



CISG Advisory Council\* Opinion No. 17  
Limitation and Exclusion Clauses in CISG  
Contracts

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\* Ingeborg Schwenzer, Chair.

Yesim Atamer, Eric Bergsten, M. Joachim Bonell, Michael Bridge,  
Alejandro Garro, Roy Goode, John Gotanda, Han Shiyuan, Sergei  
Lebedev, Pilar Perales Viscasillas, Jan Ramberg, Hiroo Sono, Ulrich  
Schroeter, Claude Witz, Members.

Sieg Eiselen, Secretary.

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## INTRODUCTION OF THE CISG-AC

The CISG-AC started as a private initiative supported by the Institute of International Commercial Law at Pace University School of Law and the Centre for Commercial Law Studies, Queen Mary, University of London. The International Sales Convention Advisory Council (CISG-AC) is in place to support understanding of the United Nations Convention on Contracts for the International Sale of Goods (CISG) and the promotion and assistance in the uniform interpretation of the CISG. At its formative meeting in Paris in June 2001, Prof. Peter Schlechtriem of Freiburg University, Germany, was elected Chair of the CISG-AC for a three-year term. Dr. Loukas A. Mistelis of the Centre for Commercial Law Studies, Queen Mary, University of London, was elected Secretary. The founding members of the CISG-AC were Prof. Emeritus Eric E. Bergsten, Pace University School of Law; Prof. Michael Joachim Bonell, University of Rome La Sapienza; Prof. E. Allan Farnsworth, Columbia University School of Law; Prof. Alejandro M. Garro, Columbia University School of Law; Prof. Sir Roy M. Goode, Oxford, Prof. Sergei N. Lebedev, Maritime Arbitration Commission of the Chamber of Commerce and Industry of the Russian Federation; Prof. Jan Ramberg, University of Stockholm, Faculty of Law; Prof. Peter Schlechtriem, Freiburg University; Prof. Hiroo Sono, Faculty of Law, Hokkaido University; Prof. Claude Witz, Universität des Saarlandes and Strasbourg University. Members of the Council are elected by the Council. At subsequent meetings, the CISG-AC elected as additional members Prof. Pilar Perales Viscasillas, Universidad Carlos III, Madrid; Professor Ingeborg Schwenzer, University of Basel; Prof. John Y. Gotanda, Villanova University; Prof. Michael G. Bridge, London School of Economics; Prof. Han Shiyuan, Tsinghua University, Prof. Yesim Atamer, Istanbul Bilgi University, Turkey, and Prof. Ulrich Schroeter, University of Mannheim. Prof. Jan Ramberg served for a three-year term as the second Chair of the CISG-AC. At its 11th meeting in Wuhan, People's Republic of China, Prof. Eric E. Bergsten of Pace University School of Law was elected Chair of the CISG-AC and Prof. Sieg Eiselen of the Department of Private Law of the University of South Africa was elected Secretary. At its 14th meeting in Belgrade, Serbia, Prof. Ingeborg Schwenzer of the University of Basel was elected Chair of the CISGAC.

### 1. OPINION

1. The Convention governs the incorporation and interpretation of clauses providing for the limitation and

exclusion of liability of the obligor for failure to perform a contract for the international sale of goods (“limitation and exclusion clauses”).

2. According to the principle of freedom of contract laid down in Article 6 CISG the parties may derogate from the provisions of the Convention by including limitation and exclusion clauses.

3. Article 11 CISG preempts the application of form requirements for limitation and exclusion clauses provided for in the otherwise applicable law or rules of law.

4. (a) The Convention does not preempt provisions for the protection of the obligee under the applicable law or rules of law, relying on notions such as intentional or willful breach, gross negligence, breach of an essential term, gross unfairness, unreasonableness, or unconscionability.

(b) However, in the application of these provisions, the international character of the contract and the general principles underlying the CISG are to be observed, including the principles of freedom of contract and reasonableness.

## 2. COMMENTS

### 2.1. RULE 1

1. The Convention governs the incorporation and interpretation of clauses providing for the limitation and exclusion of liability of the obligor for failure to perform a contract for the international sale of goods (“limitation and exclusion clauses”).

#### 2.1.1. INTRODUCTION

1.1. Generally defined, limitation and exclusion of liability clauses (“limitation clauses”, “exemption and limitation clauses”) are contract terms which directly exclude or limit the non-performing party’s liability in the event of non-performance or defective performance.<sup>1</sup> In other words, such contractual agreements derogate from the legal regime otherwise applicable in the case of breach of contract.<sup>2</sup>

1.2. The most common remedies for breach of contract are monetary damages. This is why limitation and exclusion clauses usually target liability for damages. The remedy of damages varies from jurisdiction to jurisdiction but usually include: compensatory damages, restitution, punitive, consequential, and liquidated damages.<sup>3</sup>

1.3. Because damages are difficult to measure in a precise manner before the contract is actually breached, the parties may wish to deal with this risk beforehand, i.e. at the stage of contract negotiations.

1.4. Take for example a contract for the sale of machinery. The seller can mitigate its damages risks in a number of ways: (i) by training the buyer how to operate the machines so as to prevent hazardous situations; (ii) by transferring all risks to the buyer (by providing for an exclusion clause); (iii) by sharing the risks with the buyer (by providing for a limitation clause); or (iv) by purchasing an insurance policy in the marketplace. Between the options above, limitation and exclusion clauses stand as a cost-efficient mechanism for allocating contractual risk for the seller.

1.5. Limitation clauses may be expressed in different ways (e.g., fixed sum, ceiling or cap, percentage of the performance in question, deposit retained).<sup>4</sup>

Not only may the parties limit their liability to a certain amount of money, but also to certain types of losses (e.g., direct damages), to certain types of conduct (e.g., negligent conduct, as opposed to grossly negligent conduct). They may also exclude liability for damages altogether by agreeing to an exemption clause.

1.6. Moreover, a contract term providing that a party who does not perform is to pay a specified sum to the aggrieved party for such non-performance (“agreed sums”)<sup>5</sup> or “liquidated damages”) can also have the effect of limiting the compensation due to the aggrieved party. This will be the case whenever the agreed sum is fixed at a lower level than the expected damages. In this situation it is irrelevant whether the parties intended to limit the obligor’s liability, so long as the clause performs that limiting function.<sup>6</sup>

1.7. The parties may also limit or exclude remedies available for breach, other than damages. For example, in a contract governed by the Convention they may limit the buyer’s rights under Article 46 CISG: (1) to require performance by the seller of his obligations, (2) to require delivery of substitute goods by the seller, or (3) to require the seller to remedy the lack of conformity of the goods by repair.

1.8. In contrast to agreed sums, exclusion and limitation clauses do not attempt to induce the obligor to perform the contract. They are always stipulated for the obligor’s benefit.

1.9. It is generally assumed to be beneficial to economic activity that a party to a contract should not be subject to unlimited economic loss. This explains why, despite the principle of full compensation,<sup>7</sup> the extent of damages is regulated by most legal systems, as it is by the CISG (Article 74).<sup>8</sup> More importantly, it explains why it is often self-regulated by the parties. Self-regulation affords the parties more certainty in managing their contractual risks, allowing them to calculate and, where applicable,

minimize potential damages.<sup>9</sup> The same rationale explains why the parties are free to tailor any remedy available to them besides damages.

1.10. As with other terms and conditions of a business contract, limitation and exclusion clauses are generally governed (and at the same time limited) by the fundamental principles of modern contract law, namely: a) the freedom of contract (party autonomy); b) good faith and fair dealing (reasonableness); and c) public policy (which include mandatory rules). In respect of CISG contracts, it is disputed whether the principle of good faith and fair dealing applies as such to the parties' behavior and their agreement. On the other hand, public policy ("ordre public interne") and mandatory rules of domestic origin ("lois d'ordre public interne") only apply to CISG contracts to the extent that the CISG does not provide otherwise (Article 4).

#### 2.1.2. INTERNAL GAP WITHIN THE CISG

1.11. The limitation and exclusion of liability agreed to by the parties to a contract for the international sale of goods is a matter governed but not settled by the Convention.

1.12. In spite of the limitations imposed by the CISG on the contractual liability of the parties, namely the foreseeability rule (Article 74), the duty to mitigate (Article 77) and the exemptions due to an impediment (Article 79) or to other circumstances (Article 80)<sup>10</sup> – there is no provision in the Convention specifically addressing the parties' agreement on the limitation or exclusion of liability for failure to perform the contract, in whole or in part. Article 19(3) CISG, on the reply to an offer, qualifies the "extent of one party's liability to the other" as a term that materially alters the offer, however it does not claim to govern limitation and exclusion clauses.

1.13. Rule 1 expresses the undisputed view that agreements on the exclusion or limitation of liability, except for their substantive validity, are governed but not settled by the Convention.<sup>11</sup> In other words, the regulation of such agreements constitutes an "internal gap" in the Convention, as opposed to matters outside its scope or "external gaps".<sup>12</sup>

1.14. The parties' agreement on the limitation or exclusion of their own liability falls under the scope of the Convention for two reasons. First, it is a matter connected with the rights and obligations of the buyer and seller arising from the contract, as envisaged by Article 4, first sentence CISG.<sup>13</sup> Second, it deals with the scope of the buyer's or seller's remedies for breach of contract under the Convention.

1.15. These remedies include not only damages, available for both the buyer and the seller under Art. 45(1)(b) and Art. 61(1)(b), respectively,

but also other remedies. Buyer's remedies, such as specific performance (Art. 46(1)), delivery of substitute goods (Art. 46(2)), repair of lack of conformity of the goods (Art. 46(3)), price reduction (Art. 50), and the remedy of avoidance (Art. 49) may be limited or even excluded by agreement of the parties. Likewise the seller's remedies, namely: to require the buyer to pay the price, take delivery or perform other obligations<sup>14</sup> (Art. 62), and to avoid the contract (Art. 64).

1.16. By reason of the limitation or exclusion clause, the obligee must not be placed in a position where it is left with no remedies at all.<sup>15</sup> In other words, the parties' agreement to limit or exclude one or more contractual remedies must not amount to a situation where the performance of the contract becomes optional, subject only to the will of the obligor.<sup>16</sup>

1.17. As regards claims to compensation for the breach of contractual obligations, which are primarily delineated by Article 74 CISG, the parties are free to limit or exclude by agreement both the amount that can be claimed and the circumstances under which damages can be claimed.<sup>17</sup> As to limiting other remedies available under the CISG, which seldom occurs in practice, the parties must not exclude all remedies in favor of the aggrieved party.<sup>18</sup>

1.18. In sum, the parties' agreement on the exemption or limitation of liability under the sales contract modifies the remedies regime established in the Convention.

1.19. Rule 1 recognizes that the Convention allows the parties to agree on the limitation or exclusion of their own liability under the international sales contract (Article 6 CISG).<sup>19</sup> On the same line of reasoning, it states that the Convention governs the formation of such clauses (Articles 14 – 24).<sup>20</sup> The parties may agree to a limitation or exclusion clause initially, at the conclusion of their contract, or subsequently, during the course of their contractual relationship (Article 29).

1.20. Where the limitation or exclusion of liability clause is contained in standard terms, its incorporation into the contract must be consistent with CISG-AC Opinion No. 13 Inclusion of Standard Terms under the CISG.<sup>21</sup>

1.21. The interpretation of exemption and limitation of liability clauses and their particular elements is subject to the provisions set forth in Articles 8 and 9 CISG.<sup>22</sup> Thus, terms and conditions in CISG contracts are to be construed in light of both the subjective and objective intent of the parties, as envisaged by Article 8. The parties' obligations under the sales agreement are further determined by the practices established



between the parties and by the trade usages they have agreed to – Article 9(1) –, or by those that the parties “knew or ought to have known and which in international trade [are] widely known and regularly observed” - Article 9(2).

#### 2.1.3. FILLING THE GAP

1.22. Since there is an “internal gap” in the Convention relating to this type of contractual agreement, this gap is to be filled in accordance with Article 7(2), first part, CISG. In other words, such questions are to be primarily settled in conformity with the general principles on which the Convention is based. Only in the absence of any general principle are gaps in the CISG to be settled in conformity with the otherwise applicable law or rules of law.

1.23. Hence, in order to fill this “internal gap” of the Convention it is necessary to find one or more general principles in the CISG that can support a uniform rule or approach to the regulation of limitation and exclusion of liability clauses in CISG contracts. Rules 2 and 4 intend to build up these general principles.

#### 2.1.4. ISSUES OF SUBSTANTIVE VALIDITY EXCLUDED

1.24. Issues of substantive validity of exemption and limitation clauses are, however, not governed by the Convention, as set forth in Article 4, second sentence (a) CISG.

