2008 (Norfolk Southern Railway Company v. Power Source Supply, Inc.), available on the Internet at www.cisg.law.pace.edu (equating article 35 (2) *(b)* with the "implied warranty of fitness for particular purposes" under U.S. domestic sales law); CLOUT case No. 532 [Supreme Court of British Columbia, Canada, 21 August 2003] (equating article 35 (2) *(b)* to the "statutory warranty of fitness" under Canadian domestic sales law); Supreme Court of Victoria, Australia, 24 April 2003 (Playcorp Pty Ltd v. Taiyo Kogyo Ltd), available on the Internet at www.cisg.law.pace.edu (equating article 35 (2) *(b)* with sellers' obligations under Australian domestic law); Supreme Court of Western Australia, Australia, 17 January 2003 (Ginza Pty Ltd v. Vista Corporation Pty Ltd), available on the Internet at www.cisg.law.pace.edu (equating article 35 (2) *(b)* with sellers' obligations under Australian domestic law).

[53] U.S. District Court, Southern District of New York, United States, 23 August 2006 (TeeVee Toons, Inc. v. Gerhard Schubert GmbH), available on the Internet at www.cisg.law.pace.edu.

[54] CLOUT case No. 882 [Handelsgericht Aargau, Switzerland, 5 November 2002].

[55] CLOUT case No. 532 [Supreme Court of British Columbia, Canada, 21 August 2003].

[56] CLOUT case No. 882 [U.S. Court of Appeals (4th Circuit), United States, 21 June 2002].

[57] 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 www.cisg.law.pace.edu. 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.

[58] Oberster Gerichtshof, Austria, 19 April 2007, English translation available on the Internet at www.cisg.law.pace.edu.

[59] Landgericht Coburg, Germany, 12 December 2006, English translation available on the Internet at www.cisg.law.pace.edu.

[60] CLOUT case No. 492 [Cour d'appel Lyon, France 18 December 2003].

[61] Landgericht München, Germany, 27 February 2002, English translation available on the Internet at www.cisg.law.pace.edu.

[62] Chambre Arbitrale de Paris, France, 2007, available on the Internet at www.cisg.law.pace.edu.

[63] CLOUT case No. 555 [Audiencia Provincial Barcelona, Spain, 28 January 2004].

[64] High Court of New Zealand, New Zealand, 30 July 2010, available on the Internet at www.cisg.law.pace.edu. The court noted that it reached this conclusion irrespective of which party bore the burden of proof concerning the reliance element of article 35 (2) *(b)*, since it found that authorities were in conflict concerning which party bore that burden.

[65] Landgericht Coburg, Germany, 12 December 2006, English translation available on the Internet at www.cisg.law.pace.edu.

[66] CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995]. For other cases following the approach of this decision see High Court of New Zealand, New Zealand, 30 July 2010, available on the Internet at www.cisg.law.pace.edu; Rechtsbank Rotterdam, the Netherlands, 15 October 2008 (Eyroflam S.A. v. P.C.C. Rotterdam B.V.), abstract published in *European Journal of Commercial Contract Law*; Oberster Gerichtshof, Austria, 19 April 2007, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case no. 752 [Oberster Gerichthof, Austria, 25 January 2006]; Cour d'appel Versailles, France, 13 October 2005, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case no. 774 [Bundesgerichtshof, Germany, 2 March 2005] (see full text of the decision).

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

[68] Pretore del Distretto Lugano, Switzerland, 19 April 2007, English translation available on the Internet at www.cisg.law.pace.edu.

