Article 40

The seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.

OVERVIEW

1. Article 40 relieves the buyer from the consequences of failing to meet the requirements of articles 38 (which governs the buyer's obligation to examine delivered goods) and 39 (which regulates the buyer's obligation to notify the seller of lack of conformity in delivered goods). The relief provided by article 40 is available only if the buyer's failure to meet its examination and/or notice obligations relates to a lack of conformity that is known to the seller, or of which the seller "could not have been unaware." and which the seller "did not disclose to the buyer."

ARTICLE 40 IN GENERAL

2. In an arbitral award that discusses article 40 at length the panel asserts that the provision expresses a principle of fair trading found in the domestic laws of many countries, and underlying many other provisions of the CISG; that article 40 constitutes "a safety valve" for preserving the buyer's remedies for non-conformity in cases where the seller has himself forfeited the right of protection, granted by provisions on the buyer's timely examination and notice, against claims for such remedies; that the application of article 40 "results in a dramatic weakening of the position of the seller, who loses his absolute defences based on often relatively short-term time limits for the buyer's examination and notice of non-conformity, and instead is faced with the risk of claims only precluded by . . . general prescription rules . . ."; and that article 40 should be restricted to "special circumstances" so that the protections offered by time limits for claims do not become "illusory".[1] A dissenting opinion from the same arbitration would limit the application of article 40 even further to "exceptional circumstances".[2]

3. Another decision that discusses article 40 CISG at length—even though the applicable law was the 1964 Hague Sales Convention (Uniform Law for International Sales, or ULIS)—identifies two rationales for the provision: 1) that the provision focuses on instances of *bad faith* by the seller in concealing defects of which he was aware or could not have been unaware; 2) that article 40 CISG focuses on situations where the seller *does not need* notice of the lack of conformity because it is already aware (or it could not have been unaware) of the lack of conformity, and thus that the seller can foresee that the buyer will make a claim even without notice.[3] This decision also suggests that article 40 is based on a principle of "estoppel"; and that it constitutes an exception to the rules of articles 38 and 39 CISG which should be interpreted narrowly and limited to "exceptional cases".[4] The decision also suggests that a buyer's bad faith in failing to give the seller notice of a lack of conformity until it files a claim should be considered and balanced against the seller's bad faith in not disclosing a lack of conformity, and that in close or ambiguous cases such a consideration may argue against application of article 40.[5]

4. It has also been held that article 40 must be applied independently to each separate lack of conformity claimed by the buyer. Thus a seller can be precluded by article 40 from relying on articles 38 and 39 with respect to one non-conformity, but permitted to raise defences based on articles 38 and 39 with respect to a different non-conformity.[6]

SCOPE AND EFFECT OF ARTICLE 40

5. In a number of decisions, article 40 has been successfully invoked to prevent a seller from relying on a buyer's non-compliance with article 38 and/or article 39;[7] in other cases, a buyer's invocation of article 40 has failed.[8] It has also been found that article 40 applies to contractual examination and notice provisions agreed to in derogation of articles 38 and 39—i.e., it excuses a buyer who has failed to comply with a contract clause governing examination of goods or a contractual provision requiring notice of non-conformity.[9] Alternatively, it has been posited that, even if article 40 were not directly applicable to such contractual examination and notice provisions, the principle of article 40 would apply indirectly under CISG article 7 (2) to fill this gap in the Convention.[10] A court has also concluded that the general principle embodied in article 40 prevents a seller who knowingly and fraudulently misrepresented the mileage and age of a used car from escaping liability under article 35 (3), a provision that shields a seller from liability for a lack of conformity of which the buyer knew or could not have been unaware at the time of the conclusion of the contract.[11]

REQUIREMENT THAT THE SELLER KNEW OR COULD NOT HAVE BEEN UNAWARE OF FACTS RELATED TO A LACK OF CONFORMITY: IN GENERAL

6. Article 40 applies with respect to a lack of conformity that relates to "facts of which [the seller] knew or could not have been unaware." The nature of the requirement of seller awareness has been examined in several decisions. It was discussed at length in an arbitration decision in

which a majority of the arbitrators indicated that the level of seller awareness required by the provision was not clear, although in order to prevent the protections of article 39 from becoming illusory article 40 required something more than a general awareness that goods manufactured by a seller "are not of the best quality or leave something to be desired."[12] The decision states that there is a "general consensus that fraud and similar cases of bad faith" will meet the requirements of article 40, and that the requisite awareness exists if the facts giving rise to the lack of conformity "are easily apparent or detected."[13] With respect to situations in which the seller does not have actual knowledge of a lack of conformity, the arbitration decision indicates that there is a split between those who assert that the requirements of article 40 are met if the seller's ignorance is due to "gross or even ordinary negligence", and those who would require something more, approaching "deliberate negligence".[14] Similarly, according to the tribunal, there is a split between those who argue that a seller is under no obligation to investigate for possible non-conformities, and those who assert that the seller must not "ignore clues" and may have a duty to examine the goods for lack of conformity "in certain cases".[15] A majority of the tribunal concluded that the level of seller awareness of non-conformities that is required to trigger article 40 is "conscious disregard of facts that meet the eyes and are of evident relevance to the non-conformity". A dissenting arbitrator agreed with the standard, although he believed that it required a higher degree of "subjective blameworthiness" on the seller's part than had been proven in the case.[16]

7. Another decision containing extensive discussion of article 40 CISG (even though the applicable law in the case was the1964 Hague Sales Convention (Uniform Law for International Sales, or "ULIS")) suggests that the provision applies when the seller's awareness of a defect, or its lack of knowledge of a defect of which it could not have been unaware, amounts to bad faith; that "general awareness of a seller that some of his products are not of the best quality" does not satisfy the "could not have been unaware" standard; and that to satisfy the "could not have been unaware standard," a seller's non-awareness of a lack of conformity must have arisen from "at least negligence that constitutes a breach of the customary care in trade," and possibly from "gross negligence," "more than gross negligence" ("almost fraud"), or even "de facto awareness."[17] Other decisions have indicated that the requirements of article 40 are satisfied if the seller's ignorance of a lack of conformity is due to gross negligence.[18] Some decisions assert that article 40 requires that the seller knew (or could not have been unaware) not only of the facts giving rise to the lack of conformity, but also that those facts rendered the goods non-conforming.[19]

