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**United Nations Commission  
on International Trade Law**

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

*Article 6*

The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.

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\* The present digest was prepared using the full text of the decisions cited in the Case Law on UNCITRAL Texts (CLOUT) abstracts and other citations listed in the footnotes. The abstracts are intended to serve only as summaries of the underlying decisions and may not reflect all the points made in the digest. Readers are advised to consult the full texts of the listed court and arbitral decisions rather than relying solely on the CLOUT abstracts.



## Introduction

1. According to article 6 of the Convention, the parties may exclude the Convention's application (totally or partially) or derogate from its provisions. Therefore, even if the Convention is otherwise applicable, one must nevertheless determine whether the parties have excluded it or derogated from its provisions in order to conclude that the Convention applies in a particular case.<sup>1</sup> According to various courts, the possibility of opting-out is subject to a clear intent of the parties.<sup>2</sup>

2. By allowing the parties to exclude the Convention and derogate from its provisions, the drafters affirmed the principle according to which the primary source of the rules governing international sales contracts is party autonomy.<sup>3</sup> In doing so, the drafters clearly acknowledged the Convention's non-mandatory nature<sup>4</sup> and the central role that party autonomy plays in international commerce and, in particular, in international sales.<sup>5</sup>

## Derogation

3. Article 6 makes a distinction between the exclusion of the application of the Convention and the derogation from some of its provisions. Whereas the former does not encounter any limitations, the latter does. Where one of the parties to the contract for the international sale of goods has its place of business in a State that has made a reservation under article 96,<sup>6</sup> the parties may not derogate from or vary

<sup>1</sup> See CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000]; CLOUT case No. 338 [Oberlandesgericht Hamm, Germany, 23 June 1998]; CLOUT case No. 223 [Cour d'appel Paris, France, 15 October 1997] (see full text of the decision); CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997] (see full text of the decision); CLOUT case No. 190 [Oberster Gerichtshof, Austria, 11 February 1997] (see full text of the decision); CLOUT case No. 311 [Oberlandesgericht Köln, Germany, 8 January 1997] (see full text of the decision); CLOUT case No. 211 [Tribunal Cantonal Vaud, Switzerland, 11 March 1996] (see full text of the decision); CLOUT case No. 170 [Landgericht Trier, Germany, 12 October 1995] (see full text of the decision); CLOUT case No. 106 [Oberster Gerichtshof, Austria, 10 November 1994] (see full text of the decision); CLOUT case No. 199 [Tribunal Cantonal Valais, Switzerland, 29 June 1994] (see full text of the decision); CLOUT case No. 317 [Oberlandesgericht Karlsruhe, Germany, 20 November 1992] (see full text of the decision).

<sup>2</sup> [Federal] Northern District Court for California, 21 July 2001, 2001 U.S. Dist. LEXIS 16000, 2001 Westlaw 1182401 (*Asante Technologies, Inc. v. PMC-Sierra, Inc.*), available on the Internet at <<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/010727u1.html>>; Tribunal de Commerce Namur, Belgium, 15 January 2002, available on the Internet at <<http://www.law.kuleuven.ac.be/int/tradelaw/WK/2002-01-15.htm>>.

<sup>3</sup> For a reference to this principle, see CLOUT case No. 229 [Bundesgerichtshof, Germany, 4 December 1996] (see full text of the decision).

<sup>4</sup> For an express reference to the Convention's non-mandatory nature, see Cassazione civile, Italy, 19 June 2000, *Giurisprudenza italiana*, 2001, 236; Oberster Gerichtshof, Austria, 21 March 2000, *Internationales Handelsrecht*, 2001, 41; CLOUT case No. 240 [Oberster Gerichtshof, Austria, 15 October 1998] (see full text of the decision); Handelsgericht Wien, 4 March 1997, unpublished; KG Wallis, 29 June 1994, *Zeitschrift für Walliser Rechtsprechung*, 1994, 126.

<sup>5</sup> Landgericht Stendal, Germany, 12 October 2000, *Internationales Handelsrecht*, 2001, 32.

<sup>6</sup> See article 96: "A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with article 12 that any provision of article 11, article 29, or Part II of this Convention, that allows a contract of sale

the effect of article 12. In those cases, any provision “that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply” (art. 12). All other provisions may be derogated from.<sup>7</sup>

4. Although the Convention does not expressly mention it, there are other provisions that the parties cannot derogate from, more specifically, the public international law provisions (i.e. arts. 89-101). This is due to the fact that those provisions address issues relevant to contracting States rather than private parties. It should be noted that this issue has not yet been addressed by case law.