[69] Cour d'appel Versailles, France, 13 October 2005, English translation available on the Internet at www.cisg.law.pace.edu (where the seller provided the buyer a sample of a toy intended for young children and included a designation indicating it was safe for young children, article 35 (2) *(c)* was violated when delivered goods did not meet safety regulations); U.S. District Court, Southern District of New York, United States, 23 August 2006 (TeeVee Toons, Inc. v. Gerhard Schubert GmbH), available on the Internet at www.cisg.law.pace.edu (unlike a properly functioning model shown to the buyer, the machinery seller delivered malfunctioned and failed to produce products reliably or

rapidly); CLOUT case No. 79 [Oberlandesgericht Frankfurt a.M., Germany, 18 January 1994] (holding that the goods (shoes) failed to conform to a sample supplied by the seller, but that the lack of conformity was not shown to be a fundamental breach) (see full text of the decision); CLOUT case No. 138 [U.S. Court of Appeals (2nd Circuit), United States, 6 December 1995] (finding that air conditioner compressors delivered by the seller did not conform to the contract, and that such lack of conformity constituted a fundamental breach: "The agreement between Delchi and Rotorex was based upon a sample compressor supplied by Rotorex and upon written specifications regarding cooling capacity and power consumption . . . The president of Rotorex . . . conceded in a May 17, 1988 letter to Delchi that the compressors supplied were less efficient than the sample . . . .") (see full text of the decision).

[70] Rechtbank van Koophandel Hasselt, Belgium, 19 April 2006 (Brugen Deuren BVBA v. Top Deuren VOF), available on the Internet at www.cisg.law.pace.edu.

[71] Landgericht Berlin, Germany, 15 September 1994, Unilex.

[72] Rechtbank van Koophandel, Belgium, 14 September 2005, English summary available on the Internet at www.cisg.law.pace.edu (buyer provided a model document to the seller/printer and ordered printed media in conformity); Landgericht Aschaffenburg, Germany, 20 April 2006, English translation available on the Internet at www.cisg.law.pace.edu (buyer specified the required seam slippage strength of material for use in mattresses by providing the seller a sample produced by another manufacturer); CLOUT case No. 175 [Oberlandesgericht Graz, Austria, 9 November 1995] (see full text of the decision).

[73] CLOUT case No. 1236 [Oberlandesgericht Saarbrücken, Germany, 17 January 2007], English translation available on the Internet at www.cisg.law.pace.edu. The court found that the seller's previous deliveries to the buyer, some of which involved different kinds of goods and during which the goods had not been damaged, did not constitute an implied agreement concerning the packaging of the goods.

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

[75] CLOUT case No. 1193 [Comisión para la Protección del Comercio Exterior de Mexico (Compromex), Mexico, 29 April 1996] (Conservas La Costella S.A. de C.V. v. Lanín San Luis S.A. & Agroindustrial Santa Adela S.A.), Unilex. The Compromex decision did not specifically cite CISG article 35 (2) *(d).*

[76] CLOUT case No. 1236 [Oberlandesgericht Saarbrücken, Germany, 17 January 2007], English translation available on the Internet at www.cisg.law.pace.edu.

[77] CLOUT case No. 724 [Oberlandesgericht Koblenz, Germany, 14 December 2006].

[78] Chambre Arbitrale de Paris, France, 2007, available on the Internet at www.cisg.law.pace.edu (seller was not liable under article 35 CISG because the buyer knew of the non-standard quality of the cargo and could have been aware of the cargo's condition by carrying out inspections).

[79] CLOUT case No. 1132 [Federal Court of Australia (Full Court), Victoria District Registry, Australia, 20 April 2011] (Castel Electronics Pty Ltd v. Toshiba Singapore Pte Ltd), [2011] FCAFC 55 at [311].

[80] Secretariat Commentary to (then) article 33 of the Convention, p. 32, paragraph 14.

[81] CLOUT case No. 1236 [Oberlandesgericht Saarbrücken, Germany, 17 January 2007], English translation available on the Internet at www.cisg.law.pace.edu.

[82] CLOUT case No. 219 [Tribunal cantonal du 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).

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

[84] See, for example, U.S. District Court, Southern District of Ohio, United States, 3 April 2009 (Miami Valley Paper LLC v. Lebbing Engineering & Consulting GmbH), available on the Internet at www.cisg.law.pace.edu (buyer presented sufficient evidence that it was unaware of lack of conformity when contract was concluded).