REQUIREMENT THAT THE SELLER KNEW OR COULD NOT HAVE BEEN UNAWARE OF FACTS RELATED TO A LACK OF CONFORMITY: BURDEN OF PROOF

8. Several decisions have indicated that the buyer bears the burden of proving that the seller knew or could not have been unaware of a lack of conformity.[20] Some decisions have noted, however, that the "could not have been unaware" language of article 40 reduces the evidentiary burden associated with proving the seller's actual knowledge of a lack of conformity.[21] An arbitral tribunal has asserted that the result of this language is a shifting burden of proof: "If the evidence [adduced by the buyer] and the undisputed facts show that it is more likely than not that the seller is conscious of the facts that relate to the non-conformity, it must be up to the seller to show that he did not reach the requisite state of awareness".[22] Another decision declared that the burden of proof as to whether the seller knew or could not have been unaware of a lack of conformity—a burden that normally rested on the buyer because article 40 constituted an exception to a rule, and the buyer was invoking the exception—could be shifted to the seller based either on the nature of the lack of conformity (i.e., if the goods deviated obviously from the requirements of the contract and the non-conformity resulted from facts within the seller's domain), or on the principle of "proof proximity" ("Beweisnähe"), in order to avoid unreasonable difficulties of proof where the seller had clearly superior access to the evidence as compared to the buyer.[23] Applying these principles, the court found that, because the type of non-conformity at issue (irradiated paprika powder where the contract required non-irradiated goods) was difficult to detect, the nature of the lack of conformity did not justify shifting the burden to the seller; but that the proof-proximity principle required the seller to prove that its non-awareness of the lack of conformity was not due to its gross negligence, provided the buyer had shown that the irradiation took place at the facilities of the seller or the seller's supplier.[24]

REQUIREMENT THAT THE SELLER KNEW OR COULD NOT HAVE BEEN UNAWARE OF FACTS RELATED TO A LACK OF CONFORMITY: APPLICATION (EVIDENCE)

9. Although producing sufficient evidence that the seller knew or had reason to know of a lack of conformity can be a difficult task, buyers in several cases have successfully borne the burden. For instance, the seller of dioxin contaminated sand (for use in the production of French fries) who knew from prior official probes that the sand of its mine was dioxin contaminated is aware of the non-conformity if he delivers the sand and does not warn the buyer, in particular if the seller does not know the specific use of the goods.[25] Where the seller even admitted that it was aware of a defect, obviously, a court found that the requirement of article 40 was satisfied.[26] Even without such an admission, a buyer succeeded in establishing the awareness element where the seller, while manufacturing a complex piece of industrial machinery (a rail press), had replaced a critical safety component (a lock plate) with a part that the seller had not previously used for such an application: the fact that the seller drilled several unused trial holes for positioning the substitute lock plate on the rail press evidenced both that it was aware that it was improvising by using a part that did not fit properly, and that it realized proper positioning of the substitute plate was critical, yet the seller never tried to ascertain that the buyer properly installed the plate; as a result, the majority concluded, the seller had "consciously disregarded apparent facts which were of evident relevance to the non-conformity", and article 40 excused the buyer's failure to give timely notice

of the defect.[27] The tribunal also indicated that the article 40 "knew or could not have been unaware" requirement would be satisfied where the non-conformity in identical or similar goods had previously resulted in accidents that had been reported to the seller or to the "relevant branch" of the seller's industry.[28] On this point another decision stated that, where a buyer seeks to satisfy the article 40 standard through evidence that the seller's products had been shown or alleged to be defective in other transactions, "the buyer must *at least* prove that in the past the seller discovered defects *of the kind being alleged* . . . , in the same type of products, in such a way that it should have given rise to a real concern"; and that "[w]hen we are speaking of a manufacturer who manufactures large quantities of products, it is possible that the awareness should be confined to a certain production line or consignment."[29] The same decision indicates that, to invoke article 40, the buyer must show that the seller should have foreseen that the buyer would make a claim for lack of conformity.[30]

10. Some legal systems, such as the French and Belgian systems, recognize the principle that the professional seller ought to be aware of the lack of conformity of the goods sold. Such a presumption is not applicable within the framework of article 40.[31] It has been held that a seller "could not have been unaware" that wine it sold had been diluted with water, because the non-conformity resulted from an intentional act,[32] and that sellers who shipped goods other than those ordered by their buyers necessarily knew of the lack of conformity.[33] A court has also concluded from the fact that an expert report was not followed up that the results of the tests and trials had been unfavourable and that the manufacturer had been aware, upon delivery of the goods, of the lack of conformity thereof.[34] It has also been suggested that gross negligence on the part of the seller would be presumed if the goods deviated obviously from the requirements of the contract and the non-conformity resulted from facts within the seller's domain.[35] Where the seller knew that the buyer had purchased doors and door jams in order to deliver them in combinations sets to its customers, it was held that the seller necessarily was aware of the lack of conformity when it delivered 176 door jams but only 22 doors.[36] It was also held that the requirements of article 40 were satisfied where a contract's technical specifications for the goods specified an "average" maximum level for a particular indicator, and the certificate of quality issued for the goods that were actually delivered by the seller substantially exceeded that level.[37] And it has been held that, where the seller did not provide a quality certificate and did not sufficiently test that an amphibious vehicle could be used in water, it had been shown that the seller knew or could not have been unaware that the vehicle was not usable in water, and the requirements of article 40 were satisfied.[38] In another decision, the court continued the proceedings in order to permit the buyer to prove that the seller knew or could not have been unaware that the cheese it sold was infested with maggots: the court stated that the buyer would carry its burden by proving that the maggots were present when the cheese was frozen before shipment.[39] And where the contract required non-irradiated paprika powder but the seller delivered irradiated powder, the court held that, based on the "proof proximity" principle, if the buyer proved that the irradiation occurred at the facilities of the seller or the seller's supplier, it was the seller's burden to prove that its non-awareness of the lack of conformity was not due to gross negligence.[40]