### Express exclusion

5. The applicability of the Convention can be expressly excluded by the parties. In respect of this kind of exclusion, two lines of cases have to be distinguished: the exclusion with and the exclusion without any indication by the parties of the law applicable to their contract. In those cases in which the Convention’s application is excluded with an indication of the applicable law, which in some countries can be made in the course of the legal proceedings,<sup>8</sup> the law applicable will be that applicable by virtue of the rules of private international law of the forum,<sup>9</sup> which in most countries makes applicable the law chosen by the parties.<sup>10</sup> Where the Convention is expressly excluded without an indication of the applicable law, the applicable law is to be identified by means of the private international law rules of the forum.

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or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State.”

<sup>7</sup> For example, a court has stated that article 55, relating to open-price contracts, is only applicable where the parties have not agreed to the contrary (CLOUT case No. 151 [Cour d’appel, Grenoble, France, 26 April 1995]), while another court observed that article 39, relating to the notice requirement, is not mandatory and can be derogated from (Landgericht Gießen, Germany, 5 July 1994, *Neue Juristische Wochenschrift Rechtsprechungs-Report*, 1995, 438). Similarly, the Austrian Supreme Court has concluded that article 57 also can be derogated from (CLOUT case No. 106 [Oberster Gerichtshof, Austria, 10 November 1994]).

<sup>8</sup> This is true for instance in Germany, as pointed out in case law; see, for example, CLOUT case No. 122 [Oberlandesgericht Köln, Germany, 26 August 1994]; CLOUT case No. 292 [Oberlandesgericht Saarbrücken, Germany, 13 January 1993] (see full text of the decision); this is also true in Switzerland, see Handelsgericht Kanton Zürich, 10 February 1999, *Schweizerische Zeitschrift für Internationales und Europäisches Recht*, 2000, 111.

<sup>9</sup> See CLOUT case No. 231 [Bundesgerichtshof, Germany, 23 July 1997] (see full text of the decision); Oberlandesgericht Frankfurt, Germany, 15 March 1996, *Neue Juristische Wochenschrift Rechtsprechungs-Report*, 1997, 170 ff.

<sup>10</sup> Where the rules of private international law of the forum are those laid down either in the 1955 Hague Convention on the Law Applicable to International Sales of Goods Convention, 510 U.N.T.S. 149, in the 1980 Rome Convention on the Law Applicable to Contractual Obligations (United Nations, *Treaty Series*, vol. 1605, No. 28023), or in the 1994 Inter-American Convention on the Law Applicable to Contractual Obligations (Organization of American States Fifth Inter-American Specialized Conference on Private International Law: Inter-American Convention on the Law Applicable to International Contracts, March 17, 1994, OEA/Ser.K/XXI.5, CIDIP-V/doc.34/94 rev. 3 corr. 2, March 17, 1994, available on the Internet at <http://www.oas.org/juridico/english/Treaties/b-56.html>), the law chosen by the parties will govern.

## Implicit exclusion

6. A number of courts have considered the question of whether application of the Convention can be implicitly excluded. According to many courts,<sup>11</sup> the lack of an express reference in the Convention to the possibility of implicitly excluding its application does not preclude it. This view is supported by a reference in the *Official Records*, which shows that the majority of delegations were opposed to the proposal advanced during the diplomatic conference according to which a total or partial exclusion of the Convention could only be made “expressly”.<sup>12</sup> The express reference in the Convention to the possibility of an implicit exclusion merely “has been eliminated lest the special reference to ‘implied’ exclusion might encourage courts to conclude, on insufficient grounds, that the Convention had been wholly excluded”.<sup>13</sup> According to few court decisions<sup>14</sup> and an arbitral award,<sup>15</sup> however, the Convention cannot be excluded implicitly, on the grounds that the Convention does not expressly provide for that possibility.

7. A variety of ways of implicitly excluding the Convention have been suggested. One possibility is for the parties to choose the law<sup>16</sup> of a Non-contracting State as the law applicable to their contract.<sup>17</sup>

8. The choice of the law of a Contracting State as the law governing the contract poses more difficult problems. It has been suggested in an arbitral award<sup>18</sup> and several court decisions<sup>19</sup> that the choice of the law of a Contracting State ought to amount to an implicit exclusion of the Convention’s application, since otherwise the

<sup>11</sup> See Oberster Gerichtshof, Austria, 22 October 2001, available on the Internet at <[http://www.cisg.at/1\\_7701g.htm](http://www.cisg.at/1_7701g.htm)>; Cour de Cassation, France, 26 June 2001, available on the Internet at <http://witz.jura.uni-sb.de/CISG/decisions/2606012v.htm>; CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000]; Oberlandesgericht Dresden, Germany, 27 December 1999, available on the Internet at <<http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/511.htm>>; CLOUT case No. 273 [Oberlandesgericht München, Germany, 9 July 1997] (see full text of the decision); Landgericht München, Germany, 29 May 1995, *Neue Juristische Wochenschrift*, 1996, 401 f.; CLOUT case No. 136 [Oberlandesgericht Celle, Germany, 24 May 1995] (see full text of the decision).

