

Article 100

(1) This Convention applies to the formation of a contract only when the proposal for concluding the contract is made on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph (1) (a) or the Contracting State referred to in subparagraph (1) (b) of article 1.

(2) This Convention applies only to contracts concluded on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph (1) (a) or the Contracting State referred to in subparagraph (1) (b) of article 1.

INTRODUCTION

1. The principle of non-retroactivity is established in article 100, placing temporal thresholds on the application of the Convention. Pursuant to article 100 (1), the rules on contract formation (Part II of the Convention, supplemented by Part I) are only applicable when the proposal for concluding the contract is made on or after the date when the Convention enters into force in the relevant State or States.¹ Under article 100 (2), the rules of the Convention regarding the rights and obligations of the parties (Part III of the Convention, supplemented by Part I) are applicable to contracts that are concluded on or after the date the Convention entered into force in the relevant State.² Both article 100 (1) and (2) refer to entry into force “in respect of the Contracting States referred to in subparagraph 1 (a) or the Contracting State referred to in subparagraph (1) (b) of article 1.” Under article 100 (1), for the formation rules of the Convention to apply the offer must be made after a State is considered a Contracting State per article 1 (1) (a) or 1 (1) (b).³ Under article 100 (2), for the Convention’s rules governing the rights and obligations of the parties to apply a contract must be concluded on or after the date a State is considered a Contracting State per article 1 (1) (a) or 1 (1) (b).⁴ Regardless of applicability under article 100, it has been held that parties have the discretion to opt in to the Convention at the time of a dispute.⁵

APPLICABILITY OF ARTICLE 100

2. The Convention has been held inapplicable where the contract of sale was concluded prior to the date the Convention entered into force in the countries relevant to the transaction.⁶

3. The Convention was held inapplicable in a case involving a contract between a seller from a non-Contracting State and a buyer from a State in which the Convention was not in force at the time the contract was concluded.⁷

4. The Convention was held inapplicable in a case involving a contract between a seller from a non-Contracting State and a buyer from a Contracting State that made an article 95 reservation. The Court held that article 100 supported non-applicability of the Convention because the Convention was not in force in the non-Contracting State at the conclusion of the contract.⁸

5. In one case a court held that, by virtue of Article 3 of the Convention of the Law Applicable to Contracts for the International Sale of Goods (Hague Conference June 1955), CISG was applicable to a transaction even though the contract was concluded before the Convention’s entry into force in the State of the buyer, on the basis that it was the law of the seller.⁹

6. In another case, even though the parties concluded an international sale of goods contract that included a C&F clause before the Convention entered into force, and the parties did not display any intent to apply the Convention to the contract, the court applied the Convention.¹⁰ The court held that, under the C&F clause (which provides that the seller’s liability only extended to the time the goods were handed over to the first carrier), supplemented by article 67 CISG, the seller was not responsible for damage to the goods.

7. In one case the court declined to decide between the applicability of the Convention (seller’s law) and the 1964 Hague Sales Convention (buyer’s law) because the outcome would be the same under either law.¹¹

Notes

¹ See the Digest for article 99 regarding the time for entry into force of the Convention.

² Hof van Beroep Antwerpen, Belgium, 18 June 1996, English translation available on the Internet at www.cisg.law.pace.edu; Rechtbank van Koophandel Veurne, Belgium, 19 March 2003, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 143 [Fovarosi Biroasag Budapest, Hungary, 21 May 1996], English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 188 [Tribunal Supremo, Spain, 3 March 1997 (Tana v. Naviera del O. v. Iberico)], English translation available on the

Internet at www.cisg.law.pace.edu (“The court noted that the CISG did not become part of Spanish law until after the dispute arose between the parties. Accordingly, and in view of the interpretation of articles 99 (2) and 100 (2) CISG, the court held that the CISG was not applicable to the dispute, which arose from a contract for the sale of goods concluded prior to the entry into force of the CISG in Spain.”); Arrondissementsrechtbank Arnhem, Netherlands, 3 September 1992 (*S. Jacobs v. auto Opgenoort*), English editorial remarks available on the Internet at www.cisg.law.pace.edu (“The court further held that CISG was not applicable as the contract had been concluded before 1 January, 1992, being the date of entry into force of CISG in the Netherlands (article 100 CISG)”).

³ CLOUT case no. 2 [Oberlandesgericht Frankfurt, Germany, 17 September 1991], English translation available on the Internet at www.cisg.law.pace.edu (although Germany was not a Contracting State to CISG at the time of contract formation, CISG applied via the application of article 1 (1) (b)).

⁴ Monomeles Protodikio Thessalonikis, Greece, 2003, English editorial analysis available on the Internet at www.cisg.law.pace.edu (“At the time of conclusion of the contract of sale the CISG applied in France, but not in Greece.... The CISG applied by virtue of article 1 (1) (b) thereof, since the private international law rules of France referred to the law of a Contracting State.”); CLOUT case No. 887 [Appellationsgericht Basel-Stadt, Switzerland, 22 August 2003], English translation available on the Internet at www.cisg.law.pace.edu (as the Convention was not in force in one of the States, the applicability of the Convention was based on article 1 (1) (b), i.e., the rules of private international commercial law lead to the application of the law of a Contracting State).

⁵ CLOUT case No. 191 [Cámara Nacional de Apelaciones en lo Comercial, Argentina, 31 October 1995], English translation available on the Internet at www.cisg.law.pace.edu.