1.25. Rule 4, below, specifically addresses situations where a provision under the applicable law or rules of law invalidates, with the purpose of protecting the obligee, the exclusion or limitation clause. While these issues are to be decided only by the otherwise applicable law or rules of law,<sup>23</sup> the CISG provides the backdrop against which the limitation or exclusion clause has to be assessed under the applicable validity test.<sup>24</sup>

### 2.2. RULE 2

2. According to the principle of freedom of contract laid down in Article 6 CISG the parties may derogate from the provisions of the Convention by including limitation and exclusion clauses.

#### 2.2.1. COMPARATIVE OVERVIEW

##### 2.2.2. GENERAL

2.1. Limitation and exclusion of liability clauses permit contractual parties to preventively regulate the scope of the obligor’s liability should there be a breach of contract, thus modifying the legal regime of remedies

otherwise applicable. Owing to the principle of freedom of contract, such clauses vary widely both in language and scope. For example, the parties may exclude any liability of the relevant party, agree on a cap on damages or limit the type of damages to be compensated (e.g., by excluding indirect losses). They may also limit remedies other than damages, such as specific performance or avoidance of the contract. Additionally, the parties may agree on the modification of time-limits and/or the reversal of the burden of proof.<sup>25</sup>

In some cases, an exemption or limitation of liability is a necessary condition to the performance of risky ventures. It is often required to make the risk insurable. It may also benefit the other party in the form of a price reduction.<sup>26</sup>

2.2. Such clauses are found in all types of contracts, including sales contracts. They deal with the allocation of liability between the parties in a way that is functionally similar to clauses providing for the payment of agreed sums for failure to perform the contract (“agreed sums”).<sup>27</sup>

2.3. Clauses that limit or exclude one party’s liability for non-performance are subject to specific regulation in several legal systems. While preserving the freedom to contract and the full compensation principles, legal instruments and case law have attempted to protect the weaker party by the means of techniques designed to make it difficult to exclude liability under certain circumstances (e.g., in cases of personal injury or gross negligence). In particular, an agreement to limit or exclude the obligor’s liability for breach must not leave the obligee with no contractual remedies to enforce its rights under the contract.<sup>28</sup>

2.4. Limitation and exclusion clauses contained in standard terms,<sup>29</sup> especially, are to be construed *contra preferentem*, i.e., against the proponent or the party seeking to benefit from it.<sup>30</sup> They also subject to strict interpretation and, in some jurisdictions, to specifically prohibited terms.<sup>31</sup> In addition, the proponent must give the other party a reasonable opportunity to take notice of the standard terms.<sup>32</sup>

2.5. The grounds for invalidation of exemption or limitation of liability clauses vary across regions and legal traditions. In some countries (e.g., England) the clause must satisfy a reasonableness test. In other countries, they are deemed null and void in explicit circumstances, namely, (a) where the non-performing party has willfully breached the contract (e.g., Germany); (b) where non-performance results from gross fault or grossly negligent conduct (e.g., China); (c) where the clause limits or exempts liability for death or personal injury (e.g., Quebec); and (d) where the clause contravenes mandatory norms, such as consumer protection rules (e.g., Brazil).

### 2.2.3. CIVIL LAW SYSTEMS

2.6. Exemption and limitation of liability clauses are permitted in most legal systems within the civil law tradition, including France, Belgium, Germany, Italy, Switzerland, Spain, Turkey, Brazil, Colombia, Argentina, Russia, China, Japan and Korea. Such agreements may be voided under specific circumstances (see Annex 1 for more details).

### 2.2.4. COMMON LAW SYSTEMS

2.7. In the common law tradition, agreements on the exemption and limitation of liability are generally accepted under the principle of freedom of contract.<sup>33</sup>

This is the case, for instance, in England, the United States, Canada and Australia. Such clauses are usually referred to as “exculpation or exemption clauses”, or “limitation of liability” or “limitation of remedies”. Similarly to civil law systems, such agreements may be voided where the non-performing party’s conduct was intentional or fraudulent. Peculiar to the common law tradition is the notion of fundamental breach,<sup>34</sup> or breach of a fundamental term, which for purposes of invalidating an exemption or limitation of liability clause is assimilated to gross fault (see Annex 1 for more details).<sup>35</sup>

### 2.2.5. OTHER JURISDICTIONS

2.8. In mixed systems such as Quebec (Canada) and South Africa, limitation and exclusions clauses are generally accepted, subjecting to the same kind of restrictions found in other jurisdictions, namely: exclusion of liability for willful conduct, for death or moral injury etc (see Annex 1 for more details).

### 2.2.6. EUROPEAN UNION LAW AND SOFT LAW

2.9. The CISG applies only to the sale of goods for business purposes. Contracts for the sale of goods for personal use, which generally characterize consumer contracts, fall outside the scope of the Convention (Article 2(a) CISG).<sup>36</sup> Therefore, the European Union instruments in the field of consumer protection dealing with the validity of exemption and limitation clauses are of little or no importance for comparative purposes (see Annex 1 for more details).

2.10. The Principles of European Contract Law (PECL) have resorted to a flexible standard. This soft law instrument allows for the exclusion or restriction of remedies for non-performance, “unless it would be contrary to good faith and fair dealing to invoke the exclusion or restriction”.<sup>37</sup>

#### 2.2.7. UNIFORM LAW INSTRUMENTS

2.11. At the international level, a specific provision on exemption clauses has been included, since 1994, in the UNIDROIT Principles.<sup>38</sup> While such clauses are generally valid, Article 7.1.6 has retained the more flexible idea of “gross unfairness” as the standard for invalidity, thus introducing yet another approach to the common criteria indicated above. According to a commentator, the idea of “gross unfairness” comprehends those of “gross negligence” and “intentional conduct”.<sup>39</sup>

2.12. Other international instruments, such as the 1999 Montreal Convention on the Unification of Certain Rules for International Carriage by Air, establish limitations and exclusions of liability and, by the same token, invalidate any agreement to the contrary (see Annex 1 for more details).

#### 2.2.8. THE POSITION OF THE CISG

2.13. Rule 2 of this Opinion acknowledges that exemption and limitation of liability clauses are particularly common in international contract law and practice and constitute a usual feature of international sales contracts.

2.14. The parties’ freedom to limit and exclude the remedies available to the buyer and the seller under the CISG stems from the general principle of party autonomy recognized in Article 6 CISG.<sup>40</sup>

2.15. This Rule emphasizes the parties’ freedom to derogate from any of the CISG remedial provisions, as long as the obligee is not deprived of all remedies available under the Convention. The obligee must retain at least a minimum adequate remedy.<sup>41</sup> In other words, the limitation or exclusion of remedies must not amount to a situation where the fulfillment of the sales contract becomes optional, subject only to the will of the obligor.<sup>42</sup> Such a situation would contravene both the general principle of reasonableness,<sup>43</sup> recognized as one of the most fundamental principles of the CISG, and the observance of good faith in international trade (Article 7(1) CISG).

2.16. Though frequently concerned with damages for breach in favor of the buyer (Art. 45(1)(b)) and the seller (Art. 61(1)(b)), these clauses may also limit or exclude other remedies available to the aggrieved party under the CISG.

2.17. These other remedies include: a) remedies available to the buyer: specific performance (Art. 46(1)), delivery of substitute goods (Art. 46(2)), repair of lack of conformity of the goods (Art. 46(3)), price reduction (Art. 50), and the remedy of avoidance (Art. 49); and b) to the seller: specific performance of the buyer’s obligations (Art. 62), and the

remedy of avoidance (Art. 64). The seller's right to cure (Art. 48) may also be limited or excluded by agreement of the parties.

2.18. Sometimes demand for a certain good is such that the seller may be in a position to impose the exclusion of one or more remedies available to the buyer. Take for example the market of rare earth elements, which present a given country as a quasi-monopoly supplier. If the market creates a huge demand for this product, the seller may wish to exclude the buyer's remedy of specific performance, and may also wish to limit its liability for damages in case of failure to deliver the goods.

2.19. In other situations, the goods are sold at such a low price that the seller may wish to limit its liability to the greatest extent possible. For example: a clothing wholesaler may wish to sell all of its old summer collection at very competitive prices. On the other hand, it may require buyers to agree to the exclusion of any remedies concerning the non-conformity of the goods, such as delivery of substitute goods (Art. 46(2) CISG) and repair (Art. 46(3) CISG). In addition, the seller may limit its liability to 50% of the contract price.

2.20. Given the circumstances of the parties' deal in the above examples, the agreed exclusion and limitation clauses referring to remedies other than damages seem perfectly reasonable and therefore enforceable. In contract practice, though, limitation and exclusion clauses concerning damages are way more frequent than those limiting other remedies under the CISG.

2.21. Court decisions and arbitral awards have implicitly relied on Article 6 CISG to enforce contract terms limiting or liquidating damages.<sup>44</sup> On the issue of limiting the buyer's right to damages under Article 45(1)(b) CISG, a Finnish court applied its domestic law and the CISG to validate the incorporation of the seller's standard terms into the contract. These standard terms limited the seller's liability in a manner that work, travel, freight, lay day or other indirect expenses were not to be compensated.<sup>45</sup> On this same issue, a CIETAC arbitral award concluded that a post-breach agreement settling a dispute with respect to the seller's non-performance had displaced the aggrieved party's right to full compensation under Article 74 of the Convention.<sup>46</sup>

2.22. As to remedies other than damages, an Austrian court has stated that even though the buyer has the right to avoid the contract under Article 49(1), the parties may agree to derogate from this provision and restrict the buyer's rights. It asserted that such restrictions must be valid according to the applicable domestic law (Article 4 CISG) and must not contradict the Convention's fundamental principles, namely the buyer's right to avoid the contract, which the buyer must have as *ultima ratio*.

According to the court, if the buyer's right to avoid the contract is restricted, at least it must have the right to damages.<sup>47</sup>

2.24. Still on the same issue, a German court found that the buyer's declaration of avoidance was without effect, as the buyer had failed to act in accordance with the contractually established procedure, contained in the seller's general conditions of contract. The relevant clause provided that the buyer could only declare the contract avoided following an invitation to the seller to comply with the contract, and, even so, no sooner than 15 working days from the date the seller received such an invitation without complying with the contract.<sup>48</sup>

2.25. Similarly, a Polish court understood that the buyer's right to avoid the contract in case of non-delivery had been excluded by a clause limiting the validity of the sale contract to 90 days after its conclusion. The court found that Article 49(1)(b) could not be relied upon in the case at hand. It stated that under Article 6 CISG the parties were free to shape the contract as they saw fit, which *inter alia* allowed them to introduce a provision for an automatic termination of the contract within a certain period of time. However, in light of Article 7 CISG, which calls for the application of the general principles on which the Convention is based, the rules governing the effects of the avoidance of contract must be considered. Consequently, the court ordered the seller to reimburse the full price to the buyer and to pay interests, as required by Article 84(1) CISG.<sup>49</sup>

2.26. The parties' ability to derogate from or vary the effect of the remedies regime set out in the Convention is based not only on the freedom of contract envisaged by Article 6 CISG but also on the non-mandatory character of the CISG remedial provisions, namely Articles 46, 49 and 50, which include the buyer's remedies; Articles 62 and 64, which include the seller's remedies; Article 48, which includes the seller's right to cure; and Articles 74 – 80 of the Convention, which regulate damages, interest and exemptions.<sup>50</sup>

2.27. In the case of damages, the general principle of full compensation that derives from (but is also limited by) Article 74 CISG<sup>51</sup> can therefore be excluded or limited by a contract term or condition. The parties' agreement notwithstanding, the principle of full compensation remains important and useful in establishing the effectiveness of any exclusion or limitation of liability clause under the otherwise applicable law or rules of law (*lex causae*).<sup>52</sup>

2.28. The parties' agreement on the exemption or limitation of liability may as well reduce or eliminate the obligation on a party to pay interest on any sum that is in arrears set out in Article 78 CISG.<sup>53</sup>

2.29. The parties' agreement on the exemption of liability may also modify the legal regime on exemptions set out in Articles 79 and 80 CISG.<sup>54</sup>

### 2.3. RULE 3

3. Article 11 CISG preempts the application of form requirements for limitation and exclusion clauses provided for in the otherwise applicable law or rules of law.

#### 2.3.1. GENERAL

3.1. Rule 3 addresses the interplay of the Convention's fundamental principle of freedom from form requirements (Article 11 CISG) and the rules invalidating sales contracts for lack of formal requirements set out in the otherwise applicable law or rules of law.

