

Article 3

(1) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

(2) This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.

OVERVIEW

1. This provision makes clear that the Convention's sphere of application extends to some contracts that include acts in addition to the supply of goods.¹

CONTRACTS FOR THE SALE OF GOODS TO BE MANUFACTURED OR PRODUCED

2. Pursuant to paragraph 1 of article 3, the Convention extends to contracts for the sale of goods to be manufactured or produced.² This means that the sale of such goods is subject to the provisions of the Convention as much as the sale of ready-made goods.³ This aspect of the Convention's sphere of application is, however, subject to a limitation: contracts for goods to be manufactured or produced are not governed by the Convention if the party who "orders" the goods supplies a "substantial part" of the materials necessary for their manufacture or production.⁴ Article 3 (1) does not provide specific criteria for determining when the materials supplied by the buyer constitute a "substantial part". Some courts have resorted to a purely quantitative test to determine whether the materials supplied by the buyer constitute a "substantial part" of the material necessary.⁵ One court also considered—on the basis of the French version of the Convention—the quality of the goods.⁶

3. A different—albeit related—issue is whether providing instructions, designs or specifications used for producing goods is equivalent to the supply of "materials necessary" for the goods' manufacture or production; if so, a sales contract in which the buyer supplies such information is excluded from the Convention's sphere of application if the "substantial part" criterion is met. In one case, a court held that the Convention was inapplicable, on the grounds of article 3 (1), to a contract under which the seller had to manufacture goods according to the buyer's design specifications.⁷ The court deemed the plans and instructions that the buyer transmitted to the seller to constitute a "substantial part of the materials necessary" for the production of the goods. Other courts have found that design specifications are not considered "materials necessary for the manufacture or production of goods" within the meaning of article 3 (1).⁸ A recent Supreme Court decision held that it is no contribution of a "substantial part of the materials" if the seller

manufactures the goods according to the specifications and orders of the buyer.⁹

CONTRACTS FOR THE DELIVERY OF LABOUR AND SERVICES

4. Article 3 (2) extends the Convention's sphere of application to contracts in which the seller's obligations include—in addition to delivering the goods, transferring the property and handing over the documents¹⁰—a duty to provide labour or other services, as long as the supply of labour or services does not constitute the "preponderant part" of the seller's obligations.¹¹ It has been held that work done to produce the goods themselves is not to be considered the supply of labour or other services for purposes of article 3 (2).¹² In order to determine whether the obligations of the seller consist preponderantly in the supply of labour or services, a comparison must be made between the economic value of the obligations relating to the supply of labour and services and the economic value of the obligations regarding the goods,¹³ as if two separate contracts had been made.¹⁴ Thus, where the obligation regarding the supply of labour or services amounts to more than 50 per cent of the seller's obligations, the Convention is inapplicable.¹⁵ Some courts require that the value of the service obligation "clearly" exceeds that of the goods.¹⁶ On the basis of this reasoning, several courts stated that a contract for the delivery of goods providing also for the "seller's" obligation to install the goods is generally covered by the Convention, since the installation obligation is generally minor in value compared to the more traditional "sale" obligations.¹⁷ Similarly, a contract for the delivery of goods obliging the seller to also assemble the goods does not generally fall under the article 3 (2) exclusion.¹⁸ The same holds true for contracts for the delivery of goods that also contain an obligation to train personnel,¹⁹ to provide maintenance services,²⁰ or to design the goods,²¹ if these additional obligations are only ancillary to the primary obligation to make delivery. On the basis of very similar reasoning, one court decided that a contract for a market study did not fall under the Convention's sphere of application.²² On the other hand, a contract for the dismantling and sale of a second-hand hangar was deemed to fall within the Convention's sphere of application on the ground that the value of the dismantling services amounted to only 25 per cent of the total value of the contract.²³

5. While one court stated that turn-key contracts are governed by the Convention except when the obligations other than that of delivering the goods prevail from an economic value point of view,²⁴ several courts stated that turn-key contracts are generally not covered by the Convention,²⁵ because turn-key contracts “do not so much provide for an exchange of goods against payment, but rather for a network of mutual duties to collaborate with and assist the other party”.²⁶

6. It has also been stated that factors other than purely economic ones—such as the circumstances surrounding the conclusion of the contract,²⁷ the purpose of the contract²⁸

and the interest of the parties in the various performances²⁹—should also be taken into account in evaluating whether the obligation to supply labour or services is preponderant.³⁰ Another court referred to the essential purpose of the contract as a criterion relevant to determining whether the Convention was applicable.³¹

7. The party who relies on article 3 (2) to exclude the application of the Convention to a contract in which the party who has to furnish the goods also has to supply labour or other services bears the burden of proving that the supply of labour or services constitutes the preponderant part of the obligations.³²

Notes

¹See United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March–11 April 1980, Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee, 1981, 16.