11. In several other decisions, however, the court concluded that the article 40 requirement concerning seller's awareness of a lack of conformity had not been met. This was the case where the buyer simply failed to produce evidence that the seller was or should have been aware of the lack of conformity.[41] Where the seller sold a standard product suitable for use in modern equipment, but the product failed when processed by the buyer in unusually-old machinery, the court found that the buyer had not shown that the seller knew or could not have been unaware of the problem because the buyer had not informed the seller that it planned to employ obsolete processing equipment.[42] Other decisions assert that the buyer's resale of the goods to its own customers suggests that the defects complained of were not obvious, and that the buyer had therefore failed to show that the seller could not have been unaware of the lack of conformity.[43] Another court found that, although some of the picture frame mouldings supplied by the seller were non-conforming, it was not clear whether the number exceeded the normal range of defective mouldings tolerated in the trade, and there was insufficient evidence to conclude that the seller was aware, or should have been aware, of the defects.[44] Another decision by an arbitral tribunal rejected a buyer's argument that the nature and volume of the defects in the goods and the seller's procedure for inspecting its production established that the article 40 prerequisites relating to the seller's awareness of a lack of conformity were satisfied.[45] Similarly, it has been held that the presence of feathers in turkey meat did not, as such, prove that the seller was aware of this lack of conformity, or was unaware only due to severe negligence, and thus proof of this lack of conformity did not establish the requirements for applying article 40.[46]

12. Proof that potatoes had been grown on land infected in the past by a potato disease was found insufficient to establish that the seller knew or could not have been unaware that the potatoes were infected with the disease, particularly in light of the fact that the grower had not been banned from producing potatoes on the land and the potatoes delivered by the seller had been inspected and certified as disease-free at the time of delivery.[47] Testimony that the seller knew that its products had been shown to have various defects in other transactions, it has been asserted, was insufficient to show that the seller knew or could not have been unaware of the lack of conformity claimed by the buyer, because that testimony did *not* establish that "in the past the seller discovered defects *of the kind being alleged* . . . , in the same type of products, in such a way that it should have given rise to a real concern": and proof of "a *general awareness* of 'problems' that were discovered in the past . . . does not satisfy the requirements of article 40."[48] Furthermore, an allegation that the seller had failed to warn the buyer of a change in product specifications that would require a change in installation procedures, it was held, did not constitute an allegation under article 40 that the seller knew or could not have been unaware of a lack of conformity.[49] And where a buyer argued that the seller should have informed the buyer that greenhouse panels installed in a "non-vertical fashion" would not function properly, a court held that article 40 was inapplicable because "it was

not shown that [Seller] knew that [Buyer] would apply the plates in a non-vertical fashion."[50]

REQUIREMENT THAT THE SELLER KNEW OR COULD NOT HAVE BEEN UNAWARE OF FACTS RELATED TO A LACK OF CONFORMITY: TIME AS OF WHICH SELLER'S AWARENESS IS DETERMINED

13. Article 40 does not specify the time as of which it should be determined whether the seller knew or could not have been unaware of a lack of conformity. Several decisions have indicated that this determination should be made as of the time of delivery.[51]

SELLER'S DISCLOSURE OF LACK OF CONFORMITY

14. Article 40 states that the relief it provides a buyer that has failed to comply with its obligations under articles 38 and/or 39 does not apply if the seller disclosed the lack of conformity to the buyer. The seller's obligation under article 40 to disclose known non-conformities on pain of losing its protections under articles 38 and 39 has been discussed in only a small number of decisions,[52] and has actually been applied in even fewer. In one arbitral proceeding, the majority opinion asserted that, "to disclose in the sense of article 40 is to inform the buyer of the risks resulting from the non-conformity".[53] Thus where the seller, when manufacturing a complex industrial machine, had replaced a critical safety component (a lock plate) with a different part that required careful installation to function properly, the tribunal found that the seller had not adequately disclosed the lack of conformity for purposes of article 40 where the disclosure to the buyer was limited to a difference in the part numbers appearing on the substitute lock plate and in the service manual: "even if [seller] had informed [buyer] of the exchange as such (and without any further information on proper installation or the risks involved in the arrangement, etc.) this would not be enough . . .".[54] It has also been held that the fact the goods were loaded for shipment in the presence of representatives of the buyer was not adequate disclosure for purposes of article 40 where the goods' lack of conformity was not readily apparent to observers.[55] On the other hand, where a seller delivered stainless steel plates in dimensions that it knew differed from those specified in the contract, but the dimensions of the delivered plates were disclosed on the seller's invoice that accompanied the delivery, article 40 was held not to prevent the seller from relying on the buyer's failure to give timely notice.[56] In another arbitration proceeding, however, the tribunal held that the seller had sufficiently disclosed a lack of conformity, thus preventing the buyer from invoking article 40, although the particular facts that supported this conclusion are unclear.[57] Another decision suggested that, although the buyer bears the burden of proving that the seller "knew or could not have been unaware" of a lack of conformity within the meaning of article 40, it is the seller who bears the burden of proving adequate disclosure to the buyer.[58] It has also been held that "disclosure must occur, at the latest, by the time the seller hands the goods over to the buyer—disclosure after that point does not result in non-application of article 40,"[59] and disclosure at the time the goods were delivered has been held adequate in other decisions.[60] Another decision, however, indicates that disclosure must have occurred at the time the contract was concluded.[61] One decision indicates that the seller bears the burden of proving adequate disclosure.[62]

DEROGATION AND WAIVER

15. Nothing in CISG expressly excepts article 40 from the power of the parties, under article 6, to "derogate from or vary the effect of any of [the Convention's] provisions". An arbitration panel, however, has concluded that, because article 40 expresses fundamental "principles of fair dealing" found in the domestic laws of many countries and underlying many provisions of CISG itself, a derogation from article 40 should not be implied from a contractual warranty clause that derogates from articles 35, 38 and 39[63]—even though the provisions expressly derogated from are closely associated and generally work in tandem with article 40. Indeed, the majority opinion suggests that, despite article 6, "even if an explicit derogation was made—a result of drafting efforts and discussions that stretch the imagination—it is highly questionable whether such derogation would be valid or enforceable under various domestic laws or any general principles for international trade."[64] On the other hand, a buyer was found to have waived its right to invoke article 40 when the buyer negotiated with the seller a price reduction based on certain defects in the goods, but did not at that time seek a reduction for other defects of which it then had knowledge.[65]