3.2. Given the preeminent character of the principle embodied in Article 11 CISG, the consequences of non-compliance with a form requirement under the otherwise applicable law (domestic law or rules of law) will not necessarily entail the invalidity of the limitation or exclusion clause.

#### 2.3.2. FORM GOVERNED BY ARTICLE 11 CISG

3.3. Though the wording of Article 11 CISG addresses only the formation and evidence of an international sales contract, the principle of freedom of form is applicable to all legally binding acts within the CISG,<sup>55</sup> including limitation and exclusion clauses.

3.4. Rule 3 states that the formal validity of exemption and limitation clauses in CISG contracts is not governed by the provisions of the otherwise applicable law or rules of law. Rather, it acknowledges that only Article 11 CISG regulates the formal validity of international sales contracts. This provision constitutes an exception to the general rule set out in Article 4 second sentence (a), CISG according to which questions of validity are excluded from the scope of the Convention.<sup>56</sup>

3.5. Article 11 CISG expresses the principle of freedom from form requirements and liberates CISG contracts from any such requirements regarding their conclusion, subsequent modification, or termination. Thus the formal validity of CISG contracts is only subject to party autonomy, usages applicable pursuant to Article 9 CISG, and the exception contained in Article 12 CISG,<sup>57</sup> which concerns the reservation provided in Article 96 CISG.<sup>58</sup>

3.6. Moreover, the Convention does not require the contract to be evidenced by a particular form.<sup>59</sup> It follows that the formal validity of

limitation and exclusion of liability clauses found in sales contracts is exclusively governed by the CISG and subject to the principle of freedom from form requirements.

3.7. Some jurisdictions have established specific formal requirements to be met by exemption or limitation clauses. However, in accordance with Rule 3 and the preemptive character of Article 11 CISG, a contract governed by the Convention must not comply with such formal requirements.

3.8. For instance, Article 1341 of the Italian Civil Code states that a limitation clause contained in standard conditions only binds the other party if, at the time of the contract conclusion, that party has expressly approved it in writing. The Italian courts have characterized it as a formal requirement, which is met when the other party undersigns the relevant deed twice.

3.9. Another example: under U.S. law, disclaiming an implied warranty may function as a limitation or exclusion clause.<sup>60</sup> Such a disclaimer seeks to limit the seller's obligations concerning the product's merchantability<sup>61</sup> or fitness for a particular purpose.<sup>62</sup> According to Section 2-316 of the Uniform Commercial Code the exclusion or modification of implied warranties in sales contracts (a) shall be in writing, (b) requires language mentioning "merchantability", and (c) must show the exclusion or modification of the warranty conspicuously.<sup>63</sup> Requirements (a), (b) and (c) may be characterized, in a CISG contract, as form requirements concerning the validity of the warranty disclaimer. In accordance with this Rule and the preemptive character of Article 11 CISG, the absence of such form requirements cannot render the warranty disclaimer unenforceable.<sup>64</sup>

3.10. The Convention must be uniformly interpreted and applied as required by Article 7(1) CISG. Therefore, the principle under Article 11 CISG must not give way to domestic form requirements regarding the validity of limitation clauses.<sup>65</sup>

3.11. Courts and arbitral tribunals have consistently reaffirmed the principle of freedom from form requirements established in Article 11 CISG and its prevailing character over domestic form requirements.<sup>66</sup>

## 2.4. RULE 4

4. (a) The Convention does not preempt provisions for the protection of the obligee under the applicable law or rules of law, relying on notions such as intentional or willful breach, gross negligence, breach of an essential term, gross unfairness, unreasonableness, or unconscionability.



4. (b) However, in the application of these provisions, the international character of the contract and the general principles underlying the CISG are to be observed, including the principles of freedom of contract and reasonableness.

#### 2.4.1. GENERAL

4.1. Rule 4(a) addresses the interplay of the Convention and the rules protecting the obligee contained in the otherwise applicable law or rules of law, which invalidate limitation and exclusion clauses under certain circumstances. It acknowledges the authority of such invalidating rules to govern limitation and exclusion clauses in CISG contracts.

4.2. On the other hand, Rule 4(b) addresses the application of validity tests to limitation and exclusion clauses contained in CISG contracts under the otherwise applicable law or rules of law, as envisaged by Rule 4(a). It establishes that in the application of such validity tests the general principles underlying the CISG are to be observed.

#### 2.4.2. RULE 4(A)

##### *Freedom of contract and protection mechanisms*

4.3 Owing to the basic principle of freedom of contract, most domestic legal systems and international instruments recognize the validity of exemption or limitation clauses and their aptitude to derogate from the default liability regime provided by law.<sup>67</sup>

4.4 Nevertheless, domestic legal systems and international instruments include control mechanisms to invalidate exemption or limitation clauses under certain circumstances. Such legal mechanisms provide a special protection to the obligee, i.e., the party who, if not for the exemption or limitation clause, would be in a position to claim full compensation for damages caused by the obligor's breach of contract, or exercise the remedy otherwise available. Such mechanisms also nullify exemption and limitation agreements where their application results in unfair treatment of the performing party and an evident imbalance between the parties' respective performances.<sup>68</sup> They may vary according to their legal origin but, in general, result in unenforceability of the exemption or limitation.

4.5 As seen in the comments to Rule 2, supra, the circumstances invalidating exemption or limitation clauses can be summarized as follows:

i) Exemption or limitation clauses are always invalid where the non-performance is the result of fraudulent or willful breach on the part of the obligor.<sup>69</sup>

- ii) Exemption or limitation clauses are sometimes invalid where the non-performance is the result of the obligor's grossly negligent conduct.<sup>70</sup>
- iii) Exemption or limitation clauses are invalid where they concern the very substance of the obligation (obligation vidée de sa substance) or concern a major obligation (Kardinalpflicht).<sup>71</sup>
- iv) Exemption or limitation clauses are invalid where they relate to the breach of obligations deriving from mandatory norms.<sup>72</sup>
- v) Exemption or limitation clauses are invalid when they are "unreasonable".<sup>73</sup>
- vi) Exemption or limitation clauses are invalid when they concern the liability for death or personal injuries.<sup>74</sup>
- vii) Limitation clauses are subject to the "agreed sums" legal regime in cases where they also serve as liquidated damages clauses.<sup>75</sup>
- ix) Exemption or limitation clauses may be restricted by the general principles of legislation concerning "unfair terms".<sup>76</sup>
- x) Exemption and limitation clauses included in standard terms or in adhesion contracts may have to meet the requirements imposed by some regulations on the validity of such contracts and the clauses they contain, and be interpreted restrictively or contra preferentem.<sup>77</sup>
- xi) Exemption and limitation clauses may not be invoked if it would be grossly unfair to do so, having regard to the contract.<sup>78</sup>
- xii) Exclusionary clauses are unenforceable if they are unconscionable.<sup>79</sup>

#### *The perspective of the CISG*

4.6. As per Article 4, second sentence (a), the CISG is not concerned with the validity of the contract.<sup>80</sup> It follows that protection mechanisms established by the otherwise applicable law or rules of law remain generally applicable to limitation clauses in contracts governed by the Convention. Thus, from the perspective of the CISG, all of these protection mechanisms affect the substantive validity of exemption and limitation of liability clauses.

4.7. What is considered to be a validity issue under the Convention is not to be decided by the otherwise applicable law or rules of law, but by the CISG itself.<sup>81</sup>

4.8. As limitation and exclusion clauses fall under the CISG scope, their uniform interpretation is required under Article 7(1) and governed by Articles 8 and 9 CISG.<sup>82</sup> Therefore, cases involving a challenge to the validity of such clauses under the otherwise applicable law or rules of law call for an interpretation in accordance with the general principles on

which the CISG is based (Article 7(2)). Among such principles, the principle of reasonableness stands as the most important.

*Case law*

4.9. Courts have applied protection mechanisms set out in the otherwise applicable law or rules of law in favor of the obligee, thus rendering unenforceable exemption or limitation of liability clauses.<sup>83</sup>

4.10. For example, a German court applied German law to render unenforceable the exemption of liability set out in the seller's terms and conditions drafted in Italian. It stated that the clause limited the liability to the exchange or repair of defective parts "escluso qualsiasi risarcimento di danni" ("excluding any compensation") and that the complete exclusion amounted to an inappropriate disadvantage for the plaintiff, and contradicted the legal provisions. Therefore such a term had to be considered as compulsorily invalid according to section 9 AGBG [Standard Terms of Business Act].<sup>84</sup>

4.11. While validating the exclusionary clause, a U.S. court has expressly stated that the validity and enforceability of such clause were governed by domestic law rather than by the CISG.<sup>85</sup>

2.4.3. RULE 4(B)

*General*

4.12. Rule 4(b) addresses the application of validity tests to exemption and limitation of liability clauses contained in CISG contracts, under the otherwise applicable law or rules of law, as envisaged by Rule 4(a). It stresses the need to apply such validity tests in accordance with an international standard (Article 7(1) CISG) derived from the underlying principles of the CISG (Article 7(2) CISG). This guideline intends to preserve the international character of the CISG, promote uniformity in its application and foster the observance of good faith in international trade, as envisaged by Article 7(1).

4.13. As seen in the comments to Rules 2 and 4(a), national laws and international instruments take different approaches to controlling the validity of exemption and limitation clauses. Nevertheless, from a functional perspective these mechanisms generally render exemption and limitation agreements unenforceable where they: (a) exclude or restrict the obligor's liability in cases of intentional or gross fault or gross negligence; (b) are unconscionable; (c) violate mandatory norms or the public policy of the relevant legal system; (d) exclude liability in case of a fundamental breach or breach of a fundamental term; and (e) concern the exclusion or limitation of liability for death or personal injury.

4.14. Invalidation of the clause by the competent state court or arbitral tribunal is therefore the most common protection mechanism against abusive exemption or limitation of liability agreements.

*Interpretation of validity tests under the CISG*

4.15. Where the Convention has become applicable in a particular Contracting State, it becomes part of the law of that State. More specifically, the CISG provisions become that part of state law which governs international sales contracts. In accordance with Articles 1 through 6 CISG, issues concerning international sales contracts are then submitted to the Convention rather than to another national, foreign or international body of rules.<sup>86</sup>

4.16. Accordingly, the CISG is the prevailing governing instrument for international sales of goods in any given Contracting State. The Convention thus requires a harmonizing effort in those situations where a subsidiary set of rules is called upon to supplement the CISG regime. In other words, those rules supplementing the CISG, in spite of their different origin, must be interpreted and applied in accordance with international standards derived from the principles underlying the Convention – Article 7(1) and (2) CISG.

4.17. In particular, where the validity of a limitation or exclusion clause contained in a CISG contract is assessed against the rules of a domestic law, the standards usually employed in domestic cases must give way to international standards, developed from the underlying principles of the CISG. For example, a clause excluding the seller's liability in case of breach of a CISG contract, found unconscionable and therefore unenforceable under Washington law,<sup>87</sup> is not necessarily invalid in an international context. The validity test to be applied must correspond to an international principle established by the CISG.

4.18. Correspondingly, one or more international principles derived from the CISG must prevail over any other standard in assessing the validity of exemption or limitation clauses under domestic law notions such as intentional or willful breach, bad faith, gross fault, gross negligence, lack of proportionality, excessiveness, fundamental breach or breach of a fundamental term, unconscionability or unreasonableness. Even the more flexible notion of gross unfairness found in the UNIDROIT Principles<sup>88</sup> must be construed according to an international principle derived from the CISG.

4.19. In conclusion, it is the CISG that provides the background against which the validity of an exemption or limitation of liability clause must be assessed under the otherwise applicable law or rules of law. Thus

the unfairness tainting the validity of a limitation clause must be determined in light of what is fair in international trade – and not in similar domestic transactions. The same reasoning applies to an exemption clause concerning the breach of a fundamental contract term: what exactly is a fundamental breach is to be determined in light of a principle established by the CISG.

*The principles underlying the CISG*

4.20. Determining the international principles derived from the CISG in cases involving the validity of exemption and limitation of clauses requires the application of interpretive standards of the Convention under Article 7(1) CISG.

4.21. First, regard is to be had to the international character of the CISG and, additionally, of the sales contract itself. The terms and concepts contained in the Convention are to be interpreted autonomously, i.e., in the context of the CISG itself and not by reference to the meaning which might traditionally be attached to them by a particular domestic law.<sup>89</sup> In general, the CISG employs neutral language for which a common understanding should be ideally reached. Even in situations where the CISG has employed terms or concepts peculiar to one or more domestic legal systems (e.g., the foreseeability rule in Article 74), the concept is to be interpreted autonomously considering its function within the context of the Convention.<sup>90</sup>

4.22. Second, the terms and concepts in the CISG are not to be construed in a strict and literal sense but in light of the main purpose of the Convention, which is to provide a uniform framework for the international sale of goods. Promoting the uniform application of the CISG provisions ensures that, in practice, these provisions are interpreted and applied to the greatest possible extent in the same way by courts of different Contracting States or by arbitral tribunals.