²See Kantonsgericht Zug, Switzerland, 14 December 2009, available on the Internet at www.cisg-online.ch; Obergericht Aargau, Switzerland, 3 March 2009, available on the Internet at www.cisg-online.ch; Oberlandesgericht Oldenburg, Germany, 20 December 2007, English translation available on the Internet at www.cisg.law.pace.edu; Oberlandesgericht Innsbruck, Austria, 18 December 2007, English translation available on the Internet at www.cisg.law.pace.edu; Oberlandesgericht Linz, Austria, 24 September 2007, English translation available on the Internet at www.cisg.law.pace.edu; Kantonsgericht Aargau, Switzerland, 20 September 2007, available on the Internet at www.cisg-online.ch; CLOUT case No. 935 [Handelsgericht des Kantons Zürich, Switzerland, 25 June 2007], also available in *Internationales Handelsrecht*, 2008, 31; Cour de Justice de Genève, Switzerland, 20 January 2006, English translation available on the Internet at www.cisg.law.pace.edu; China International Economic and Trade Arbitration Commission, People’s Republic of China, 2005 (Arbitral award No. CISG/2005/12), English translation available on the Internet at www.cisg.law.pace.edu; Handelsgericht Aargau, Switzerland, 25 January 2005, English translation available on the Internet at www.cisg.law.pace.edu; Rechtbank van Koophandel Hasselt, Belgium, 14 September 2004, available on the Internet at www.law.kuleuven.be; Handelsgericht St. Gallen, Switzerland, 29 April 2004, English translation available on the Internet at www.cisg.law.pace.edu; Oberster Gerichtshof, Austria, 21 April 2004, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 892 [Kantonsgericht Schaffhausen, Switzerland, 27 January 2004]; Szedegi Iteletabla, Hungary, 2003, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 886 [Handelsgericht St. Gallen, Switzerland, 3 December 2002] (Sizing machine case), *Schweizerische Zeitschrift für internationales und europäisches Recht*, 2003, 104, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 882 [Handelsgericht Aargau, Switzerland, 5 November 2002]; CLOUT case No. 1017 [Hof van Beroep Gent, Belgium, 15 May 2002], available in Dutch on the Internet at www.law.kuleuven.be; CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002 (see full text of the decisions)]; Landgericht Hamburg, Germany, 21 December 2001, English translation available on the Internet at www.cisg.law.pace.edu; Oberster Gerichtshof, 18 April 2001, available on the Internet at www.cisg.at; CLOUT case No. 446 [Oberlandesgericht Saarbrücken, Germany, 14 February 2001], also in *Internationales Handelsrecht*, 2001, 64; Landgericht München, Germany, 16 November 2000, English translation available on the Internet at www.cisg.law.pace.edu; Oberlandesgericht Stuttgart, Germany, 28 February 2000, available on the Internet at www.cisg-online.ch; CLOUT case No. 430 [Oberlandesgericht München, Germany, 3 December 1999]; CLOUT case No. 313 [Cour d’appel de Grenoble, France, 21 October 1999]; Court of Arbitration of the International Chamber of Commerce, 1999 (Arbitral award No. 9083), English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 630 [Court of Arbitration of the International Chamber of Commerce, July 1999 (Arbitral award No. 9448)]; Hof Arnhem, the Netherlands, 27 April 1999, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 325 [Handelsgericht des Kantons Zürich, Switzerland, 8 April 1999]; CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999]; CLOUT case No. 252 [Handelsgericht des Kantons Zürich, Switzerland, 21 September 1998] (see full text of the decision); CLOUT case No. 337 [Landgericht Saarbrücken, Germany, 26 March 1996]; CLOUT case No. 164 [Arbitration—Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 5 December 1995]; Hof ’s-Hertogenbosch, Netherlands, 9 October 1995, *Nederlands Internationaal Privaatrecht*, 1996, No. 118; Landgericht Oldenburg, Germany, 9 November 1994, *Recht der internationalen Wirtschaft*, 1996, 65 f.; CLOUT case No. 167 [Oberlandesgericht München, Germany, 8 February 1995] (see full text of the decision); CLOUT case No. 262 [Kanton St. Gallen, Gerichtskommission Oberrheintal, Switzerland, 30 June 1995]; Landgericht Memmingen, Germany, 1 December 1993, *Praxis des internationalen Privat- und Verfahrensrechts*, 1995, 251 f.; CLOUT case No. 302 [Court of Arbitration of the International Chamber of Commerce, 23 August 1994 (Arbitral award 7660/JK)], see also *ICC Court of Arbitration Bulletin*, 1995, 69 ff.; Court of Arbitration of the International Chamber of Commerce, 1994 (Arbitral award No. 7844), *ICC Court of Arbitration Bulletin*, 1995, 72 ff.; CLOUT case No. 97 [Handelsgericht des Kantons Zürich, Switzerland, 9 September 1993]; CLOUT case No. 95 [Zivilgericht Basel-Stadt, Switzerland, 21 December 1992] (see full text of the decision).