ARTICLE 40 AS EMBODYING GENERAL PRINCIPLES UNDERLYING THE CISG

16. Under article 7 (2) of the CISG, questions within the scope of the Convention that are not expressly settled in it are to be resolved "in conformity with the general principles on which [the Convention] is based . . . ."[66] Several decisions have identified article 40 as embodying a general principle of the Convention applicable to resolve unsettled issues under the CISG.[67] According to an arbitration panel, "Article 40 is an expression of the principles of fair trading that underlie also many other provisions of CISG, and it is by its very nature a codification of a general principle."[68] Thus, the decision asserted, even if article 40 did not directly apply to a lack of conformity under a contractual warranty clause, the general principle underlying article 40 would be indirectly applicable to the situation by way of article 7 (2). In another decision, a court derived from article 40 a general CISG principle that even a very negligent buyer deserves more protection than a fraudulent seller, and then applied the principle to conclude that a seller could not escape liability under article 35 (3)[69] for misrepresenting the age and mileage of a car even if the buyer could not have been unaware of the lack of conformity.[70]

Notes

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

[2] Ibid.

[3] Supreme Court, Israel, 17 March 2009 (Pamesa Cerámica v. Yisrael Mendelson Ltd), English text available on the Internet at www.cisg.law.pace.edu. Compare Hof van Beroep Ghent, Belgium, 16 April 2007 (Dat-Schaub International a/s v. Kipco-Damaco N.V.), English translation available on the Internet at www.cisg.law.pace.edu ("Article 40 aims at either the bad faith of the seller, or severe negligence on his part"); Oberster Gerichtshof, Austria, 30 November 2006, English translation available on the Internet at www.cisg.law.pace.edu ("It would be unjust and unnecessary formalism in such cases to oblige the buyer to inform the seller about any non-conformities when the latter has already been aware or could not have been unaware of them . . . [article 40] seeks not to protect a seller acting in bad faith"); Oberlandesgericht Düsseldorf, Germany, 23 January 2004, English translation available on the Internet at www.cisg.law.pace.edu (indicating that article 40 focuses on the seller's bad faith, which means "not only deceit but also unawareness of the non-conformity of the goods which is due to gross negligence," along with the "essential element" of "non-disclosure of the lack of conformity"); Oberlandesgericht Schleswig, Germany, 22 August 2002, English translation available on the Internet at www.cisg.law.pace.edu ("article 40 CISG applies, if the respective seller acted in bad faith"); Hof van Beroep Antwerpen, Belgium, 27 June 2001, English translation available on the Internet at www.cisg.law.pace.edu ("Article 40 CISG . . . is an application of the good faith principle").

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

[5] Ibid.

[6] CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998] (buyer's late notice of non-conformity prevented it from asserting that the colour and weight of jackets that the seller had delivered did not conform to the contract; the seller, however, was aware that some jackets were a different model than specified in the contract, and article 40 precluded seller from relying on late notice with regard to this lack of conformity) (see full text of the decision); Landgericht Landshut, Germany, 5 April 1995, Unilex (seller admitted pre-delivery knowledge that the goods (clothes) suffered a shrinkage problem, so that article 40 prevented seller from relying on articles 38 and 39 as a defence to buyer's claim for this lack of conformity; but buyer failed to prove that seller was aware or could not have been unaware that some items were missing from delivery boxes, and seller could use late notice as a defence as to this non-conformity).

[7] In the following cases, the tribunal found that article 40 precluded the seller from relying on articles 38 and/or 39: Shanghai First Intermediate People's Court, People's Republic of China, 25 December 2008 (Shanghai Anlili International Trading Co. Ltd v. J & P Golden Wings Corp.), English translation available on the Internet at www.cisg.law.pace.edu; China International Economic and Trade Arbitration Commission [CIETAC], People's Republic of China, December 2006, English translation available on the Internet at www.cisg.law.pace.edu; Oberster Gerichtshof, Austria, 30 November 2006, 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, 19 October 2006, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 1153 [Higher Court in Lujubljana, Slovenia, 14 December 2005], English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 838 [Cour de cassation, France, 4 October 2005] (Société ISF v. Société Riv. SARL)]; CLOUT case No. 747 [Oberster Gerichtshof, Austria, 23 May 2005]; High People's Court of Shandong Province, People's Republic of China, 10 September 2004 (WS China Import GmbH v. Longkou Guanyuan Food Co.), English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 694 [U.S. Bankruptcy Court, District of Oregon, United States, 29 March 2004 (In re Siskiyou Evergreen, Inc.)]; CLOUT case No. 596 [Oberlandesgericht Zweibrücken, Germany, 2 February 2004]; Hof van Beroep Gent, Belgium, 28 January 2004 (J.B. and G.B. v. BV H.V.), English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No 477 [Oberster Gerichtshof, Austria, 27 February 2003]; CLOUT case No. 45 [Arbitration Court of the International Chamber of Commerce, 1989 (Arbitral award No. 5713)]; CLOUT case No. 237 [Arbitration Institute of the Stockholm Chamber of Commerce, Sweden, 5 June 1998]; CLOUT case No. 170 [Landgericht Trier, Germany, 12 October 1995]; Landgericht Landshut, Germany, 5 April 1995, Unilex. In the following case, the tribunal found that further proceedings were required to determine whether article 40 prevented the seller from relying on articles 38 and 39: CLOUT case No. 98 [Rechtbank Roermond, the Netherlands, 19 December 1991].