4.23. Last, but not least, the Convention must be interpreted with a view to foster the observance of good faith in international trade (Article 7 (1) CISG). While there is no consensus as to the direct application of the good faith principle to individual CISG contracts – much to the contrary – the principle exerts at least indirect influence on the contractual relationship between the parties.<sup>91</sup>

*The principle of reasonableness*

4.24. ‘Reasonableness’ is not only a general principle of the CISG but one of the most fundamental principles on which the Convention is based.<sup>92</sup>

4.25. In different opinions, the CISG Advisory Council has referred to the principle of reasonableness in the context of the Convention (e.g. – Opinions No. 5, on the avoidance of the sales contract by the buyer; No. 6, on the calculation of damages under Article 74; No. 8, on the calculation of damages under Articles 75 and 76; No. 9, on the consequences of avoidance; No. 10, on agreed sums; and No. 13, on the inclusion of standard terms).<sup>93</sup>

4.26. The principle of reasonableness also appears under different labels in the Convention. It is at the origin of the prohibition against abuse of rights and the prohibition against contradictory behavior (*venire contra factum proprium*), both stemming from Article 7 CISG.<sup>94</sup>

4.27. Regarding reasonableness as a fundamental principle of the CISG and reading it into every Convention provision has been said to help tilt the scales in favor of filling the gaps in the Convention by the means of its general principles rather than using the otherwise law applicable. A tilting of scales that is required by virtue of the good faith and uniform-law mandate recited in Article 7(1) CISG.<sup>95</sup>

*Interpretation of limitation and exclusion clauses under international principles*

4.28. Article 7(1) CISG requires that solutions developed to fill in the gaps in the Convention be acceptable in a majority of legal systems belonging to different legal traditions.<sup>96</sup> As seen in this Opinion, the law largely recognizes the parties' ability to exclude or limit their own contractual liability by agreement. As a result, the condition set forth in Article 7(1) CISG is met. Hence, the interpretation of the protection mechanisms set forth in the otherwise applicable law or rules of law must follow a comparative law approach.

4.29. Additionally, as a fundamental principle of the CISG, reasonableness has a strong bearing on the proper interpretation of the protection mechanisms set forth in the otherwise applicable law or rules of law, which govern the substantive validity of limitation and exclusion agreements.

4.30. Since freedom of contract is recognized as a general principle of the CISG,<sup>97</sup> it must be determined whether the parties' freedom in the context of international trade provides sufficient grounds for the interpretation of validity mechanisms concerning exemption and limitation of liability clauses. Given the width of the parties' freedom to allocate their risks and liabilities in a manner which modifies the remedies regime established in the Convention (Article 6 CISG), the interpretation of the protection mechanisms set forth in the otherwise applicable law or rules of law must follow the priority of freedom of contract.

4.31. In sum, the interpretation of the validity of protection mechanisms set forth in the otherwise applicable law or rules of law must observe the principles of reasonableness and freedom of contract underlying the CISG.

## 2.5. ANNEX 1 - LIMITATION AND EXCLUSION CLAUSES IN COMPARATIVE PERSPECTIVE

### 2.5.1. CIVIL LAW SYSTEMS

Exemption and limitation of liability clauses are permitted in most legal systems within the civil law tradition, including France, Belgium, Germany, Italy, Switzerland, Spain, Turkey, Brazil, Colombia, Argentina, Russia, Japan and Korea. See Annex 1 for more details.

(France) The French Civil Code is silent with respect to exemption and limitation clauses. Nevertheless, they are generally valid under the principle of freedom of contract.<sup>98</sup> In sales contracts, the legal regime governing exemption and limitation clauses is quite complex, as the Civil Code distinguishes between the seller's warranty for hidden defects (*garantie des vices cachés*) (*pejus*), on the one hand, and the seller's liability for delivery of non-conforming goods (*aliud*) on the other. Under Article 1645 of the Civil Code, the seller cannot exclude the warranty for those hidden defects that he knew at the time of the conclusion of the contract. Furthermore, case law equates the professional seller's warranty for hidden defects to that of a seller acting in bad faith, since the former is presumed to know all defects in the goods sold. Clauses exempting or limiting the professional seller's warranty for hidden defects are, nevertheless, admitted as between professionals of the same business sector. As regards the seller's liability for non-conforming goods (*aliud*), the law is more flexible. French courts have admitted the exemption of the seller's liability in cases where the goods delivered were of a different kind of those contracted for.<sup>99</sup> Accordingly, the courts only invalidate limitation and exemption clauses in case of willful breach or gross fault on the part of the seller, or in cases where the clause depletes an essential obligation under the sales contract (new Art. 1170, Civil Code).<sup>100</sup> In addition, the 2016 reform of the French Civil Code has introduced a particular regime concerning exclusion and limitation of liability in adhesion contracts (Art. 1171).<sup>101</sup> With regard to CISG contracts, doctrinal authorities advocate that the Convention's uniform treatment must prevail over the French domestic law distinction between the professional seller's warranty for hidden defects and the ordinary seller's liability for

non-conforming goods, even where the CISG does not specifically cover the specific aspect of the contract.<sup>102</sup>

(Belgium) The Belgian Civil Code is also silent with respect to exemption and limitation clauses. However, the case law has adopted a liberal approach that permits the exclusion of consequential damages even in case of gross negligence (but not in case of willful negligence).<sup>103</sup> In addition, Belgian law does not contain any restriction on the exemption and limitation of liability for personal injury.<sup>104</sup>

(Germany) The German legal regime is more liberal towards limitation and exclusion agreements. Hence, such clauses are valid in commercial contracts, save in cases where the obligor has intentionally breached the contract (Section 276, BGB).<sup>105</sup> In standard terms and adhesion contracts, exemption and limitation of liability clauses are deemed invalid in many circumstances, including where the breach of contract results from gross fault by the non-performing party.[9] Some big German companies notoriously choose foreign laws, notably Swiss law, to govern their international contracts in order to avoid the strict control on exclusion clauses in their standard terms which apply under German law.<sup>106</sup>

(Italy) While this type of clause is generally valid under Italian law, Article 1229 of the Civil Code contains a specific provision invalidating the agreement where the breach of contract results either from willful or grossly negligent conduct, or from acts contravening public policy rules.<sup>107</sup> In addition, exemption and limitation clauses contained in standard contract terms must be specifically approved by the adhering party (Article 1341, Civil Code).<sup>108</sup>

(Switzerland) In Switzerland, Article 100 of the Code of Obligations sets out a general rule validating, *a contrario sensu*, exemption and limitation clauses which do not exclude liability for unlawful intent or gross negligence.<sup>109</sup> This provision also allows the court to invalidate the exclusion of liability for minor negligence under certain circumstances. Swiss law makes no provision for control of standard terms in commercial contracts.

(Spain) Similarly to France, the Spanish Civil Code is silent on exemption and limitation of liability agreements. However, such clauses are generally valid under the principle of freedom of contract, save in cases where the breach results from intentional conduct or gross negligence, or the agreement contravenes good morals and public order (Civil Code, Article 1102).<sup>110</sup> The 1998 Law on General Contract Conditions, which transposes EU Directive 93/13/CEE into Spanish law, establishes a strict control on limitation and exclusion clauses contained in standard terms. It



applies not only to consumers but also to contracts between professionals.

(Turkey) Under the 2012 Turkish Code of Obligations, limitation and exemption agreements are valid, except in case of gross negligence (Code of Obligations, Article 115). Such clauses are also unenforceable where they contravene mandatory norms (Article 27).<sup>111</sup> In sale contracts, the exclusion or limitation of warranty is enforceable, except where the seller has acted intently or has been grossly negligent.<sup>112</sup>

(Brazil) The Brazilian Civil Code is also silent in relation to such clauses. Nevertheless, exemption and limitation agreements are generally valid, under the principle of freedom of contract. They may be rendered null and void in situations where: a) they exempt the liability of the non-performing party in cases of intentional conduct; b) they contravene a mandatory rule;<sup>113</sup> c) they affect the very substance of the obligation or they concern a major obligation; and d) they concern liability for personal injury.<sup>114</sup> In the case of standard contract terms, the proponent has to bring the existence of the exemption or limitation clause to the attention of the other party, as a result of the *contra preferentem* (Article 423, Civil Code) and strict contract interpretation rules.<sup>115</sup>

(Colombia) In Colombia, the Civil Code permits the parties to exclude or restrict their liability for failure to perform the contract (Article 1604, final sentence).<sup>116</sup> The Colombian courts have consistently validated exemption and limitation of liability clauses, including those contained in adhesion contracts. However, the Supreme Court has established that a party in breach is liable in case of willful misconduct or gross negligence, and invoked both the CISG and the UNIDROIT Principles in support of its understanding.<sup>117</sup> While the validity of such clauses is not expressly addressed by the Code, nullity (and not only unenforceability) seems to be the consequence of their being contrary to public policy rules (Articles 1741 and 1742).<sup>118</sup> The Commercial Code, like other laws (e.g., Ley 80/93 on contracts with state entities), contains specific rules on exemption and limitation of liability.

(Argentina) The new Civil and Commercial Code of Argentina entered into force in 2015, unifying the rules on civil and commercial obligations.<sup>119</sup> Under the new regime limitation and exclusion clauses are valid, except where they exempt the obligor's liability for willful conduct, contravene good faith and mandatory rules, or are abusive in nature (Article 1743).<sup>120</sup>

(Russia) Article 421 of the Russian Civil Code, enacted in the 1990's, embraces the principle of freedom of contract.<sup>121</sup> In addition, Article 400 expressly allows the parties' agreement to exclude or restrict their own

liability for failure to perform the contract.<sup>122</sup> Liability can thus be limited to (a) the reimbursement of actual damages (excluding loss of profits) or of only specific types of damages; (b) cases where non-performance is based on the party's faulty conduct; (c) a cap, including a fixed amount. However, the clause is deemed null and void where the obligor has intentionally non-performed the contract (Article 401).<sup>123</sup> The Russian Civil Code also governs the contract for the sale of goods, including agricultural products.<sup>124</sup> Article 461, for example, renders null and void the exemption of liability of the seller where the buyer has been dispossessed of the goods by a third party on grounds that already existed before the conclusion of the sales contract.<sup>125</sup>

(China) In China, the 1999 Contract Law mirrors the UNIDROIT Principles in many aspects, including the principle of freedom of contract.<sup>126</sup> Accordingly, it is possible to insert an exclusion or limitation of liability clause in most types of contracts, including sales contracts. This is qualified by the prohibition against excluding liability for bodily or personal injury (including death) and liability for damages if incurred deliberately or due to gross negligence. Standard terms are subject to further restrictions, the violation of which may result in the standard term not being validly incorporated into the contract. According to Article 39 of the 1999 Contract Law a party that provides standard clauses must draw the other party's attention to limitations and exclusions of liability and provide adequate explanation upon request.<sup>127</sup> The same provision prescribes that standard clauses, by sanction of nullity, must satisfy the fairness requirement.

(Japan) In Japan, the principle of freedom of contract allows the parties to agree on limitation and exclusion clauses. The 1896 Civil Code, under reform since 2009,<sup>128</sup> also permits the parties to agree on the amount of liquidated damages for the failure to perform an obligation (Art. 420(1)). On the other hand, the Civil Code establishes the general principle of good faith (Art. 1(2)) and public policy (Art. 90).<sup>129</sup> On the basis of these principles, courts have held that limitation and exclusion clauses do not release the obligor from liability if that liability was caused by an intentional act or by gross negligence. There are other specific statutory regulations as well. For example, concerning sales contracts, Art. 572 of the Civil Code does not permit disclaimer of warranty if the seller knew of the defects. The Japanese Consumer Contract Act further establishes both general and specific provisions which restrict the scope of limitation clauses in consumer contracts.<sup>130</sup>

(Korea) Limitation and exclusion clauses are valid under Korean law on the basis of the general principle of freedom of contract, as stated in

Article 105 of the 1958 Korean Civil Code (also known as Civil Act).<sup>131</sup> On the other hand, such clauses are deemed unenforceable or invalid in cases of bad faith, intentional or grossly negligent conduct on the part of the obligor.<sup>132</sup> In Korea there are no specific rules governing limitation and exclusion clauses in standard terms.