³See also United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March–11 April 1980, Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee, 1981, 17.

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

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

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

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

⁸See CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999] (see full text of the decision); CLOUT case No. 2 [Oberlandesgericht Frankfurt a.M., Germany, 17 September 1991] (see full text of the decision).

⁹Bundesgerichtshof, Germany, 24 September 2014, *Neue Juristische Wochenschrift* 2015, 867 = CISG-online No. 2545 (para. 19)

¹⁰For a definition of a contract for the sale of goods under the Convention, see the Digest for article 1.

¹¹For references in case law to article 3 (2) of the Convention as an element to be looked into for the purpose of deciding whether the Convention applies, see Landgericht Landshut, Germany, 12 June 2008, English translation available on the Internet at www.cisg.law.pace.edu; Cour d'appel de Colmar, France, 26 February 2008, English translation available on the Internet at www.cisg.law.pace.edu; U.S. District Court, Southern District of New York, United States, 23 August 2006, available on the Internet at www.cisg.law.pace.edu; Handelsgericht Zürich, Switzerland, 17 February 2000, English translation available on the Internet at www.cisg.law.pace.edu; Hof Arnhem, Netherlands, 27 April 1999, *Nederlands Internationaal Privaatrecht*, 1999, No. 245; CLOUT case No. 327 [Kantonsgericht Zug, Switzerland, 25 February 1999]; CLOUT case No. 287 [Oberlandesgericht München, Germany, 9 July 1997] (see full text of the decision); CLOUT case No. 192 [Obergericht des Kantons Luzern, Switzerland, 8 January 1997]; CLOUT case No. 196 [Handelsgericht des Kantons Zürich, Switzerland, 26 April 1995]; CLOUT case No. 152 [Cour d'appel de Grenoble, France, 26 April 1995]; CLOUT case No. 105 [Oberster Gerichtshof, Austria, 27 October 1994]; CLOUT case No. 201 [Richteramt Laufen des Kantons Bern, Switzerland, 7 May 1993]; for a decision in which article 3 (2) was cited, but in which the court did not resolve the issue of whether the contract was one for the sale of goods or one for the supply of labour and services, see Rechtbank Koophandel Hasselt, Belgium, 19 September 2001, available on the Internet at www.law.kuleuven.be. For decisions in which the courts did not apply the Convention on the grounds that the service obligations were preponderant, see Hof van Beroep Antwerpen, Belgium, 3 January 2005, available on the Internet at www.law.kuleuven.be (repairs to a cutting machine); Hof van Beroep Ghent, Belgium, 24 November 2004, English translation available on the Internet at www.cisg.law.pace.edu (contract for the delivery of computer equipment, with specifically designed software programs); Hof van Beroep Ghent, Belgium, 29 October 2003, available on the Internet at www.law.kuleuven.be (contract for the delivery of cooling installations that also included the provision of services and labor considered to be the preponderant part of the obligations); CLOUT case No. 728 [Corte di Cassazione, Italy, 6 June 2002] (the obligation to assemble the machinery sold and to train workers were considered to be the preponderant compared to the obligation to deliver the machinery).

¹²Oberlandesgericht Karlsruhe, Germany, 12 June 2008, English translation available on the Internet at www.cisg.law.pace.edu; Cour d'appel de Colmar, France, 26 February 2008, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 481 [Court d'appel de Paris, France, 14 June 2001]; see also CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002 (see full text of the decision) (approving lower appeals court's approach that applied the Convention to contract for the sale of specially manufactured goods and rejected trial court's holding that the Convention was inapplicable because the services used to produce the goods constituted the preponderant part of the seller's obligations).

¹³See, for the application of the economic value test referred to in the text, Obergericht Aargau, Switzerland, 3 March 2009, available on the Internet at www.cisg-online.ch; Hof van Beroep Ghent, Belgium, 14 November 2008, English translation available on the Internet at www.cisg.law.pace.edu; Bundesgerichtshof, Germany, 9 July 2008, English translation available on the Internet at www.cisg.law.pace.edu; Court of Arbitration of the International Chamber of Commerce, 2000 (Arbitral award No. 9781), available on the Internet at www.cisg.law.pace.edu; Oberlandesgericht Wien, Austria, 1 June 2004, English translation available on the Internet at www.cisg.law.pace.edu; Rechtbank van Koophandel Hasselt, Belgium, 4 February 2004, available on the Internet at www.law.kuleuven.be; Handelsgericht Zürich, Switzerland, 17 February 2000, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 430 [Oberlandesgericht München, Germany, 3 December 1999]; CLOUT case No. 327 [Kantonsgericht Zug, Switzerland, 25 February 1999]; CLOUT case No. 346 [Landgericht Mainz, Germany, 26 November 1998]; CLOUT case No. 152 [Cour d'appel de Grenoble, France, 26 April 1995]; CLOUT case No. 26 [Court of Arbitration of the International Chamber of Commerce, 1992 (Arbitral award No. 7153)].