[8] In the following cases, the tribunal found that the requirements to apply article 40 had not been established: CLOUT case No. 1028 [Cour de cassation, France, 16 September 2008 (Société Industrielle et Agricole du Pays de Caux (SIAC) v. Agrico Cooperatieve Handelsvereiniging Voor Akkerbouwgewassen BA)], affirming 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; CLOUT case No. 1232 [Oberlandesgericht Stuttgart, Germany, 31 March 2008], English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 1058 [Oberster Gerichtshof, Austria, 19 December 2007], English translation available on the Internet at www.cisg.law.pace.edu; Hof van Beroep Ghent, Belgium, 16 April 2007 (Dat-Schaub International a/s v. Kipco-Damaco N.V.), English translation available on the Internet at www.cisg.law.pace.edu; Cour d'appel de Paris, France, 25 February 2005 (S.A. DIG... v. Société S…), Unilex, reversed on other grounds, CLOUT case No. 836 [Cour de cassation, France, 13 February 2007]; Hof van Beroep Ghent, Belgium, 4 October 2004 (Deforche NV v. Prins Gebroeders Bouwstoffenhandel BV), English translation available on the Internet at www.cisg.law.pace.edu; Oberlandesgericht Düsseldorf, Germany, 23 January 2004, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 608 [Tribunale Rimini, Italy, 26 November 2002 (Al Palazzo S.r.l v. Bernardaud di Limoges S.A.) (see full text of the decision); Oberlandesgericht Rostock, Germany, 25 September 2002, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 285 [Oberlandesgericht Koblenz, Germany, 11 September 1998]; CLOUT case No. 341 [Ontario Superior Court of Justice, Canada, 31 August 1999]; CLOUT case No. 232 [Oberlandesgericht München, Germany, 11 March 1998]; Landgericht Landshut, Germany, 5 April 1995, Unilex (re some but not all non-conformities); CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (see full text of the decision); Bulgarska turgosko-promishlena palata, Bulgaria, 24 April 1996 (Arbitral award No. 56/1995), Unilex; CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997]; CLOUT case No. 270 [Bundesgerichtshof, Germany, 25 November 1998]. See also Supreme Court, Israel, 17 March 2009 (Pamesa Cerámica v. Yisrael Mendelson Ltd), English text available on the Internet at www.cisg.law.pace.edu (holding that the buyer had failed to prove the requirements for applying article 40 of the1964 Hague Sales Convention (Uniform Law for International Sales, or "ULIS"), which the court construed by reference to the similar provisions of article 40 CISG).

[9] Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 19 October 2006, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 237 [Arbitration Institute of the Stockholm Chamber of Commerce, Sweden, 5 June 1998].

[10] CLOUT case No. 237 [Arbitration Institute of the Stockholm Chamber of Commerce, Sweden, 5 June 1998].

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

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

[13] For another decision suggesting that article 40 applies in cases where the seller has acted in bad faith with respect to an undisclosed lack of conformity, and in which the obviousness of a lack of conformity rebutted any argument that the seller was unaware of it, see CLOUT case No. 596 [Oberlandesgericht Zweibrücken, Germany, 2 February 2004] (see full text of the decision). See also CLOUT case No. 773 [Bundesgerichtshof, Germany, 30 June 2004] (see full text of the decision) (stating that gross negligence on the part of the seller would be presumed if the goods deviated obviously from the requirements of the contract and the non-conformity resulted from facts within the seller's domain).

[14] CLOUT case No. 237 [Arbitration Institute of the Stockholm Chamber of Commerce, Sweden, 5 June 1998] (see full text of the decision). See CLOUT case No. 597 [Oberlandesgericht Celle, Germany, 10 March 2004] (stating that the phrase "could not have been unaware" requires, at a minimum, "gross negligence" by the seller in failing to discover a lack of conformity).

[15] CLOUT case No. 237 [Arbitration Institute of the Stockholm Chamber of Commerce, Sweden, 5 June 1998] (see full text of the decision). See also CLOUT case No. 596 [Oberlandesgericht Zweibrücken, Germany, 2 February 2004] (seller argued that he was unaware of the lack of conformity because he was under the mistaken impression that goods of the type delivered would conform to the contract; court held that the argument would not prevent application of article 40 because the seller was not permitted to "ignore clues" that the buyer valued the particular type of goods specified in the contract) (see full text of the decision).

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

[17] Supreme Court, Israel, 17 March 2009 (Pamesa Cerámica v. Yisrael Mendelson Ltd), English text available on the Internet at www.cisg.law.pace.edu. Compare CLOUT case No. 1232 [Oberlandesgericht Stuttgart, Germany, 31 March 2008], English translation available on the Internet at www.cisg.law.pace.edu (stating that, because the buyer failed to allege even gross negligence, it was unnecessary to decide whether article 40 requires gross negligence or fraud on the part of the seller); Hof van Beroep Ghent, Belgium, 16 April 2007 (Dat-Schaub International a/s v. Kipco-Damaco N.V.), English translation available on the Internet at www.cisg.law.pace.edu ("Article 40 aims at either the bad faith of the seller, or severe negligence on his part"); Hof van Beroep Ghent, Belgium, 4 October 2004 (Deforche NV v. Prins Gebroeders Bouwstoffenhandel BV), English translation available on the Internet at www.cisg.law.pace.edu (dismissing buyer's article 40 argument because "this is not a case of fraud").

[18] CLOUT case No. 773 [Bundesgerichtshof, Germany, 30 June 2004] (see full text of the decision); CLOUT case No.597 [Oberlandesgericht Celle, Germany, 10 March 2004] ("at least gross negligence"); Oberlandesgericht Düsseldorf, Germany, 23 January 2004, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 232 [Oberlandesgericht München, Germany, 11 March 1998] (see full text of the decision).