(Sweden) In general, under Swedish law the parties are free to make their own bargain, and the courts will not interfere or question whether or not the terms are unreasonable. This principle is however restricted in a number of ways. Generally, a contract term cannot relieve, release or exonerate anyone from liability for breach of duty arising from his own fraud, willful misconduct, and gross negligence. The closest to codification of this principle is section 36 of the Contracts Act, which provides a general prohibition against unreasonable terms in contracts.<sup>133</sup>

#### 2.5.2. COMMON LAW SYSTEMS

In the common law tradition, agreements on the exemption and limitation of liability are generally accepted under the principle of freedom of contract.<sup>134</sup> This is the case, for instance, in England, the United States, Canada and Australia. Such clauses are usually referred to as “exculpation or exemption clauses”, or “limitation of liability” or “limitation of remedies”. Similarly to civil law systems, such agreements may be voided where the non-performing party’s conduct was intentional or fraudulent. Peculiar to the common law tradition is the notion of fundamental breach,<sup>135</sup> or breach of a fundamental term, which for purposes of invalidating an exemption or limitation of liability clause is assimilated to gross fault.

(United States) Specific provisions on exemption and limitation of liability in sales contracts are found in Section 2-719 of the American Uniform Commercial Code.<sup>136</sup> Under this provision the parties may limit or alter the measure of damages recoverable under the relevant UCC provisions, as by limiting the buyer’s remedies to return the goods and repayment of the price or to repair and replacement of non-conforming goods or parts. The parties may also agree to establish a remedy as exclusive of all other remedies. Where an apparently fair and reasonable clause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of Part 7 of the UCC. Clauses limiting or excluding the buyer’s remedies, liability for consequential damages or personal injuries may be challenged as unconscionable under Section 2-302 of the UCC.<sup>137</sup> Warranty disclaimers regulated by Sections 2-314 and 2-315 of the UCC may function as a limitation or exclusion clause, given

that their purpose of limiting the seller's obligations concerning the product's merchantability<sup>138</sup> or its fitness for a particular purpose.<sup>139</sup> Section 2-316 of the Uniform Commercial Code requires that the exclusion or modification of implied warranties in sales contracts (a) must be in writing; (b) must use language mentioning "merchantability" and (c) must show the exclusion or modification of the warranty conspicuously.<sup>140</sup>

(England) The English Unfair Contract Terms Act of 1977 (UCTA) regulates the exclusion and restriction of liability for breach of express and implied contractual obligations and the common law duty of care.<sup>141</sup> It is not possible to exclude or restrict liability for death or personal injury resulting from negligence. In the case of other loss or damage resulting from negligence, liability can be restricted, but only insofar as the term or notice satisfies the UCTA reasonableness test.<sup>142</sup> As regards the breach or non-performance of a contract, Section 3 of the UCTA prevents the use of an exclusion clause under certain circumstances,<sup>143</sup> unless it satisfies the reasonableness test.

Additionally, the English Sale of Goods Act of 1979 and the Supply of Goods (Implied Terms) Act of 1973 imply warranties as to title and quiet possession into contracts for the sale of goods and hire-purchase agreements which effectively confirm the seller's right to sell. Under section 6(1) of UCTA, liability for breach of these implied warranties cannot be excluded or restricted. Likewise, similar warranties which are implied by the Supply of Goods and Services Act 1982 into other types of contract cannot be excluded.<sup>144</sup>

(Canada) In the common law provinces of Canada, a court shall refuse to give effect to an exclusion or a limitation of liability clause where it finds the clause unconscionable or concludes that it is contrary to public policy.<sup>145</sup>

(Australia) Under Australian law limitation and exclusion agreements in business contracts are generally enforceable. There is no requirement for reasonableness in an exclusion clause. Generally, there is no concept of gross negligence in Australian law outside of particular legislative uses of the phrase. Accordingly, it is possible to exclude liability for gross negligence subject to clear language being used to achieve this outcome. On the other hand, it is not possible to exclude liability for fraud or to contract out of relevant legislation. Since the High Court of Australia decision in *Darlington Futures Ltd v. Delco Australia Pty Ltd* (1986) 161 CLR 500,<sup>146</sup> exclusion clauses subject to Australian law are to be interpreted according to their natural and ordinary meaning and read in light of the contract as a whole, looking at the context in which the clause appears.

Thus, limitation and exclusion clauses are usually interpreted against the party for whose benefit it is intended to operate, and not in a manner that results in an absurd outcome or in a way that defeats the giving of consideration under a contract. A court may also take into consideration the relative bargaining power of the parties and whether there are any issues of unconscionability associated with the exclusion clause or disclaimer. In consumer and domestic transactions there are a number of statutory guarantees and implied conditions that cannot be excluded.

### 2.5.3. OTHER JURISDICTIONS

In mixed systems such as Quebec (Canada) and South Africa, limitation and exclusions clauses are generally accepted, subjecting to the same kind of restrictions found in other jurisdictions (exclusion of liability for willful conduct, for death or moral injury etc.).

(Canada) In Quebec, Article 1474 of the Civil Code forbids the exclusion or restriction of liability for material injury caused to another through an intentional or gross fault.<sup>147</sup> Under this same provision, it is not possible to exclude or limit liability for bodily or moral injury caused to another. As for contracts of sale, manufacturers and professional sellers are presumed to know of latent defects existing at the time of sale. Therefore, an exclusion clause addressing latent defects is valid only if the seller or manufacturer can rebut the aforesaid presumption of knowledge (Articles 1473 and 1733). As in Canadian common law provinces, limitation and exclusion clauses are restrictively interpreted under the law of Quebec.

(South Africa) South African law generally follows the common law approach. An exemption clause excluding liability for willful conduct or fraud is deemed to be against public policy and void and so is a clause which excludes liability for an intentional breach of contract. However, it is noteworthy that a clause excluding liability for ordinary and gross negligence is not against public policy.<sup>148</sup> In contrast, doctrine and case law have developed a general presumption according to which, in case of doubt, the contracting parties' intention was not to exclude liability for negligent acts. Secondly, where the exemption clause is ambiguous, or the language used in the contract is capable of more than one meaning, the exemption clause is interpreted narrowly.<sup>149</sup>

### 2.5.4. EUROPEAN UNION LAW AND SOFT LAW

The CISG applies only to the sale of goods for business purposes. Contracts for the sale of goods for personal use, which generally characterize consumer contracts, are excluded from the scope of the

Convention (Article 2(a) CISG).<sup>150</sup> Therefore, the European Union instruments in the field of consumer protection that deal with the validity of exemption and limitation clauses are of little or no importance for comparative purposes (see Annex 1 for more details).

In the context of this Opinion it is nevertheless worth mentioning two European Union Directives in the field of consumer protection law that deal with the validity of exemption and limitation clauses. As per the EU Directive of April 5, 1993 on unfair terms in consumer contracts,<sup>151</sup> such clauses may be considered “unfair”, thus non-binding on the consumer, where they are found to be “contrary to the requirement of good faith” or to cause “a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer” (Article 3.1). Member States must provide that such clauses are not binding on the consumer (Article 6).

Similarly, exemption or limitation clauses may be considered “ineffective” in consumer contracts, as per the EU Directive of May 25, 1999 on the sale of consumer goods and associated guarantees.<sup>152</sup> It provides that under conditions set out by domestic law, the consumer is not bound by “any contracted terms or agreements concluded with the seller before the lack of conformity is brought to the seller’s attention which directly or indirectly waive or restrict the rights resulting from this Directive” (Article 7). The 1999 EU Directive has been incorporated into the more recent 2011 Directive on Consumer Rights, which, however, does not deal directly with the validity of exemption or limitation of liability clauses.<sup>153</sup>

Under the recent proposal for a Common European Sales Law,<sup>154</sup> which deals with both consumer and non-consumer contracts, the principle of freedom of contract plays a central role, as stated in Article 1. However, “unfair contract terms”, such as those listed in Article 84, are deemed not binding on the parties (Article 79). The list of “unfair contract terms” include agreements on the exclusion or limitation of liability of the trader (a) for death or personal injury caused to the consumer; or (b) for any loss or damage to the consumer caused deliberately or as a result of gross negligence. In addition, may be deemed unfair any term excluding or hindering the consumer’s right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to submit disputes exclusively to arbitration.

The Principles of European Contract Law (PECL) have resorted to a flexible standard, similar to the UNIDROIT Principles (see below), which allows for the exclusion or restriction of remedies for non-

performance, “unless it would be contrary to good faith and fair dealing to invoke the exclusion or restriction”.<sup>155</sup>

#### 2.5.5. UNIFORM LAW INSTRUMENTS

At the international level, a specific provision on exemption clauses has been included in the UNIDROIT Principles since their first edition (1994).<sup>156</sup> While such clauses are generally valid, Article 7.1.6 has retained the more flexible idea of “gross unfairness” as the standard for invalidity, thus introducing yet another approach to the other common criteria indicated above. In accordance with a commentator, the idea of “gross unfairness” comprehends those of “gross negligence” and “intentional conduct”.<sup>157</sup>

Other international instruments, such as the 1999 Montreal Convention on the Unification of Certain Rules for International Carriage by Air, establish limitations and exclusions of liability and, by the same token, invalidate any agreement to the contrary. The Convention, which has replaced the 1929 Warsaw Convention, establishes several limitations and exemptions of liability of the international carrier.<sup>158</sup> In addition, Article 26 of the Convention invalidates any contractual provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in the Convention.

By contrast to other international instruments and most domestic laws, the 1956 United Nations Convention on the Contract for the International Carriage of Goods by Road has not embraced the principle of freedom of contract.<sup>159</sup> While establishing several rules on the liability of the carrier (Articles 17 to 29), the Convention does not allow the parties to contract out of its provisions (Article 41).

It is also worth mentioning 2008 United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, widely known as the Rotterdam Rules.<sup>160</sup> Though not yet in force, this instrument establishes a modern, comprehensive, uniform legal regime for the international maritime carriage of goods, updating, and in some cases replacing, many provisions in the Hague Rules, Hague-Visby Rules and 1978 Hamburg Rules. As compared to the latter instruments, the Rotterdam Rules are much stricter with respect to the parties’ freedom to agree on exemption and limitation of liability clauses.<sup>161</sup>

## 2.6. ANNEX 2 - LIMITATION AND EXCLUSION CLAUSES (EXAMPLES)

## 2.6.1. LIMITATION OF DAMAGES

*(Indirect and special damages excluded)*

Contract for the sale and purchase of Brazilian iron

## 11 Liability

11.1 Neither the SELLER nor the BUYER shall be liable, whether in contract, tort or otherwise, for any indirect, punitive, consequential or special losses, damages or expenses of any kind directly or indirectly arising out of or in any way connected with the performance of this CONTRACT. The SELLER shall in no circumstances be liable for more than the difference between the contract price and the market price, based on the nearest available market, as the date of any breach of the CONTRACT.

*(Damages limited to a cap)*

Contract for the sale and purchase of Brazilian iron

12.2. The maximum aggregate liability of one Party to the other from all sources in relation to this Contract or any other obligation, whether in contract, statute or regulation, tort (including negligence) strict liability or otherwise shall not exceed the amount of the Contract Year or such lesser amount as may be expressly provided for under the provisions of this Contract, provided, however, that such limitation of liability shall not apply to liability resulting from fraud, willful misconduct or gross negligence by the Parties (which shall not counted for the purposes of determining whether the maximum liability has been reached). In addition, neither of the Parties have any liability to each other for indirect, incidental, special, moral or consequential damages or any kind arising from or attributable to this Contract.

*(Damages limited to a cap)*

Contract for the acquisition of a Brazilian company (quota purchase agreement)

5.5. The total amount of losses subject to indemnification by the seller under this section shall be limited to the aggregate amount of R\$ 15,000,000.00 and the amount effectively received by the seller as earn-out consideration calculated in accordance with schedule 3.3, and the purchaser recognises and agree that the limitation of liabilities set forth herein is an essential condition to seller to enter into this agreement.

*(Damages limited to a cap, except in case of gross negligence)*

Notwithstanding the above, the limit of cumulative liability under paragraph B shall not apply to SELLER's liabilities arising from gross



negligence and willful acts of SELLER for which SELLER's liability under CONTRACT shall be unlimited.

*(Damages insured by purchaser and special, indirect, incidental and consequential damages excluded)*

Contract for the sale of turbine spare parts  
ADD TO CLAUSE 11.1 (SELLER'S STANDARD TERMS – ECE 188)

[The Seller] is not responsible for any damage which are insured by Purchaser or for any special, indirect, incidental or consequential damages including but not limited to loss of profit, loss of power, loss of use, loss of revenue, cost of capital or costs due to interruption of power supply.