<sup>12</sup> *Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980* (United Nations publication, Sales No. E.81.IV.3), 85-86.

<sup>13</sup> *Ibid.*, 17.

<sup>14</sup> See Landgericht Landshut, Germany, 5 April 1995, available on the Internet at: <http://www.jura.uni-freiburg.de/ipr1/Convention/>; [Federal] Court of International Trade, United States, 24 October 1989, 726 Fed. Supp. 1344 (*Orbisphere Corp. v. United States*), available on the Internet at: <http://cisgw3.law.pace.edu/cases/891024u1.html>.

<sup>15</sup> See Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, award No. 54/1999, referred to on the Internet at <<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/000124r1.html>>.

<sup>16</sup> Whether such a choice is to be acknowledged at all depends on the rules of private international law of the forum.

<sup>17</sup> See CLOUT case No. 49 [Oberlandesgericht Düsseldorf, Germany, 2 July 1993] (see full text of the decision).

<sup>18</sup> See CLOUT case No. 92 [Arbitration—Ad hoc tribunal, 19 April 1994].

<sup>19</sup> See Cour d’Appel Colmar, France, 26 September 1995, available on the Internet at: <http://witz.jura.uni-sb.de/cisg/decisions/260995.htm>; CLOUT case No. 326 [Kantonsgericht des Kantons Zug, Switzerland, 16 March 1995]; CLOUT case No. 54 [Tribunale Civile de Monza, Italy, 14 January 1993].

choice of the parties would have no practical meaning. Most court decisions<sup>20</sup> and arbitral awards,<sup>21</sup> however, take a different view. The grounds for that view may be summarized as follows: on the one hand, the Convention is part of the law of the Contracting State chosen by the parties and, on the other, the choice of the law of the Contracting State functions to identify the law by which the gaps in the Convention must be filled.<sup>22</sup> According to this line of decisions, the choice of the law of a Contracting State, if made without particular reference to the domestic law of that State, does not appear to exclude the Convention's applicability. Of course, where the parties clearly chose the domestic law of a Contracting State to apply, the Convention must be considered as having been excluded.<sup>23</sup>

9. The choice of a forum may also lead to the implicit exclusion of the Convention's applicability. In those cases, however, where the forum chosen is

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- <sup>20</sup> Hof van Beroep Gent, 17 May 2002, available on the Internet at <<http://www.law.kuleuven.ac.be/int/tradelaw/WK/2002-05-17.htm>>; Oberlandesgericht Frankfurt, 30 August 2000, available on the Internet at <<http://cisgw3.law.pace.edu/cisg/text/000830g1german.html>>; CLOUT case No. 270 [Bundesgerichtshof, Germany, 25 November 1998]; CLOUT case No. 297 [Oberlandesgericht München, Germany, 21 January 1998] (see full text of the decision); CLOUT case No. 220 [Kantonsgericht Nidwalden, Switzerland, 3 December 1997]; CLOUT case No. 236 [Bundesgerichtshof, Germany, 21 July 1997]; CLOUT case No. 287 [Oberlandesgericht München, Germany, 9 July 1997]; CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997] (see full text of the decision); CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997] (see full text of the decision); CLOUT case No. 206 [Cour de Cassation, France, 17 December 1996] (see full text of the decision); Landgericht Kassel, Germany, 15 February 1996, *Neue Juristische Wochenschrift Rechtsprechungs-Report*, 1996, 1146 f.; CLOUT case No. 125 [Oberlandesgericht Hamm, Germany, 9 June 1995]; Rechtbank s'Gravenhage, the Netherlands, 7 June 1995, *Nederlands Internationaal Privaatrecht*, 1995, No. 524; CLOUT case No. 167 [Oberlandesgericht München, Germany, 8 February 1995] (see full text of the decision); CLOUT case No. 120 [Oberlandesgericht Köln, Germany, 22 February 1994]; CLOUT case No. 281 [Oberlandesgericht Koblenz, Germany, 17 September 1993]; CLOUT case No. 48 [Oberlandesgericht Düsseldorf, Germany, 8 January 1993].
- <sup>21</sup> See ICC Court of Arbitration, award No. 9187, available on the Internet at <<http://www.unilex.info/case.cfm?pid=1&do=case&id=466&step=FullText>>; CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996]; Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 17 November, Unilex; ICC Court of Arbitration, France, award No. 8324, *Journal du droit international*, 1996, 1019 ff.; ICC Court of Arbitration, France, award No. 7844, Unilex; ICC Court of Arbitration, France, award No. 7660, Unilex; ICC Court of Arbitration, France, award No. 7565, *Journal du droit international*, 1995, 1015 ff.; CLOUT case No. 103 [Arbitration—International Chamber of Commerce no. 6653 1993]; CLOUT case No. 93 [Arbitration—Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft—Wien, 15 June 1994].
- <sup>22</sup> *B.P. Petroleum International Ltd. v. Empresa Estatal Petroleos de Ecuador (Petroecuador)*, 02-20166, United States Court Of Appeals For The Fifth Circuit, 2003 U.S. App. LEXIS 12013, June 11, 2003.
- <sup>23</sup> Oberlandesgericht Frankfurt, Germany, 30 August 2000, available on the Internet at <<http://cisgw3.law.pace.edu/cisg/text/000830g1german.html>>; Oberlandesgericht Frankfurt, Germany, 15 March 1996, available on the Internet at <<http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/284.htm>>.

