

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.

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. Thus even if the Convention would otherwise be applicable, in order to decide whether it applies in a particular case one must determine whether the parties have excluded the Convention or derogated from its provisions.¹ According to several courts, opting-out requires a clear expression of intent by the parties.²

2. By allowing the parties to exclude the Convention or derogate from its provisions, the drafters affirmed the principle that the primary source of rules for international sales contracts is party autonomy.³ Thus the drafters clearly acknowledged the Convention's non-mandatory nature⁴ and the central role that party autonomy plays in international commerce—specifically, in international sales.⁵

DEROGATION

3. Article 6 distinguishes between excluding application of the Convention entirely and derogating from some of its provisions. The former is not subject to any express limitations in the Convention, but the latter is. Where one party to a contract governed by the Convention has its place of business in a State that has made a reservation under article 96,⁶ the parties may not derogate from or vary the effect of article 12. In such cases, therefore, 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" (article 12). Otherwise, the Convention does not expressly limit the parties's right to derogate from any provision of the Convention.⁷

4. Although the Convention does not expressly so state, the parties cannot derogate from the public international law provisions of the Convention (i.e. articles 89-101) because those provisions address issues relevant to Contracting States rather than private parties. This issue, however, has not yet been addressed by case law.

EXPRESS EXCLUSION

5. The parties can expressly exclude application of the Convention. Express exclusions come in two varieties: exclusion with and exclusion without indication by the parties of the law applicable to their contract. Where the

parties expressly exclude the Convention and specify the applicable law, which in some countries can occur in the course of legal proceedings,⁸ the law applicable will be that designated by the rules of private international law of the forum,⁹ resulting (in most countries) in application of the law chosen by the parties.¹⁰ Where the parties expressly exclude the Convention but do not designate the applicable law, the governing law is to be identified by means of the private international law rules of the forum.

IMPLICIT EXCLUSION

6. A number of decisions have considered whether application of the Convention can be excluded implicitly. Many courts admit the possibility of an implicit exclusion.¹¹ Although there is no express support for this view in the language of the Convention, a majority of delegations were opposed to a proposal advanced during the diplomatic conference which would have permitted total or partial exclusion of the Convention only if done "expressly".¹² An express reference to the possibility of an implicit exclusion was eliminated from the text of the Convention merely "lest the special reference to 'implied' exclusion might encourage courts to conclude, on insufficient grounds, that the Convention had been wholly excluded".¹³ According to some court decisions¹⁴ and an arbitral award,¹⁵ however, the Convention cannot be excluded implicitly, based on the fact that the Convention does not expressly provide for that possibility.

7. A variety of ways in which the parties can implicitly exclude the Convention—for example, by choosing the law¹⁶ of a Non-contracting State as the law applicable to their contract¹⁷—have been recognized.

8. More difficult problems are posed if the parties choose the law of a Contracting State to govern their contract. An arbitral award¹⁸ and several court decisions¹⁹ suggest that such a choice amounts to an implicit exclusion of the Convention, because otherwise the choice would have no practical meaning. Most court decisions²⁰ and arbitral awards,²¹ however, take a different view. They reason that the Convention is the law for international sales in the Contracting State whose law the parties chose; and that the parties' choice remains meaningful because it identifies the national law to be used for filling gaps in the Convention.²² 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 exclude the Convention's applicability. Of course, if the parties clearly chose the domestic law of a Contracting State, the Convention must be deemed excluded.²³

9. The choice of a forum may also lead to the implicit exclusion of the Convention's applicability. Where there was evidence that the parties wanted to apply the law of the chosen forum and that forum was located in a Contracting State, however, two arbitral tribunals have applied the Convention.²⁴

10. The question has arisen whether the Convention's application is excluded if the parties litigate a dispute solely on the basis of domestic law, despite the fact that all requirements for applying the Convention are satisfied. In those jurisdictions where a judge must apply the correct law even if the parties have relied on law that does not apply in the case (*jura novit curia*), the mere fact that the parties based their arguments on domestic law has not by itself lead to the exclusion of the Convention.²⁵ Another court has 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 wrongly believe that law applies, judges should apply the Convention.²⁶ In one country which does not recognize the principle of *jura novit curia*, a court has applied domestic sales law where the parties argued their case under that law.²⁷ This approach has also been adopted by a court²⁸ and an arbitral tribunal²⁹ sitting in countries that acknowledge the principle *jura novit curia*.