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

[86] See High Court, New Zealand, New Zealand, 30 July 2010 (RJ & AM Smallmon v. Transport Sales Limited and Grant Alan Miller), available on the Internet at www.cisg.law.pace.edu (finding "a conflict in the authorities on the Convention" over which party bore the burden of proof with respect to conformity of the goods).

[87] Oberlandesgericht Köln, Germany, 12 January 2007, English translation available on the Internet at www.cisg.law.pace.edu; High People's Court of Shadong Province, People's Republic of China, 27 June 2005 (Norway Royal Supreme Seafoods v. China Rizhao Jixiang Ocean Food Co. and China Rizhao Shanfu Food Co.), English translation available on the Internet at www.cisg.law.pace.edu. Rechtbank van Koophandel Kortrijk, Belgium, 6 October 1997, Unilex; Rechtbank van Koophandel Kortrijk, Belgium, 16 December 1996, available on the Internet at www.law.kuleuven.be.

[88] CLOUT case No. 1509 [Cour de cassation, France, 26 March 2013]; U.S. District Court, Western District of Washington, United States, 3 April 2009 (Barbara Berry S.A. de C.V. v. Ken M Spooner Farms, Inc.), available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 1129 [Juzgado de Primera Instancia e Instrucción, no. 5 de La Laguna, Spain, 23 October 2007]; Arbitral Institute of the Stockholm Chamber of Commerce, Sweden, 5 April 2007, Unilex; Cour d'appel de Rouen, France, 19 December 2006 (Société Agrico v. Société SIAC), English translation available on the Internet at www.cisg.law.pace.edu, affirmed by CLOUT case No. 1028 [Cour de cassation, France, 16 September 2008]; Rechtbank van Koophandel Hasselt, Belgium, 19 April 2006 (Brugen Deuren BVBA v. Top Deuren VOF), available on the Internet at www.cisg.law.pace.edu; Hovioikeus/hovrätt Helsinki, Finland, 31 May 2004 (Crudex Chemicals Oy v. Landmark Chemicals S.A.), available on the Internet at www.cisg.law.pace.edu.

[89] U.S. Court of Appeals (7th Circuit), United States, 23 May 2005 (Chicago Prime Packers, Inc. v. Northam Food Trading Co.), available on the Internet at www.cisg.law.pace.edu; Oberlandesgericht Köln, Germany, 12 January 2007, English translation available on the Internet at www.cisg.law.pace.edu; Chambre Arbitrale de Paris, France, 2007 (Arbitral award No. 9926), available on the Internet at www.cisg.law.pace.edu. CLOUT case No. 103 [Court of Arbitration of the International Chamber of Commerce, 1993 (Arbitral award No. 6653)]. A Swiss court has acknowledged the view that the burden of proving a lack of conformity should be allocated by applying domestic law, but it neither adopted nor rejected this approach because the contrary view led to the same result (buyer bore the burden). CLOUT case No. 253 [Cantone del Ticino Tribunale d'appello, Switzerland, 15 January 1998].

[90] CLOUT case No. 934 [Tribunal cantonal du Valais, Switzerland, 27 April 2007] (see full text of the decision); CLOUT case No. 721 [Oberlandesgericht Karlsruhe, Germany, 8 February 2006]; CLOUT case No. 894 [Bundesgericht, Switzerland, 7 July 2004] (see full text of the decision); CLOUT case No. 885 [Bundesgericht, Switzerland, 13 November 2003]; CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (containing an extended discussion of the issue). To the same general effect, see CLOUT case No. 97 [Handelsgericht des Kantons Zürich, Switzerland, 9 September 1993]. One court has noted the view that the Convention contains a general principle allocating the burden to the buyer, but it neither adopted nor rejected this approach because the contrary view led to the same result (buyer bore the burden). CLOUT case No. 253 [Cantone del Ticino Tribunale d'appello, Switzerland, 15 January 1998]; see also Netherlands Arbitration Institute, the Netherlands, 15 October 2002 (Arbitral award, No. 2319), Unilex. Without expressly discussing the issue, several decisions appear to have impliedly adopted the view that CISG allocated the burden of proving lack of conformity to the buyer. See CLOUT case No. 107 [Oberlandesgericht Innsbruck, Austria, 1 July 1994] (buyer failed to prove that the goods did not conform to the contract); Landgericht Düsseldorf, Germany, 25 August 1994, Unilex (buyer failed to prove lack of conformity). See also the Digest for article 4, paragraph 4.