[19] Oberlandesgericht Schleswig, Germany, 22 August 2002, English translation available on the Internet at www.cisg.law.pace.edu (holding that, where the sales contract was not clear in requiring the delivery of sheep that were ready for slaughter, "the exemption under article 40 CISG is not applicable, since this provision would require that the parties had agreed on the delivery of sheep, mature to be slaughtered immediately and that the [Seller] had positive knowledge of this fact" (emphasis added); CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997]; CLOUT case No. 270 [Bundesgerichtshof Germany 25 November 1998]. See also Supreme Court, Israel, 17 March 2009 (Pamesa Cerámica v. Yisrael Mendelson Ltd), English text available on the Internet at www.cisg.law.pace.edu (stating that, to invoke article 40, the buyer must show that the seller should have foreseen that the buyer would make a claim for lack of conformity) (dicta—the transaction at issue was governed the1964 Hague Sales Convention (Uniform Law for International Sales, or "ULIS")); Cour d'appel de Paris, France, 25 February 2005 (S.A. DIG... v. Société S…), Unilex, reversed on other grounds, CLOUT case No. 836 [Cour de cassation, France, 13 February 2007] (asserting that the buyer must prove that the seller had "precise knowledge of the buyer's intended use of the goods"). *Cf.* CLOUT case No. 596 [Oberlandesgericht Zweibrücken, Germany, 2 February 2004] (see full text of the decision) (the seller was aware that some of the milling machinery it delivered was of Russian origin, which the court determined was a breach of the parties' contract, but the seller argued that article 40 did not apply because the seller "acted on the assumption that it was allowed to deliver Russian mills"; the court found article 40 applicable, emphasizing that the buyer clearly intended to purchase mills of German origin, and "[i]f [Seller] felt entitled to deliver Russian mills anyhow, it defied concerns that it could not and should not have ignored").

[20] CLOUT case No. 1554 [Cour de cassation, France, 4 November 2014]; CLOUT case No. 1232 [Oberlandesgericht Stuttgart, Germany, 31 March 2008], English translation available on the Internet at www.cisg.law.pace.edu; Hof van Beroep Ghent, Belgium, 16 April 2007 (Dat-Schaub International a/s v. Kipco-Damaco N.V.), English translation available on the Internet at www.cisg.law.pace.edu; Cour d'appel de Paris, France, 25 February 2005 (S.A. DIG... v. Société S…), Unilex, reversed on other grounds, CLOUT case No. 836 [Cour de cassation, France, 13 February 2007]; Hof van Beroep Gent, Belgium, 24 March 2004 (NV Segers-Van Ingelgem v. NV Axima et al.), English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 608 [Tribunale Rimini, Italy, 26 November 2002 (Al Palazzo S.r.l v. Bernardaud di Limoges S.A.) (see full text of the decision)]; CLOUT case No. 98 [Rechtbank Roermond, the Netherlands, 19 December 1991]; CLOUT case No. 237 [Arbitration Institute of the Stockholm Chamber of Commerce, Sweden, 5 June 1998] (see full text of the decision). See also CLOUT case No. 773 [Bundesgerichtshof, Germany, 30 June 2004] (see full text of the decision), stating that the buyer generally bears the burden of proving that the seller knew or could not have been unaware of the lack of conformity based on the "rule-exception" burden of proof principle, which the court identified as a general principle underlying the Convention, applicable pursuant to article 7 (2) CISG; as discussed further in paragraph 5 *supra*, however, the court also stated that, on the facts of the case, the burden could be placed on the seller to prove that its lack of awareness of the non-conformity was not due to gross negligence. Other decisions have implied, without expressly so stating, that the buyer bore the burden of proving that seller was on notice of a lack of conformity within the meaning of article 40: CLOUT case No.597 [Oberlandesgericht Celle, Germany, 10 March 2004] (article 40 did not apply because buyer "neither argued nor substantiated" the requirements of article 40); Landgericht München, Germany, 20 February 2002, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 879 [Handelsgericht Bern, Switzerland, 17 January 2002] (see full text of the decision); ICC Arbitration Case No. 11333, International Chamber of Commerce, 2002, English text available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (see full text of the decision); CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997]; Landgericht Landshut, Germany, 5 April 1995, Unilex. The last case distinguishes between the burden of proving that the seller knew or could not have been unaware of a lack of conformity (which the buyer bears) and the burden of proving that the seller disclosed the lack of conformity to the buyer (which the court suggests the seller bears).

[21] CLOUT case No. 237 [Arbitration Institute of the Stockholm Chamber of Commerce, Sweden, 5 June 1998] (see full text of the decision); CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997] (see full text of the decision).

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

[23] CLOUT case No. 773 [Bundesgerichtshof, Germany, 30 June 2004] (see full text of the decision).

[24] Ibid.

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

[26] Landgericht Landshut, Germany, 5 April 1995, Unilex.

[27] CLOUT case No. 237 [Arbitration Institute of the Stockholm Chamber of Commerce, Sweden, 5 June 1998] (see full text of the decision). Compare Oberster Gerichtshof, Austria, 30 November 2006, English translation available on the Internet at www.cisg.law.pace.edu (where, in a sale of industrial equipment, the seller substituted a control feature it had developed for the one required by the contract, the seller was "undoubtedly aware" of the lack of conformity).

[28] CLOUT case No. 237 [Arbitration Institute of the Stockholm Chamber of Commerce, Sweden, 5 June 1998] (see full text of the decision). See also Arbitration Court of the International Chamber of Commerce, 2002 (Arbitral award No. 11333), English text available on the Internet at www.cisg.law.pace.edu ("By way of example, the seller who knows, from complaints received from other customers in the context of previous sales of similar goods, that the goods lack conformity cannot rely on the fact that the buyer did not give notice within the time limit of article 39 CISG"); Hof van Beroep Antwerpen, Belgium, 27 June 2001, English translation available on the Internet at www.cisg.law.pace.edu ("it also emerges from . . . the earlier damages cases which gave rise to a settlement [involving a significant payment] that the [seller] knew or at least could not have been unaware of the defects").

[29] Supreme Court, Israel, 17 March 2009 (Pamesa Cerámica v. Yisrael Mendelson Ltd), English text available on the Internet at www.cisg.law.pace.edu (dicta—the transaction at issue was governed by the 1964 Hague Sales Convention (Uniform Law for International Sales, or "ULIS")).

[30] Ibid. See also Cour d'appel de Paris, France, 25 February 2005 (S.A. DIG... v. Société S…), Unilex, reversed on other grounds, CLOUT case No. 836 [Cour de cassation, France, 13 February 2007] (asserting that the buyer must prove that the seller had "precise knowledge of the buyer's intended use of the goods").