⁶ Hof 's Hertogenbosch, the Netherlands, 27 November 1991, English translation available on the Internet at www.cisg.law.pace.edu; Arrondissementsrechtbank Arnhem, the Netherlands, 27 May 1993 (*Hunfeld v. Vos*), English translation available on the Internet at www.cisg.law.pace.edu (“On the basis of Article 100 of the CISG, this Convention is not applicable to the agreements that were concluded before 1 January 1992, and the Convention relating to a Uniform Law on the International Sale of Goods (hereinafter ULIS), which was in force until 1 January 1992, is applicable.”); CLOUT case No. 102 [Arbitration Court of the International Chamber of Commerce, 26 August 1989], available on the Internet at www.cisg.law.pace.edu (“The tribunal found that, pursuant to Article 100 (2) CISG, the Convention was not applicable, since the contract was concluded before the Convention entered into force in the countries involved (including France, the place of arbitration), even though those countries were parties to the Convention at the time of the issuance of the arbitral award.”); CLOUT case No. 8 [Corte di Cassazione, Italy, 24 October 1988 (*Kretshmer v. Muratori Enzo*)], English translation available on the Internet at www.cisg.law.pace.edu; Arrondissementsrechtbank Almelo, the Netherlands, 21 June 1989 (*Societe Nouvelle des Papeteries v. Machinefabriek*), English translation available on the Internet at www.cisg.law.pace.edu; Hoge Raad, the Netherlands, 25 September 1992 (*Societe Nouvelle des Papeteries v. Machinefabriek*), English translation available on the Internet at www.cisg.law.pace.edu; Gerechtshof Amsterdam, the Netherlands, 8 April, 1993 (*Verwer v. Pex Handelsmij & Toshiba Deutschland*), English editorial remarks available on the Internet at www.cisg.law.pace.edu; Arrondissementsrechtbank Arnhem, the Netherlands, 29 April 1993 (*Groticke v. Neptunus Shipyard*), English editorial remarks available on the Internet at www.cisg.law.pace.edu; Arrondissementsrechtbank Arnhem, the Netherlands, 27 May 1993 (*Hunfeld v. Vos*), English editorial remarks available on the Internet at www.cisg.law.pace.edu; Oberster Gerichtshof, Austria, 26 May 1994, English editorial remarks available on the Internet at www.cisg.law.pace.edu; Oberlandesgericht Karlsruhe, Germany, 11 February 1993, English editorial remarks available on the Internet at www.cisg.law.pace.edu; Oberlandesgericht Koln, Germany, 16 October 1992, English editorial remarks available on the Internet at www.cisg.law.pace.edu; Oberlandesgericht Koln, Germany, 2 October 1992, English editorial remarks available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 22 [Cámara Nacional de apelaciones en lo Comercial, Argentina, 15 March 1991]; Gerechtshof Arnhem, the Netherlands, 27 April 1991, English translation available on the Internet at www.cisg.law.pace.edu; Rechtbank van koophandel Hasselt, Belgium, 16 March 1994, Unilex (“The Court held that the deliveries made after the entry into force of CISG in the Netherlands were governed by CISG, as the Belgian rules of private international law led to the application of the law of the Netherlands, a contracting State (article 1 (1) (b) CISG), while only the deliveries made prior to that date were governed by the 1964 Hague Convention relating to a Uniform Law on the International Sale of Goods ULIS”); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 18 December 1998, English translation available on the Internet at www.cisg.law.pace.edu (the Convention was not considered applicable as it was not in force in one of the States at the time of the conclusion of the contract; however, it was considered “subsidiary law” under article 7 (2) because “its provisions are considered to be applicable to the relations between the parties as the rules making it pursuant to the Constitution of the Russian Federation [seller’s country] ... a component part of the legal system of Russia.”); Tribunal cantonal de Vaud, Switzerland, 14 March 1993, Unilex; CLOUT case No. 212 [Tribunal cantonal de Vaud, Switzerland, 14 March 1996]; Tribunal cantonal de Vaud, Switzerland, 29 April 1992, Unilex; Handelsgericht Zurich, Switzerland, 9 April 1991, Unilex.

⁷ Arrondissementsrechtbank Arnhem, the Netherlands, 22 October 1992 (*Streamline Building Products v. Albrecht*), English editorial remarks available on the Internet at www.cisg.law.pace.edu; Arrondissementsrechtbank Arnhem, Netherlands, 15 April 1993 (*J.A. Harris & Sons v. Nijmergsche Ijzergieterij*), English editorial remarks available on the Internet at www.cisg.law.pace.edu.

⁸ CLOUT case No. 616 [U.S. District Court, Southern District of Florida, United States, 22 November 2002 (*Impuls v. Psion-Teklogix*)], available on the Internet at www.cisg.law.pace.edu.

⁹ Rechtbank van Koophandel Ieper, 29 January 2001, English case outline available on the Internet at www.cisg.law.pace.edu.

¹⁰ CLOUT case no. 191 [Cámara Nacional de Apelaciones en lo Comercial, Argentina, 31 October 1995], English translation available on the Internet at www.cisg.law.pace.edu.

¹¹ Rechtbank van koophandel Hasselt, Belgium, 21 January 1997, English case outline available on the Internet at www.cisg.law.pace.edu.