11. According to one court decision, the fact that the parties incorporated an Incoterm into their agreement does not constitute an implicit exclusion of the Convention.³⁰

OPTING-IN

12. Although the Convention expressly empowers the parties to exclude its application in whole or in part, it does not declare whether the parties may designate the Convention as the law governing their contract when it would not otherwise apply. This issue was expressly addressed in 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 gave the parties the power to "opt in". The fact that the Convention contains no comparable provision does not necessarily mean that the parties are prohibited from "opting in". A proposal by the former German Democratic Republic during the diplomatic conference³¹ that the Convention should apply even where the preconditions for its application were not met, provided the parties wanted it to be applicable, was rejected; it was noted during the discussions, however, 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.

Notes

¹See 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).

²CLOUT case No. 433 [[Federal] Northern District Court of California, 27 July 2001], *Federal Supplement (2nd Series)* vol. 164, p. 1142 (*Asante Technologies v. PMC-Sierra*), also 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>.

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

⁴For an express reference to the Convention's non-mandatory nature, see CLOUT case No. 647 [Cassazione civile, Italy, 19 June 2000], also in *Giurisprudenza italiana*, 2001, 236; see CLOUT case No. 425 [Oberster Gerichtshof, Austria, 21 March 2000], also in *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; CLOUT case No. 199 [KG Wallis, 29 June 1994], also in *Zeitschrift für Walliser Rechtsprechung*, 1994, 126.

⁵CLOUT case No. 432 [Landgericht Stendal, Germany, 12 October 2000], also in *Internationales Handelsrecht*, 2001, 32.

⁶See 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 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."

⁷For 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 February 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]).

⁸This 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 CLOUT case No. 331 [Handelsgericht Kanton Zürich, 10 February 1999], also in *Schweizerische Zeitschrift für Internationales und Europäisches Recht*, 2000, 111.

⁹See 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.

¹⁰Where 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.

¹¹See CLOUT case No. 605 [Oberster Gerichtshof, Austria, 22 October 2001], also available on the Internet at 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. 483 [Audiencia Provincial de Alicante, Spain, 16 November 2000]; 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).

¹²*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.

¹³*Ibid.*, 17.

¹⁴See 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>.

¹⁵See CLOUT case No. 474 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, award in case No. 54/1999 of 24 January 2000], also referred to on the Internet at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/000124r1.html>.

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

¹⁷See CLOUT case No. 483 [Audiencia Provincial de Alicante, Spain, 16 November 2000] (the parties implicitly excluded application of the Convention by providing that their contract should be interpreted in accordance with the law of a Non-contracting State and by submitting their petitions, statements of defence, and counterclaims in accordance with the domestic law of the forum (a Contracting State)); CLOUT case No. 49 [Oberlandesgericht Düsseldorf, Germany, 2 July 1993] (see full text of the decision).

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

¹⁹See 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].

²⁰CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002 (see full text of the decision approving lower appeals court reasoning); Hof van Beroep Gent, 15 May 2002, available on the Internet at <http://www.law.kuleuven.be/ipr/eng/cases/2002-05-15.html>; CLOUT case No. 482 [Cour d'appel Paris, France, 21 November 2001]; CLOUT case No. 631 [Supreme Court of Queensland, Australia, 17 November 2000]; CLOUT case No. 429 [Oberlandesgericht Frankfurt, 30 August 2000], also available on the Internet at <http://cisgw3.law.pace.edu/cisg/text/000830g1german.html>; CLOUT case No. 630 [Court of Arbitration of the International Chamber of Commerce, Zurich, Switzerland, July 1999] (see full text of the decision); 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, 23 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); CLOUT case No. 409 [Landgericht Kassel, Germany, 15 February 1996], also in *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].

²¹See 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 1995, 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; CLOUT case No. 302 [ICC Court of Arbitration, France, award No. 7660[also in Unilex]; CLOUT case No. 300 [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].

²²CLOUT case No. 575 [*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.

²³CLOUT case No. 429 [Oberlandesgericht Frankfurt, Germany, 30 August 2000], also 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>.

²⁴CLOUT case No. 293 [Schiedsgericht der Hamburger freundlichen Arbitrage, Germany, 29 December 1998] also in *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).

²⁵See 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.

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

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

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

²⁹ICC Court of Arbitration, award No. 8453, *ICC Court of Arbitration Bulletin*, 2000, 55.

³⁰CLOUT case No. 605 [Oberster Gerichtshof, Austria, 22 October 2001], also available on the Internet at http://www.cisg.at/1_7701g.htm.

³¹See *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.