[91] CLOUT case No. 885 [Bundesgericht, Switzerland, 13 November 2003]. Because this approach can result in allocating the burden of proof to both parties, the court indicated that the burden ultimately should be allocated on the basis of the "proof proximity" principles, so that the burden of proving lack of conformity is allocated to a buyer that has received and taken control of the goods.

[92] CLOUT case No. 934 [Tribunal cantonal du Valais, Switzerland, 27 April 2007] (see full text of the decision); Hovioikeus/hovrätt Helsinki, Finland, 31 May 2004 (Crudex Chemicals Oy v. Landmark Chemicals S.A.), English editorial analysis available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 894 [Bundesgericht, Switzerland, 7 July 2004] (see full text of the decision); CLOUT case No. 891 (Bundesgericht, Switzerland, 13 January 2004, Unilex); CLOUT case No. 885 [Bundesgericht, Switzerland, 13 November 2003]; Arrondissementsrechtbank Zwolle, the Netherlands, 21 May 2003 (Remeha B.V. v. Keramab N.V.), available on the Internet at www.rechtspraak.nl; Hof van Beroep Antwerpen, Belgium, 16 December 2002, available on the Internet at www.cisg.law.pace.edu.

[93] CLOUT case No. 1596 [Cour d'appel de Nancy, France, 6 November 2013]; CLOUT case No. 590 [Landgericht Saarbrücken, Germany, 1 June 2004 (see full text of the decision); Hovioikeus/hovrätt Helsinki, Finland, 31 May 2004 (Crudex Chemicals Oy v. Landmark Chemicals S.A.), English editorial analysis available on the Internet at www.cisg.law.pace.edu; 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].

[94] Appelationshof Bern, Switzerland, 11 February 2004, available on the Internet at www.cisg.law.pace.edu. CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998]. See also CLOUT case No. 486 [Audiencia Provincial de La Coruña, Spain, 21 June 2002] (stating that buyer has burden of proving lack of conformity in delivered goods, but not explaining the grounds for the statement). Compare Polimeles Protodikio Athinon, Greece, 2009 (docket no. 4505/2009), English editorial analysis available on the Internet at www.cisg.law.pace.edu ("After the buyer takes over the goods (CISG article 60 *(b)*), if a matter of non-conformity arises, he is the one who must prove that the goods did not correspond to the contract at the time of transfer of risk (CISG article 36 (1) and articles 67-69). Nevertheless, if the buyer, following receipt of the goods, examines the goods within as short a period as is practicable in the circumstances (CISG article 38 (1), discovers a non-conformity [and gives notice to the seller] specifying the nature of the lack of conformity, events for which he bears the burden of proof, then, the burden of proof is shifted and it is for the seller to prove that at the time of transfer of risk the goods conformed to the contract of sale").

[95] High Court of New Zealand, New Zealand, 30 July 2010, available on the Internet at www.cisg.law.pace.edu.

[96] CLOUT case No. 1236 [Oberlandesgericht Saarbrücken, Germany, 17 January 2007], available on the Internet at www.cisg.law.pace.edu.

[97] CLOUT case No. 636 [Cámara Nacional de Apelaciones en lo Comercial de Buenos Aires, Argentina, 21 July 2002]; CLOUT case No. 580 [U.S. Court of Appeals (4thCircuit), United States, 21 June 2002].

[98] CLOUT case No. 1029 [Cour d'appel Rennes, France, 27 May 2008], English translation available on the Internet at www.cisg.law.pace.edu; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 6 June 2003, English translation available on the Internet at www.cisg.law.pace.edu; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 17 February 2003, English translation available on the Internet at www.cisg.law.pace.edu.