*(Certain types of damages limited – short version)*

Neither party shall be liable (whether in contract, tort (including negligence) or otherwise) for any loss of profit, loss of business or of revenues, loss of goodwill or reputation, whether caused directly or indirectly, or for any indirect, incidental, punitive or consequential loss, damage, cost or expense.

*(Consequential loss defined)*

#### 2.6.2. CONSEQUENTIAL LOSS

For the purposes of this article the expression “Consequential Loss” shall mean: (i) consequential or indirect loss under English law; and (ii) loss and/or deferral of production, loss of product, loss of use, loss of revenue, profit or anticipated profit (if any), in each case whether direct or indirect to the extent that these are not included in (i), and whether or not foreseeable at the EFFECTIVE DATE.

Notwithstanding any provision to the contrary elsewhere in the AGREEMENT and except to the extent of any agreed liquidated damages (including without limitation any predetermined termination fees) provided for in the AGREEMENT, the BUYER shall save, indemnify, defend and hold harmless the SELLER GROUP from the BUYER GROUP's own Consequential Loss and the SELLER shall save, indemnify, defend and hold harmless the BUYER GROUP from the SELLER GROUP's own Consequential Loss, arising from, relating to or in connection with the performance or non-performance of the AGREEMENT.

*(Excluded damages defined)*

(a) For purposes of this Agreement's limitation(s) of liability, the term = Excluded Damages = refers to consequential, indirect, special, punitive, exemplary, or similar damages arising from any breach of this Agreement. The term encompasses, for example, the following: (1) loss of profits == from collateral business arrangements ==; (2) damages from

business interruption; (3) loss of use; and (4) loss of data or privacy or confidentiality.

(b) For the avoidance of doubt, the term = consequential damages = refers to damages that the breaching party could not reasonably have foreseen upon entering into this Agreement; and

(c) For the avoidance of doubt, the term = Excluded Damages = does not encompass incidental damages, namely reasonable expenses incurred by a party incident to a breach or delay by another party; that is to say, incidental damages are not excluded.

*(Broad effect of limitation)*

The parties have specifically agreed that all limitations of liability set forth in this Agreement are to apply: (1) to all claims for damages or other monetary relief, whether alleged to arise in contract, tort, or otherwise, and (2) even if the allegedly-liable party was advised, knew, or had reason to know of the possibility of Excluded Damages and/or of damages in excess of the relevant Damages Cap, if any; and (3) even if a limited remedy fails of its essential purpose.

*(Parties' liability not limited in case of fraud or willful misconduct)*

Exclusive Remedy – The indemnification provisions contained in this Article 10 shall constitute the exclusive remedy of the Parties in connection with this Agreement and the transactions contemplated hereby other than claims arising out of willful misconduct or fraud by a Party.

*(Deposit retained)*

Default by buyer: if buyer fails to perform the contract within the time specified, the deposits(s) made or agreed to be made by buyer may be retained or recovered by or for the account of seller as liquidated damages, consideration for the execution of the contract and in full settlement of all claims; whereupon all parties shall be relieved of all obligations under the contract; or seller, at his option, may proceed at law or in equity to enforce his rights under the contract.

*(Earnest money deposit)*

Horse sale agreement

PURCHASE PRICE.

3.1 [...]

3.2 The Purchase Price shall be paid as follows: Buyer shall pay a non-refundable earnest money deposit of \$\_\_\_\_\_ Dollars in cash or readily available funds. It is expressly understood by the Buyer that the nonrefundable earnest money deposit will be applied toward the Purchase Price if the Purchase Contingency is satisfied or waived. In the event the contingency is not satisfied, the Seller shall retain the non-refundable earnest money deposit

in consideration for Horse being unavailable for sale to another Buyer during the Inspection Period.

3.3. [...]

#### 2.6.3. LIMITATION OF REMEDIES

*(Liability limited to replacement of goods)*

The Company warrants only that all goods shall be of merchantable quality and in accordance with specifications. It will replace without charge f.o.b. point of destination, Dominion of Canada, all goods shown to be otherwise than as warranted. Liability is limited to such replacement and the Company shall in no case be liable otherwise or for indirect or consequential damages.

*(Liability limited to repairing or replacing a defective part)*

Our obligation under this Warranty shall be limited to repairing a defective part, or at our option, refunding the purchase price or replacing such part or parts as shall be necessary to remedy any malfunction resulting from defects in material or workmanship as covered by this Warranty.

#### 2.6.4. EXCLUSION OF LIABILITY

*(Exclusion of liability)*

Contract for the supply of a remote network operations center service

[...] neither party will be liable to the other for any damage to software, damage to or loss of data, loss of profit, anticipated profit, revenues, anticipated savings, goodwill or business opportunity, or for any indirect or consequential loss or damage.

*(Supplier's liability excluded)*

Industrial Machinery suppliers will not be liable for any loss or damage whatsoever which is due to late or defective delivery; defective, faulty or negligent workmanship; or defective or faulty material; or any act, default or omission of its employees, suppliers or subcontractors.

*(Vendor's liability excluded)*

The Vendor shall not be under any liability to the Purchaser for any defects in the goods or for any damage, loss, death or injury (other than death or personal injury caused by the negligence of the Vendor) resulting from such defects or from any work done in connection therewith

*(Seller's liability excluded)*

The delivery times provided are merely indicative and depend on procurement opportunities. The delivery times will be respected to the extent possible. Delays in delivery cannot be the basis for cancellation of

the order or for claims to compensation or damages. No penalty is applicable in the event of delay, regardless of any notice to the contrary.

*(Seller's liability excluded)*

B shall bear all liabilities, in contract, in torts (including negligence) or otherwise, for any damage whatsoever, to person or property, sustained during the period of time from the delivery of the prototype by A until restitution of the latter to A pursuant to article 6.

Accordingly, A shall bear no liability whatsoever for any kind of damage, given the fact that the prototypes are delivered "as such", that no warranty whatsoever is granted by A with regard to the performance, quality or design of such prototypes and finally that B alone is responsible for installing the prototypes on its facilities and for the testing work to be performed therewith.

*(Seller's liability excluded)*

Contract for the acquisition of a Brazilian pharmaceutical company (quota purchase agreement).

Notwithstanding anything to the contrary in this Agreement or under applicable Law, the Sellers' obligations to indemnify under this Article X shall be subject to the following restrictions and limitations:

- Survival. In no event shall the Sellers be responsible to the Purchaser for any obligation arising out of Sections 10.2 (a) and 10.2 (b) in respect to which a Third Party Claim is not underway as of the Closing Date or an Indemnification Notice is delivered later than:
  1. The whole statutory period set forth in applicable Law, with respect to the Warranties granted under Sections 8.1.11 (Organization and Powers), 8.1.2 (Subsidiaries), 8.1.3 (Capital Stock and Ownership of Sold Quotas), 8.1.4 (No Violation), 8.1.5 (Authorizations) and 8.1.6 (No Litigation or Other Obligations on Quotas) of Exhibit 8.1;
  2. Six (6) years from the Closing Date, with respect to the Warranties granted under Sections 8.1.11 (Tax Issues; Tax Benefits) and 8.1.18 (Safety, Health and Environmental Laws) of Exhibit 8.1;
  3. Three (3) years as from the Closing Date, with respect to the Warranties granted under Section 8.1.16 (Civil and Criminal Litigation) of Exhibit 8.1; and
  4. Two (2) years as from the Closing Date, with respect to the warranties not referred to in the foregoing items.
- De minimis. Except for any obligation arising out of Sections 10.2(c), 10.2(d) and 10.2(e), the Sellers shall have no

obligation to indemnify the Purchaser under the present Agreement for those Losses that, on a unitary basis, do not exceed fifteen thousand Reais (R\$ 15,000.00). In other words, no Loss involving an individual amount equal to or less than such threshold shall be indemnifiable by the Sellers under this Agreement, other than those referred to in Sections 10.2(c), 10.2(d) and 10.2(e);

*(Seller's liability not excluded in case of fraud, bad faith or gross negligence)*

Neither A, its employees, nor any affiliated company of A or its employees, will be responsible for losses or damages that may be incurred by B or any third party by reason of any action or omission by B, its employees or any third party even though said action or omission was based on technical information or advice furnished by A, its employees, any of its affiliated companies or its employees, in accordance with this Agreement, except if such damages or losses were caused by fraud, bad faith or gross negligence on the part of A or its employees.

*(Seller's liability for environmental contingencies excluded)*

Y shall not be liable for any corrective action required by third parties or for any fines or damages resulting from a situation or procedure which was identified as problematic in the conclusions of the environmental audit, and for which no corrective action has been required by Y.

*(Seller's liability excluded by virtue of limiting the scope of its obligation)*

The technical assistance and the services which A undertakes to perform for B in accordance with this Agreement will be of an advisory nature only, and due to this all of the responsibility for the utilization of the technical recommendations provided by A, its employees, its affiliates or their employees in accordance with this Agreement, shall rest solely with B.

*(Seller's liability for timely delivery excluded)*

Delivery dates are The technical assistance and the services which A undertakes to perform for B in accordance with this Agreement will be of an advisory nature only, and due to this all of the responsibility for the utilization of the technical recommendations provided by A, its employees, its affiliates or their employees in accordance with this Agreement, shall rest solely with B.

#### 2.6.5. MODIFICATION OF TIME-LIMITS

The Buyer agrees that any claim or lawsuit relating to the purchased goods must be filed no more than six (6) months after the delivery date. The Buyer hereby waives any statute of limitations to the contrary.

## 2.7. ANNEX 3 - CASES CITED

*AUSTRALIA*

**Forum:** Darlington Futures Ltd v. Delco Australia Pty Ltd, High Court of Australia [Supreme Court].

**Case reference:** 1986 161 CLR 500  
<http://www.austlii.edu.au/au/cases/cth/HCA/1986/82.html>

**Facts:** Darlington Futures Ltd. is a broker which engages in transactions on the commodity futures market. Delco Australia Pty Ltd. is an engineering company which earned large profits in the financial year ended 30 June 1981. As that year drew to a close Delco's accountant, Mr Schultz, discussed with Darlington's Mr Kleemann means by which the expected profit might be postponed until the succeeding financial year for tax purposes.

Upon Darlington's advice, the parties executed a written contract dated 12 June 1981, according to which Darlington would enter into tax straddle transactions on behalf of Delco. A tax straddle is a trading mechanism which is not designed for the making of profits out of trading; it is intended to avoid, so far as possible, exposure to trading losses. Its purpose is to enable a loss to be made in one financial year which is offset by a corresponding profit in the succeeding financial year. This is achieved by matching contracts to sell commodities with contracts to buy commodities.

A provision in the contract authorizing Darlington to operate a discretionary account on behalf of the respondent was crossed out. The contract provided that, unless the client's account was to be traded as a discretionary account by Darlington, the client should be solely responsible for operating and controlling it (clause 9). Initially the transactions were entered into by Darlington in such a way that the risk of loss to Delco was minimized, leaving it with no disadvantage except brokerage fees. In July 1981 Delco decided to take some risks with a view to recouping the brokerage fees. Delco's executives instructed Darlington to engage in day trading. Day trading leaves the investor exposed to the market for one day in the hope of making profits. Such day trade transactions generated heavy losses to Delco. Delco sued to recover \$279,715.36 damages from Darlington, claiming that this was the amount of the losses it sustained on contracts as a result of Darlington's breach of duty in trading in futures contracts without the respondent's authority.

**Decision:** At first instance, the Court found that Delco's exposure of the coffee contracts and the silver contracts to the risks of the market for a substantial period of time was outside the ambit of the general

instructions which had been given to Darlington. It accepted the evidence that Delco's officials had not authorized these transactions and were unaware that Delco was exposed to those risks. However, the Court found for Darlington on the ground that, notwithstanding that the relevant transactions were not authorized by the respondent, clause 6 of the written contract between the parties excluded the appellant's liability for any loss arising in any way out of any trading activity undertaken on behalf of the client whether pursuant to the contract or not.

On appeal the Full Court of the Supreme Court of South Australia considered that the exclusion clause should be construed strictly and that, in accordance with this approach, the last sentence in clause 6 had no application to the case because the relevant trading activity was unauthorized. The Full Court also held that clause 7, which capped the damages to be paid by Darlington, did not apply. In particular it considered that, as the transactions were unauthorized, the claim did not fall with clause 7(c). Although the primary judge was not satisfied that Darlington had deliberately defied Delco's instructions, the Full Court thought that deliberate defiance of those instructions was the proper, if not the inevitable, inference to be drawn from the evidence.