¹⁴For an express reference in case law to the principle mentioned in the text, see Kantonsgericht Zug, Switzerland, 14 December 2009, available on the Internet at www.cisg-online.ch; for an implicit affirmation of the principle referred to in the text, see CLOUT case No. 26 [Court of Arbitration of the International Chamber of Commerce, 1992 (Arbitral award no. 7153)].

¹⁵Kantonsgericht Zug, Switzerland, 14 December 2009, available on the Internet at www.cisg-online.ch; Tribunale di Padova, Italy, 10 January 2006, English translation available on the Internet at www.cisg.law.pace.edu; Bundesgericht, Switzerland, 18 May 2009, English translation available on the Internet at www.cisg.law.pace.edu (applying the Convention to a purchase of a packaging machine consisting of ten individual devices as well as several transportation and interconnection systems, which also imposed upon the seller the obligation to install the packaging machine and prepare its operation at the buyer's works).

¹⁶CLOUT case No. 327 [Kantonsgericht Zug, Switzerland, 25 February 1999]; Kreisgericht Bern-Laupen, Switzerland, 29 January 1999, available on the Internet at www.cisg-online.ch.

¹⁷Kantonsgericht Zug, Switzerland, 14 December 2009, available on the Internet at www.cisg-online.ch; Tribunale di Padova, Italy, 10 January 2006, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 890 [Tribunale d'appello Lugano, Switzerland, 29 October 2003]; Kantonsgericht Schaffhausen, Switzerland, 25 February 2002, English translation available on the Internet at www.cisg.law.pace.edu; Landgericht München, Germany, 16 November 2000, English translation available on the Internet at www.cisg.law.pace.edu. For a case where the installation obligation was preponderant and thus led to the Convention's inapplicability, see Foreign Trade Court of Arbitration attached to the Yugoslav Chamber of Commerce, Serbia, 9 May 2003, available on the Internet at www.cisg.law.pace.edu.

¹⁸See Tribunale di Forlì, Italy, 16 February 2009, English translation available on the Internet at www.cisg.law.pace.edu; Hof van Beroep Ghent, Belgium, 14 November 2008, English translation available on the Internet at www.cisg.law.pace.edu; Obergericht Zug, Switzerland, 19 December 2006, English translation available on the Internet at www.cisg.law.pace.edu; Zivilgericht Basel-Stadt, Switzerland,

8 November 2006, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 430 [Oberlandesgericht München, Germany, 3 December 1999].

¹⁹Zivilgericht Basel-Stadt, Switzerland, 8 November 2006, English translation available on the Internet at www.cisg.law.pace.edu.

²⁰Ibid.

²¹Oberster Gerichtshof, Austria, 8 November 2005, English translation available on the Internet at www.cisg.law.pace.edu.

²²See CLOUT case No. 122 [Oberlandesgericht Köln, Germany, 26 August 1994].

²³See CLOUT case No. 152 [Cour d'appel de Grenoble, France, 26 April 1995] (see full text of the decision).

²⁴Kantonsgericht Zug, Switzerland, 14 December 2009, available on the Internet at www.cisg-online.ch.

²⁵Obergericht Aargau, Switzerland, 3 March 2009, available on the Internet at www.cisg-online.ch.

²⁶CLOUT case No. 881 [Handelsgericht Zürich, Switzerland, 9 July 2002].

²⁷See CLOUT case No. 346 [Landgericht Mainz, Germany, 26 November 1998].

²⁸CLOUT case No. 346 [Landgericht Mainz, Germany, 26 November 1998]; see also Oberster Gerichtshof, Austria, 8 November 2005, English translation available on the Internet at www.cisg.law.pace.edu (referring to the intentions of the parties as an element to be taken into account when determining whether the contracts falls into the sphere of application of the Convention).

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

³⁰See CLOUT case No. 346 [Landgericht Mainz, Germany, 26 November 1998].

³¹See Corte di Cassazione, Italy, 9 June 1995 (no. 6499, *Foro padano*, 1997, 2 ff.), Unilex.

³²Oberlandesgericht Oldenburg, Germany, 20 December 2007, English translation available on the Internet at www.cisg.law.pace.edu; Oberster Gerichtshof, Austria, 8 November 2005, English translation available on the Internet at www.cisg.law.pace.edu.