[99] See, for example, Appellationsgericht Basel-Stadt, Switzerland, 26 November 2008, English translation available on the Internet at www.cisg.law.pace.edu.

[100] Oberlandesgericht Koblenz, Germany, 21 November 2007, English translation available on the Internet at www.cisg.law.pace.edu.

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

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

[103] Arrondissementsrechtbank Arnhem, the Netherlands, 28 June 2006 (Silicon Biomedical Instruments B.V. v. Erich Jaeger GmbH), English translation available on the Internet at www.cisg.law.pace.edu; Landgericht München, Germany, 29 November 2005, English translation available on the Internet at www.cisg.law.pace.edu.

[104] Gerechtshof Arnhem, the Netherlands, 7 October 2008 (Arens Sondermachinen GmbH v. Smit Draad/Draad Nijmegen B.V.), English abstract available in *European Journal of Commercial Contract Law*; China International Economic and Trade Arbitration Commission, People's Republic of China, 18 April 2008, English translation available on the Internet at www.cisg.law.pace.edu; Obergericht Zug, Switzerland, 5 July 2005, English translation available on the Internet at www.cisg.law.pace.edu; Hovioikeus/hovrätt Helsinki, Finland, 31 May 2004 (Crudex Chemicals Oy v. Landmark Chemicals S.A.), English editorial analysis available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 50 [Landgericht Baden-Baden, Germany, 14 August 1991] (see full text of the decision). But see CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] where the court rejected expert opinion evidence offered by the seller because under Italian civil procedure law only an expert appointed by the court can offer such an opinion (see full text of the decision). For cases in which courts appointed experts to evaluate the conformity of the goods, see, inter alia, Hof van Beroep Gent, Belgium, 10 May 2004 (N.V. Maes Roger v. N.V. Kapa Reynolds), English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995] (reporting that the trial court had obtained an expert opinion of public health authorities on the cadmium level in mussels) (see full text of the decision); CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999] (expert opinion that

damage to vines was caused by defective vine wax) (see full text of the decision); Rechtbank van Koophandel, Kortrijk, Belgium, 6 October 1997, Unilex (appointing judicial expert to determine the conformity of yarn); Rechtbank van Koophandel, Kortrijk, Belgium, 16 December 1996, available on the Internet at www.law.kuleuven.be.

[105] Arbitral Institute of the Stockholm Chamber of Commerce, Sweden, 5 April 2007, Unilex.

[106] Helsinki Court of Appeal, Finland, 29 January 1998, available on the Internet at www.utu.fi.

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

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

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

[110] CLOUT case No. 802 [Tribunal Supremo, Spain, 17 January 2008] (see full text of decision).

[111] CLOUT case No. 481 [Cour d'appel Paris, France, 14 June 2001], affirmed on appeal in CLOUT case No. 494 [Court de cassation, France, 24 September 2003]. Compare CLOUT case No. 486 [Audiencia Provincial de La Coruña, Spain, 21 June 2002] (stating that buyer had not sufficiently proved that the seller delivered non-conforming goods where a pre-shipment inspection reported that they were conforming).

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

[113] 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]. See also Hof van Beroep Antwerpen, Belgium, 22 January 2007 (B.V.B.A. I.T.M. v. S.A. Montanier), English translation available on the Internet at www.cisg.law.pace.edu (asserting that the parties' use of an INCOTERM does not directly determine where the seller's obligation to deliver goods in conformity with article 35 is performed for purposes of jurisdiction under article 5 (1) of the Brussels Convention, but nevertheless holding that the performance of that obligation occurs at the place where risk of loss for the goods passes from seller to buyer—a question governed by the parties' INCOTERM). For discussion of jurisdiction under article 5 (1) of the Lugano Convention when the buyer claims that the goods seller delivered lack conformity, see Obergericht Zürich, Switzerland, 6 February 2009, English translation available on the Internet at www.cisg.law.pace.edu.