The High Court affirmed in part the Full Court's judgment, specially in respect of the inference drawn by the latter. When the critical transactions are viewed in this light, the failure to unlock the straddle by taking the final step on the same day, or within a day, was not a negligent performance of Delco's instructions. It positively committed Delco to a form of speculation quite beyond the ambit of the authority given to Darlington.

As to whether clause 6 protected Darlington from the consequences of what otherwise would be breaches of contract, Darlington argued, on the basis of the House of Lords precedents, that exclusion clauses should be simply construed in accordance with their language and that they should not be subjected to a strained construction in order to reduce the ambit of their operation.

The High Court acknowledged that it had in past decisions authoritatively stated the approach to be adopted in Australia to the construction of exclusion and limitation clauses, without relying on the doctrine of fundamental breach. It noted that the interpretation of an exclusion clause is to be determined by construing the clause according to its natural and ordinary meaning, read in the light of the contract as a whole, thereby giving due weight to the context in which the clause appears including the nature and object of the contract, and, where appropriate, construing the clause *contra proferentem* in case of

ambiguity. Notwithstanding the comments of Lord Fraser in *Ailsa Craig* (at p.970; p.105 of All E.R.), the same principle applies to the construction of limitation clauses, which may be so severe in their operation as to make their effect virtually indistinguishable from that of exclusion clauses.

Turning to clause 6 of the contract, the High Court examined whether the relevant losses arose "in any way out of any trading activity undertaken on behalf of the Client whether pursuant to this Agreement or not". It found that, read in context, these words plainly refer to trading activity undertaken by Darlington for Delco with the latter's authority, whether pursuant to the Agreement or not. The Court further noted that it could scarcely be supposed that the parties had intended to exclude liability on the part of Darlington for losses arising from trading activity in which it presumed to engage on behalf of the respondent when the appellant had no authority so to do.

Finally, the High Court examined whether Darlington was protected by clause 7(c) of the contract, which limited the liability of the appellant to \$100 in relation to claims of three kinds : (1) claims arising out of or in connection with the relationship established by the agreement; (2) claims arising out of or in connection with any conduct under the agreement; and (3) claims arising out of or in connection with any orders or instructions given by the client to the broker. As opposed to the Full Court, the High Court found that it must not interpret must not place a more restrictive interpretation on the clause than its language would naturally bear. In particular, the clause is expressed to comprehend claims arising out of or in connection with the relationship established by the agreement. A claim in respect of an unauthorized transaction may nonetheless have a connection, indeed a substantial connection, with the relationship of broker and client established by the agreement. The Court then found that it was unable to discern any basis on which clause 7(c) can be construed so as not to apply to such a claim. The present case is one in which Delco's claim arises in connection with the relationship of broker and client established by the contract between the parties, notwithstanding the finding that the relevant transactions were not authorized.

In the result clause 7(c) operates to limit the appellant's liability to \$100 in respect of each of the unauthorized coffee and silver contracts.

*AUSTRALIA*

**Forum:** Oberster Gerichtshof [Supreme Court]

**Case reference:** 7 September 2000 Case No. 8 Ob 22/00v Unilex, available at <http://www.unilex.info/case.cfm?id=473>



**Facts:** A German seller and an Austrian buyer concluded a contract for the delivery of gravestones made of dark stone, as they had previously done. The price was to be paid by a bill of exchange. According to the seller's standard order form, written notice of non-conformity should be made within 24 hours. If the goods were not conforming, the seller had the right either to cure the defect, or to replace the goods or else to pay back the price. Furthermore, the buyer did not have the right to withhold payment.

A few weeks after delivery, white marks were detected on the gravestones. The marks could not have been detected upon delivery, since they developed later. The buyer phoned the seller, which sent for some of the stones for examination. It was never discussed if the seller should deliver new gravestones, or if the buyer should not pay the price. The terms of the standard order form were not discussed either.

As the bill of exchange was dishonoured by non acceptance, the seller refused to continue negotiations with the buyer. The buyer then declared the contract avoided. The seller commenced action against the buyer, alleging that the latter had to pay the price since it did not have the right to withhold payment; moreover, the goods were conforming or at least the defects in the stones were of minor importance. The buyer contested the validity of the standard clauses, and stated furthermore that it did not have to pay the price, since it had the right to avoid the contract according to Art. 49(1) CISG.

According to the applicable German law, the standard terms including the restriction of the right to withhold payment were valid. This was not in contradiction with the fundamental principles of CISG, since the restriction of the right of retention did not reduce the buyers right to avoid the contract. Therefore, the buyer had to pay the price, even though the matter of conformity was not settled. Then, if the seller could not cure the defect or if he did not replace the goods, the question would be whether or not the buyer could avoid the contract or if it only had the right to a reduction of the price.

**Decision:** The Court stated that even though the buyer, according to Art. 49(1) CISG, has the right to avoid the contract under certain circumstances, the parties can agree to derogate from this provision and restrict the buyer's rights. These changes must be valid according to the applicable domestic law (Art. 4 CISG). However, even if the changes are valid according to the rules of the applicable domestic law, such rules must not contradict the fundamental principles (*Grundwertungen*) of the CISG.

The Court stated that one of CISG's fundamental principles is the right for the buyer to avoid the contract, which the buyer must have as

ultima ratio, if the seller after an additional period of time still has not delivered the goods, or if the goods in spite of the sellers remedies are still essentially useless. If this right to avoid the contract is restricted, at least the buyer must have the right to damages.

**Forum:** Oberster Gerichtshof [Supreme Court]

**Case reference:** 14 January 2002 Case number: 7 Ob 301/01t <http://cisgw3.law.pace.edu/cases/020114a3.html> CLOUT case No. 541 (Cooling system case) [Principle of full compensation]

**Facts:** An Austrian buyer ordered from the German seller a cooling device according to custom specifications for its special intended use in a water plant. The general terms of delivery and payment of the contract contained a choice of German law and special rules on the notice of lack of conformity. As the seller did not deliver on the agreed date, the equipment had to be delivered directly to the construction site and could not be tested, as originally planned, before it was set into place. Due to a construction flaw, the cooler could be operated only provisionally and had later to be completely rebuilt by the buyer. The buyer notified the lack of conformity of the cooling device to the seller. The buyer also warned the seller that he would be held responsible for damages to the main contractor if the cooling device could not be made fully operational on schedule and that the repair of the cooler might be very expensive. In fact, the damages stemming from the malfunctioning of the cooling device considerably exceeded its price, and the buyer declared their set off with the price for other equipment delivered by the seller under a different contract.

**Decision:** Both the Court of Appeal and the Supreme Court deemed the CISG applicable to the contract. In particular, the Supreme Court discussed three issues: whether the examination of the good was performed properly and timely; whether the notice of non-conformity was timely and sufficiently specific; and the amount of damages to be paid, with special regard to the circumstances and conditions under which the damages to be paid could exceed the price of the goods. Among other issues, the Supreme Court stated that if the seller fails to repair the nonconforming goods within reasonable time, the buyer may do so and claim compensation from the seller for the related expenses, which amount to damages within the meaning of article 45(1)(b) CISG. The Court added that the same mechanism applies when the seller cannot be expected to carry out a repair, but that the expenses for such a repair may be compensated only insofar as they are reasonable in relation to the intended use of the sold goods. Taking into account all the circumstances of the case (urgency, time needed to replace the faulty device, claims from

the main contractor), the Court held that the buyer could set off the damages against the full amount of the contractual price.

Finally, the Supreme Court noted that the right to damages under article 74 CISG follows the principle of foreseeability and full compensation, and that all losses, including expenses made in view of the performance of the contract and loss of profit, are to be compensated to the extent they were foreseeable at the time of the conclusion of the contract. According to the Court, the foreseeability requirement is met if, all the circumstances of the case considered, a reasonable person could have foreseen the consequences of the breach of contract, even if not in all details and in their final amount (article 8(2) CISG). Consequential loss may also be compensated, if not excluded by parties' agreement, as it was not in this case.

**Forum:** Arbitral award Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft Wien

**Case reference:** 15 June 1994 SCH-4366 <http://www.unilex.info/case.cfm?id=55> CLOUT case No. 93 [*Citing article 74 for general principle within meaning of article 7 (2) CISG*]

**Facts:** In 1990 and 1991 an Austrian seller and a German buyer concluded contracts for the sale of rolled metal sheets. The initial contracts provided that the goods were to be delivered 'FOB Hamburg', by March 1991 at the latest. Later, due to the buyer's financial difficulties, the seller allowed the buyer to take delivery in installments according to the possibilities of resale, and the buyer had to pay promptly after receiving each invoice and cover all storage costs. The buyer took delivery of some of the goods without paying, and refused to take delivery of other goods. Pursuant to an arbitration clause, the seller commenced arbitral proceedings, demanding payment of the price. The seller further asked for damages, including those deriving from a substitute sale of the undelivered goods.

**Decision:** The sole arbitrator held that since the parties had chosen Austrian law, the contracts were governed by CISG as the international sales law of Austria, a contracting State (Art. 1(1)(b) CISG).

With regard to the goods delivered but not paid, the sole arbitrator found that the seller was entitled to payment of their price (Arts. 53 and 61 CISG). Regarding the cover sale made by the seller, the arbitrator observed that the seller had the right to make a cover sale, and presumably even a duty to do so because of the duty to mitigate damages (Art. 77 CISG). The seller would be entitled to the difference between the contract price and the substitute sale price.

The sole arbitrator further held that interest on the price accrued from the date payment was due (Arts. 78 and 58 CISG). Since the parties' agreement required the buyer to pay after receiving each invoice, interest accrued from the date of such receipt, which should occur within 10 days after issuance of each invoice.

The sole arbitrator held that the interest rate is a matter governed but not expressly settled by CISG. Therefore, it must be settled in conformity with the general principles on which the CISG is based (Art. 7(2) CISG). Referring to Arts. 78 and 74 CISG, the arbitrator found that full compensation is one of the general principles underlying CISG. In relations between merchants, it is expected that the seller, due to the delayed payment, resorts to bank credit at the interest rate commonly practiced in its own country with respect to the currency of payment. Such currency may be either the currency of the seller's country, or any other foreign currency agreed upon by the parties. The arbitrator observed that this solution is stated also in Art. 7.4.9 of the UNIDROIT Principles of International Commercial Contracts. The interest rate awarded, therefore, was the average prime rate in the seller's country (Austria), with respect to the currencies of payment (US dollars and German marks).

#### *BELGIUM*

**Forum:** Hof van Beroep, Gent

**Date and reference:** 15 May 2002 <http://www.unilex.info/case.cfm?id=940> [Considers the good faith principle in the context of the CISG to establish the binding nature of the contract]

**Facts:** A Belgian seller negotiated with a French buyer to produce the plastic holders for pagers and to insert the pagers in these. The results of the negotiations were set out in writing signed by the parties and entitled by them 'letter of intent'.

**Decision:** When the buyer, after subsequent market changes, denied the existence of a binding contract the seller sued the buyer for breach of contract.

The Court of first instance denied its jurisdiction.

The Court of appeal reversed the decision and affirmed the jurisdiction of Belgian courts. It based its decision on Art. 5(1) of the 1968 Brussels Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters. The Court determined the place of performance of the obligation in dispute (the payment of the price) in accordance with CISG, which was the law governing the contract since the parties had chosen French law as the applicable law and France was a contracting State to CISG. According to

Art. 57 CISG, payment of the price should be made at the seller's place of business, i.e. in Belgium.

As to the merits the Court decided in favor of the existence of a binding contract. The Court pointed out that it was not always possible to identify clearly in practice a sequence of an offer and an acceptance as provided in CISG. In the case at hand it affirmed the existence of binding contract in the light of the circumstances and the principle of good faith (Art. 7(1) CISG), despite the fact the title 'letter of intent' given by the parties to their writing.