[31] See CLOUT case No. 1554 [Cour de cassation, France, 4 November 2014], rejecting the appeal against: Cour d'appel de Lyon, France, 18 October 2012, and, previously, Cour d'appel de Paris, France, 4 March 2009 (application of the presumption of French law) and CLOUT case No. 838 [Cour de cassation, France, 4 October 2005] (Société ISF v. Société Riv. SARL)] (ambiguous case law); see also, as a judgement against a comparable presumption in Belgian law: Cour d'appel de Gand, 28 January 2004, CISG-online, No. 830, English translation available at www.cisg.law.pace.edu.

[32] CLOUT case No. 170 [Landgericht Trier, Germany, 12 October 1995] (see full text of the decision). Compare CLOUT case No. 838 [Cour de cassation, France, 4 October 2005] (Société ISF v. Société Riv. SARL)], where the court held that, because defects in steel used for engine parts were attributable to the mixture of materials used during the casting of the steel, the seller (as the manufacturer of the goods) could not have been ignorant of the lack of conformity; and that this was confirmed by the fact the seller had not provided the buyer with a certificate of the analysis of the composition of the metal as required by the contract, thus suggesting that the seller deliberately concealed the non-conformity from the buyer.

[33] Shanghai No. 1 Intermediate People's Court, People's Republic of China, 25 December 2008 (Shanghai Anlili International Trading Co. Ltd v. J & P Golden Wings Corp.), English translation available on the Internet at www.cisg.law.pace.edu; High People's Court of Shandong Province, People's Republic of China, 10 September 2004 (WS China Import GmbH v. Longkou Guanyuan Food Co.), English translation available on the Internet at www.cisg.law.pace.edu (inspection indicated that the seller changed and mixed other goods with the goods required by the contract, which constituted sufficient proof that the seller knew or could not have been unaware of the loack of conformity); CLOUT case No. 694 [U.S. Bankruptcy Court, District of Oregon, United States, 29 March 2004 (In re Siskiyou Evergreen, Inc.)] (where the contract required #1 grade Christmas trees but the seller delivered inferior #3 grade trees, the court held that the seller could not have been unaware of the non-conformity because the delivered trees were either purchased by the seller from third-party suppliers under contracts expressly calling for inferior #3 grade trees, or were harvested from the seller's own land by its own employees); Oberlandesgericht Düsseldorf, Germany, 23 January 2004, English translation available on the Internet at www.cisg.law.pace.edu (seller was presumed to know that it delivered stainless steel plates in dimensions different from those specified in the contract; article 40 was held inapplicable, however, because the seller adequately disclosed the lack of conformity); CLOUT case No. 477 [Oberster Gerichtshof, Austria, 27 February 2003] (seller was presumed to be aware that it delivered fish from an earlier year's catch than that required by the contract); CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998] (see full text of the decision). See also CLOUT case No. 596 [Oberlandesgericht Zweibrücken, Germany, 2 February 2004] (seller could not have been unaware that the goods delivered were from a different manufacturer than that specified in the contract because the difference was manifest).

[34] CLOUT case No. 1508 [Cour d'appel de Bordeaux, France, 12 September 2013]).

[35] CLOUT case No. 773 [Bundesgerichtshof, Germany, 30 June 2004] (see full text of the decision).

[36] CLOUT case No. 1153 [Higher Court in Lujubljana, Slovenia, 14 December 2005], English translation available on the Internet at www.cisg.law.pace.edu.

[37] Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 19 October 2006, English translation available on the Internet at www.cisg.law.pace.edu.

[38] China International Economic and Trade Arbitration Commission, People's Republic of China, December 2006, English translation available on the Internet at www.cisg.law.pace.edu.

[39] CLOUT case No. 98 [Rechtbank Roermond, the Netherlands, 19 December 1991]. Compare U.S. Court of Appeals (5th Circuit), United States, 11 June 2003 (BP Oil International v. Empresa Estatal Petroleos de Ecuador), English test available on the Internet at www.cisg.law.pace.edu (remanding the case back to the trial court to permit the development of evidence as to whether the seller knew or could not have

been unaware that it had delivered gasoline with excessive gum content). In an arbitral award, the tribunal found that article 40 excused the buyer from failing to perform its obligations under articles 38 and 39 because the seller knew or could not have been unaware of the lack of conformity. The decision, however, does not specify the facts that supported this conclusion, indicating only very generally that "it clearly transpires from the file and the evidence that the Seller knew and could not be unaware" of the lack of conformity. See CLOUT case No. 45 [Arbitration Court of the International Chamber of Commerce, 1989 (Arbitral award No. 5713).

[40] CLOUT case No. 773 [Bundesgerichtshof, Germany, 30 June 2004] (see full text of the decision).

[41] CLOUT case No. 1232 [Oberlandesgericht Stuttgart, Germany, 31 March 2008], English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No.597 [Oberlandesgericht Celle, Germany, 10 March 2004]; Hof van Beroep Gent, Belgium, 28 January 2004 (J.B. and G.B. v. BV H.V.), English translation available on the Internet at www.cisg.law.pace.edu; Landgericht Landshut, Germany, 5 April 1995, Unilex.

[42] CLOUT case No. 285 [Oberlandesgericht Koblenz, Germany, 11 September 1998] (see full text of the decision).

[43] Supreme Court, Israel, 17 March 2009 (Pamesa Cerámica v. Yisrael Mendelson Ltd), English text available on the Internet at www.cisg.law.pace.edu (dicta—the transaction at issue was governed by the 1964 Hague Sales Convention (Uniform Law for International Sales, or "ULIS")); CLOUT case No. 232 [Oberlandesgericht München, Germany, 11 March 1998].

[44] CLOUT case No. 341 [Ontario Superior Court of Justice, Canada, 31 August 1999] (see full text of the decision). This situation may illustrate a seller's "general awareness" of defects that, as mentioned in paragraph 4 *supra*, an arbitration tribunal has indicated is insufficient to satisfy the requirements of article 40; see CLOUT case No. 237 [Arbitration Institute of the Stockholm Chamber of Commerce, Sweden, 5 June 1998] (see full text of the decision).