located in a Contracting State and there is evidence that the parties wanted to apply the law of the forum, two arbitral tribunals have applied the Convention.<sup>24</sup>

10. The question has arisen of whether the Convention's application is also excluded where the parties argue a case on the sole basis of a domestic law despite the fact that all of the Convention's criteria of applicability are met. In those countries where the judge must always apply the correct law even if the parties based their arguments on a law that does not apply in the case (*jura novit curia*), the mere fact that the parties argued on the sole basis of a domestic law did not in itself lead to the exclusion of the Convention.<sup>25</sup> One court found that if the parties are not aware of the Convention's applicability and argue on the basis of a domestic law merely because they believe that this law is applicable, the judges will nevertheless have to apply the Convention.<sup>26</sup> In one country which does not recognize the principle of *jura novit curia*, a court applied domestic law when the parties argued their case by reference to domestic sales law.<sup>27</sup> This approach has also been adopted by a court<sup>28</sup> as well as an arbitral tribunal<sup>29</sup> sitting in countries that acknowledge the principle *jura novit curia*.

11. According to one court decision, the inclusion of Incoterms by the parties does not constitute an implicit exclusion of the Convention.<sup>30</sup>

### Opting-in

12. While the Convention expressly provides the parties with the possibility of excluding its application either in whole or in part, it does not address the issue of whether the parties may make the Convention applicable when it would not otherwise apply. This issue was expressly dealt with by the 1964 Hague Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, which contained a provision, article 4, that expressly provided the parties with the possibility of "opting in". The fact that the Convention does not contain a provision comparable to that article does not necessarily mean that the parties are not allowed to "opt in". This view is also supported by the fact that a proposal made by the former German Democratic Republic during the diplomatic conference<sup>31</sup> that

<sup>24</sup> Schiedsgericht der Hamburger freundlichen Arbitrage, Germany, 29 December 1998, *Internationales Handelsrecht*, 2001, 36-37; CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996] (see full text of the decision).

<sup>25</sup> See CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000]; CLOUT case No. 125 [Oberlandesgericht Hamm, Germany, 9 June 1995]; Landgericht Landshut, Germany, 5 April 1995, Unilex.

<sup>26</sup> See CLOUT case No. 136 [Oberlandesgericht Celle, Germany, 24 May 1995] (see full text of the decision).

<sup>27</sup> [Oregon Court of Appeals, United States], 12 April 1995, 133 Or. App. 633 (*GPL Treatment Ltd. v. Louisiana-Pacific Group*).

<sup>28</sup> Cour de Cassation, France, 26 June 2001, available on the Internet at <http://witz.jura.uni-sb.de/CISG/decisions/2606012v.htm>.

<sup>29</sup> ICC Court of Arbitration, award No. 8453, *ICC Court of Arbitration Bulletin*, 2000, 55.

<sup>30</sup> Oberster Gerichtshof, Austria, 22 October 2001, available on the Internet at [http://www.cisg.at/1\\_7701g.htm](http://www.cisg.at/1_7701g.htm).

<sup>31</sup> See *Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980* (United Nations publication, Sales No. E.81.IV.3), 86, 252-253.

the Convention should apply even where the preconditions for its application are not met, as long as the parties wanted it to be applicable. This proposal was rejected. It was noted during the discussions that the proposed text was unnecessary in that the principle of party autonomy was sufficient to allow the parties to “opt in” to the Convention.

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