[45] CLOUT case No. 474 [Tribunal of International Court of Commercial Arbitration of the Chamber of Commerce and Industry, Russian Federation, Russian Federation, 24 January 2000 (Arbitral award No. 54/1999)].

[46] Hof van Beroep Ghent, Belgium, 16 April 2007 (Dat-Schaub International a/s v. Kipco-Damaco N.V.), English translation available on the Internet at www.cisg.law.pace.edu.

[47] CLOUT case No. 1028 [Cour de cassation, France, 16 September 2008 (Société Industrielle et Agricole du Pays de Caux (SIAC) v. Agrico Cooperatieve Handelsvereiniging Voor Akkerbouwgewassen BA)], affirming Cour de 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.

[48] Supreme Court, Israel, 17 March 2009 (Pamesa Cerámica v. Yisrael Mendelson Ltd), English text available on the Internet at www.cisg.law.pace.edu (dicta—the transaction at issue was governed by the 1964 Hague Sales Convention (Uniform Law for International Sales, or "ULIS")).

[49] CLOUT case No. 1058 [Oberster Gerichtshof, Austria, 19 December 2007], English translation available on the Internet at www.cisg.law.pace.edu.

[50] Hof van Beroep Ghent, Belgium, 4 October 2004 (Deforche NV v. Prins Gebroeders Bouwstoffenhandel BV), English translation available on the Internet at www.cisg.law.pace.edu.

[51] China International Economic and Trade Arbitration Commission, People's Republic of China, December 2006, English translation available on the Internet at www.cisg.law.pace.edu; Landgericht Landshut, Germany, 5 April 1995, Unilex. But see Shanghai No. 1 Intermediate People's Court, People's Republic of China, 25 December 2008 (Shanghai Anlili International Trading Co. Ltd v. J & P Golden Wings Corp.), English translation available on the Internet at www.cisg.law.pace.edu, where the court apparently suggests that knowledge of a non-conformity which the seller acquired during negotiations conducted after the goods had been delivered could trigger article 40; CLOUT case No. 1232 [Oberlandesgericht Stuttgart, Germany, 31 March 2008], English translation available on the Internet at www.cisg.law.pace.edu, where the court appears to indicate that the seller must be aware (or could not have been unaware) of the lack of conformity at the time of the conclusion of the contract.

[52] Oberlandesgericht Düsseldorf, Germany, 23 January 2004, English translation available on the Internet at www.cisg.law.pace.edu; Oberlandesgericht Rostock, Germany, 25 September 2002, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 285 [Oberlandesgericht Koblenz, Germany, 11 September 1998] (recognizing a seller's duty to warn of known non-conformities under article 40, but finding no such duty in the case because the goods were in fact conforming); CLOUT case No. 237 [Arbitration Institute of the Stockholm Chamber of Commerce, Sweden, 5 June 1998] (see full text of the decision); Bulgarian Chamber of Commerce and Industry Arbitration, Bulgaria, 24 April 1996 (Arbitral award No. 56/1995), Unilex. See also Landgericht Landshut, Germany, 5 April 1995, Unilex, which indicates that the seller bears the burden of proving adequate disclosure.

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

[54] Ibid. (see full text of the decision).

[55] CLOUT case No. 596 [Oberlandesgericht Zweibrücken, Germany, 2 February 2004] (see full text of the decision).

[56] Oberlandesgericht Düsseldorf, Germany, 23 January 2004, English translation available on the Internet at www.cisg.law.pace.edu. Compare Oberlandesgericht Rostock, Germany, 25 September 2002, English translation available on the Internet at www.cisg.law.pace.edu (seller sufficiently disclosed the lack of conformity in documents that accompanied the delivery of the goods).

[57] Bulgarian Chamber of Commerce and Industry Arbitration, Bulgaria, 24 April 1996 (Arbitral award No. 56/1995), Unilex.

[58] Landgericht Landshut, Germany, 5 April 1995, Unilex.

[59] Oberster Gerichtshof, Austria, 30 November 2006, English translation available on the Internet at www.cisg.law.pace.edu.

[60] Oberlandesgericht Düsseldorf, Germany, 23 January 2004, English translation available on the Internet at www.cisg.law.pace.edu; Oberlandesgericht Rostock, Germany, 25 September 2002, English translation available on the Internet at www.cisg.law.pace.edu.

[61] Cour d'appel de Paris, France, 25 February 2005 (S.A. DIG... v. Société S…), Unilex, reversed on other grounds, CLOUT case No. 836 [Cour de cassation, France, 13 February 2007].

[62] Landgericht Landshut, Germany, 5 April 1995, Unilex.

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

[64] Ibid. (see full text of the decision). Note that, under CISG article 4 (a), questions concerning the "validity" of a contract or its provisions are beyond the scope of the Convention, and thus are governed by other law as determined by the rules of private international law.

[65] CLOUT case No. 343 [Landgericht Darmstadt, Germany, 9 May 2000]. Contrast CLOUT case No. 596 [Oberlandesgericht Zweibrücken, Germany, 2 February 2004], where the court found that the parties' agreement as to the final payment due under the contract was not intended to cover a lack of conformity of which the buyer was unaware and which met the requirements of article 40, and thus buyer had not by such agreement waived its right to invoke article 40 (see full text of the decision).

[66] In the absence of general CISG principles that would settle an unresolved issue, article 7 (2) directs that the question be settled "in conformity with the law applicable by virtue of the rules of private international law".

[67] Cf. Supreme Court, Israel, 17 March 2009 (Pamesa Cerámica v. Yisrael Mendelson Ltd), English text available on the Internet at www.cisg.law.pace.edu (dicta—the transaction at issue was governed by the 1964 Hague Sales Convention (Uniform Law for International Sales, or "ULIS")), in which (without mentioning article 7 (2) or identifying the following as "general principles" underlying the Convention) the court asserts that article 40 embodies a principle of estoppel, and encompasses a comparison of the good and bad faith behavior of the seller and the buyer.

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

[69] Article 35 (3) provides that a seller is not liable for a lack of conformity under article 35 (2) "if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity".

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