*CANADA*

**Forum:** Tercon Contractors Ltd. v. British Columbia (*Transportation and Highways*), Supreme Court of Canada

**Date and reference:** 12 February 2010 2010 SCC 4 [2010] 1 SCR 69  
Case number: 32460  
<http://sccsc.lexum.com/sccsc/sccsc/en/item/7843/index.do>  
(*Doctrine of fundamental breach*)

**Facts:** The Province of British Columbia issued a request for expressions of interest (“RFEI”) for the design and construction of a highway. Six teams responded with submissions including Tercon and Brentwood. A few months later, the Province informed the six proponents that it now intended to design the highway itself and issued a request for proposals (“RFP”) for its construction. The RFP set out a specifically defined project and contemplated that proposals would be evaluated according to specific criteria. Under its terms, only the six original proponents were eligible to submit a proposal; those received from any other party would not be considered. The RFP also included an exclusion of liability clause which provided: “Except as expressly and specifically permitted in these Instructions to Proponents, no Proponent shall have any claim for compensation of any kind whatsoever, as a result of participating in this RFP, and by submitting a Proposal each Proponent shall be deemed to have agreed that it has no claim.” As it lacked expertise in drilling and blasting, Brentwood entered into a pre-bidding agreement with another construction company (“EAC”), which was not a qualified bidder, to undertake the work as a joint venture. This arrangement allowed Brentwood to prepare a more competitive proposal. Ultimately, Brentwood submitted a bid in its own name with EAC listed as a “major member” of the team. Brentwood and Tercon were the two short-listed proponents and the Province selected Brentwood for the project. Tercon successfully brought an action in damages against the Province. The trial judge found that the Brentwood bid was, in fact, submitted by a joint

venture of Brentwood and EAC and that the Province, which was aware of the situation, breached the express provisions of the tendering contract with Tercon by considering a bid from an ineligible bidder and by awarding it the work. She also held that, as a matter of construction, the exclusion clause did not bar recovery for the breaches she had found. The clause was ambiguous and she resolved this ambiguity in Tercon's favour. She held that the Province's breach was fundamental and that it was not fair or reasonable to enforce the exclusion clause in light of the Province's breach. The Court of Appeal set aside the decision, holding that the exclusion clause was clear and unambiguous and barred compensation for all defaults.

**Decision:** In respect of the doctrine of fundamental breach, the Supreme Court described it as follows: "... where the defendant had so egregiously breached the contract so as to deny the plaintiff substantially the whole of its benefit ... the innocent party was excused from further performance but the defendant could still be held liable for the consequences of its 'fundamental breach' even if the parties had excluded liability by clear and express language.

#### *CHINA*

**Forum:** China International Economic and Trade Arbitration Commission (CIETAC)

**Date and reference:** 1 April 1993, Arbitral award No. 75, Unilex, available at <http://www.unilex.info/case.cfm?id=429>

**Facts:** A Chinese seller and an US buyer concluded a contract for the sale of steel products. In view of the seller's impossibility to deliver a substantial part of the goods, both parties agreed to enter into further negotiations in order to terminate the contract and amicably settle their dispute. The seller took the initiative and declared itself willing to pay the penalty provided for in the contract for late delivery on the condition that the buyer would discharge it from any further contractual obligation; the buyer replied it would accept this proposal provided that the seller would also bear the insurance expenses. The seller then sent a fax to the buyer whereby it (1) expressly accepted the buyer's offer and (2) asked the latter to draft a formal termination agreement. After the seller paid its penalty, however, the buyer filed an arbitration suit claiming its entitlement to the full compensation of the harm sustained (invoking Art. 19 of the Law of the People's Republic of China on Economic Contracts Involving Foreign Interests together with Art. 74 CISG): it argued that the afore-mentioned fax sent by the seller, amounted to a counter-offer which it had never accepted.

**Decision:** With respect to the law governing the contract, the Arbitral Tribunal stated that it would apply both the Law of the People's Republic of China on Economic Contracts Involving Foreign Interests (by virtue of the principle of closest relation with the contractual performance) and CISG (because China and the United States were both contracting countries).

The Arbitral Tribunal rejected the buyer's claim. In its view, the fax sent by the seller amounted to an acceptance of the offer made by the buyer (Art. 19 (2) CISG) rather than, as pleaded by the latter, to a counter-offer. The Arbitral Tribunal therefore concluded that the parties had reached a final agreement on the termination of the contract, whereby they had completely settled their dispute, and held that the buyer was not entitled to any compensation in addition to the contractual penalty.

*COLUMBIA*

**Forum:** Constitutional Court

**Date and reference:** 9 December 2010 Case number: C-1008  
<http://www.unilex.info/case.cfm?id=1591>

**Facts:** Colombian citizens challenged the constitutionality of Article 1616 of the Colombian Civil Code according to which, except in case of willful misconduct or gross negligence, a party in breach is liable for the harm it had foreseen or should have foreseen as a consequence of its nonperformance. They argued that such limitation violated, among others, the parties' fundamental right to full compensation.

**Decision:** The Constitutional Court rejected the claim. In so doing the Court pointed out that not only was the provision in question neither irrational or arbitrary but was inspired by basic criteria of justice and contractual fairness, and moreover was in conformity with important international instruments such as the Vienna Sales Convention (Article 74) and the UNIDROIT Principles (Article 7.4.4).

*ENGLAND*

**Forum:** *Hadley v. Baxendale*, Court of Exchequer

**Date and reference:** 1854 EWHC J70 9 Exch. 341, 156 Eng. Rep. 145

**Facts:** A shaft in Hadley's (Plaintiff) mill broke rendering the mill inoperable. Hadley hired Baxendale (Defendant) to transport the broken mill shaft to an engineer in Greenwich so that he could make a duplicate. Hadley told Baxendale that the shaft must be sent immediately and Baxendale promised to deliver it the next day. Baxendale did not know that the mill would be inoperable until the new shaft arrived.

Baxendale was negligent and did not transport the shaft as promised, causing the mill to remain shut down for an additional five days. Hadley had paid 2 pounds four shillings to ship the shaft and sued for 300 pounds in damages due to lost profits and wages.

**Decision:** The jury awarded Hadley 25 pounds beyond the amount already paid to the court and Baxendale appealed.

To determine the amount of damages to which an injured party is entitled for breach of contract, the Court of Exchequer held that an injured party may recover those damages reasonably considered to arise naturally from a breach of contract, or those damages within the reasonable contemplation of the parties at the time of contracting.

The court held that the usual rule was that the claimant is entitled to the amount he or she would have received if the breaching party had performed; i.e. the plaintiff is placed in the same position she would have been in had the breaching party performed. Under this rule, Hadley would have been entitled to recover lost profits from the five extra days the mill was inoperable.

The court held that in this case however the rule should be that the damages were those fairly and reasonably considered to have arisen naturally from the breach itself, or such as may be reasonably supposed to have been in the contemplation of both parties at the time the contract was made.

The court held that if there were special circumstances under which the contract had been made, and these circumstances were known to both parties at the time they made the contract, then any breach of the contract would result in damages that would naturally flow from those special circumstances.

Damages for special circumstances are assessed against a party only when they were reasonably within the contemplation of both parties as a probable consequence of a breach. The court held that in this case Baxendale did not know that the mill was shut down and would remain closed until the new shaft arrived. Loss of profits could not fairly or reasonably have been contemplated by both parties in case of a breach of this contract without Hadley having communicated the special circumstances to Baxendale. The court ruled that the jury should not have taken the loss of profits into consideration.

#### *EUROPEAN UNION*

**Forum:** *Alstom Atlantique SA v Compagnie de constructio n mécanique Sulzer SA*, European Court of Justice, Second Chamber



**Date and reference:** 24 January 1991 Case number: C-339/89  
Reference for a preliminary ruling: Tribunal de commerce de Paris - France. Articles 2, 3(f), 34 and 85 (1) of the EEC Treaty - Liability for defective products. [Liability for defective products and free movement of goods]

**Facts:** Sulzer, involved in a claim for latent defects in two vessel engines provided to Alsthom, was, according to French law, unable to rely on a clause that exempted its liability. A peculiar but consolidated case law of the Cour de Cassation interpreted the relevant provisions of the French Civil Code so as to allow clauses limiting liability only where the parties to the contract were engaged in the same specialized field (which was not the case).

Sulzer therefore claimed that such case law distorted competition and hindered, contrary to article 29 (formerly 34) EC, the free movement of goods by putting French undertakings at a disadvantage compared to the foreign competitors who were not subject to such stringent liability.

**Decision:** The ECJ held that article 29 EC applied to restrictions on intraCommunity trade which placed the export trade at a disadvantage for the benefit of domestic trade. Accordingly, the fact that all traders subject to French law were at a disadvantage, without there being any advantage for domestic production, did not trigger the application of article 29 EC. In addition, parties to an international contract of sale are generally free to determine the law applicable to their contractual relations and can thus avoid being subject to French law.

#### *FINLAND*

**Forum:** *UTC GmbH v. S P Ky*, Turku Court of Appeal

**Date and reference:** 12 April 2002 S 97/324  
<http://cisgw3.law.pace.edu/cases/020412f5.html> (*Forestry equipment case*)

**Facts:** The case involved a sale of components to be attached to forestry equipment between a German Buyer (the plaintiff) and a Finnish Seller (the defendant). The questions in dispute included the relationship between a warranty term limiting recovery of damages and the provisions of the CISG.

While the Buyer argued alleged that the warranty clause had to be interpreted in a way that the terms relating to limitation of liability should be interpreted restrictively so as to apply manufacture defects only, and not to design or structural defects, the Seller interpreted it in such a way that manufacturing included both the machinetooling and the design.

**Decision:** The Court of Appeal confirmed that the law applicable to the contract was the CISG. It also stated that the Seller's

interpretation, the previous practice of the Buyer, and word-for-word interpretation of the warranty terms supported the interpretation that factory defects comprise both defects caused by machine tooling and design and, in connection with these, structural defects.

The Court concluded that the warranty terms were not unreasonable, even though they had strongly limited the Seller's liability for nonconformities.

However, the Court of Appeal stated that even though the parties had agreed upon the warranty term and that they were part of the contract, the Buyer had a right to claim damages for the defects according to the CISG.

*FRANCE*

**Forum:** Cour de Cassation, Chambre civile 1 [Supreme court]

**Date and reference:** 24 February 1993 Case number: 91-13.940  
<https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007028954> [Validity in general of limitation clauses under French law]

**Facts:** In 1990 a French consumer ordered at FNAC two extra copies of a vacation videocassette tape he had filmed during a trip to Jordania. The client's tape was misplaced in the shop premises and eventually lost. The consumer sued the shop for damages. The shop disputed the amount claimed by the client and offered to settle for 750 francs, on the basis of a limitation clause contained on the service order, which stated that the shop's liability in case of nonrestitution or destruction of films, photos or videocassettes was limited to the value of a blank film or cassette. The limitation clause further stated that, in case of very important works, the client should make a declaration at the moment of handing the film or tape to the shop, "so as to facilitate mutual negotiations".

**Decision:** The Tribunal d'Instance of Paris found that the limitation clause was not enforceable in the case at hand because the tape had not been lost as a result of the shop's service of film developing or copying tapes. Accordingly, it awarded the plaintiff 4,000 francs in damages.

The Cour de Cassation reversed the first instance judgment stating that limitation of liability clauses are generally valid under French law and can only be set aside in cases of willful misconduct or gross negligence of the obligor.

**Forum:** *Chronopost* Cour de cassation, Chambre commerciale [Supreme court]

**Date and reference:** 22 October 1996 Case number: 93-18632  
[https://www.courdecassation.fr/IMG///CO\\_arret\\_9318632\\_961022\\_EN.pdf](https://www.courdecassation.fr/IMG///CO_arret_9318632_961022_EN.pdf) [Unenforceability of limitation of liability clauses – failure to fulfill a main obligation arising from the contract]

**Facts:** The Banchereau company entrusted, on two occasions, an envelope containing a tender submission to the Chronopost company, which acquired the rights of the SFMI company. Contrary to its undertaking, Chronopost failed to deliver these envelopes before midday on the day following their posting. Banchereau brought proceedings to recover compensation for loss from Chronopost. In defence, Chronopost relied on the clause in the contract limiting compensation for delay to the transportation costs paid by Banchereau.

**Decision:** The Court of first instance found that the limitation clause was unenforceable because it limited the obligor's liability even in situations where it failed to fulfill its main obligation under the contract.

On 30 June 1993, the Rennes Court of Appeal reversed the first instance judgment and dismissed Banchereau's claims. It held that while Chronopost had failed to fulfil its obligation to deliver the envelopes before midday on the day following their posting, it had nevertheless not committed gross negligence debarring the limitation of liability in the contract.

In 1996, the Cour de Cassation reversed the Court of Appeal judgment, holding that it violated article 1131 of the French Civil Code. It further noted that Chronopost specialized in rapid transportation and guaranteed the reliability and swiftness of its service. As it had undertaken to deliver Banchereau's letters within a set timeframe and failed to fulfill this essential obligation, the clause limiting liability in the contract, which denied the effect of the undertaking given, had to be deemed null and void.

**Forum:** *Faurecia v. Oracle France*, Cour de cassation, Chambre commerciale, financière et économique [Supreme court]

**Date and reference:** 29 June 2010 Case number: 732  
[https://www.courdecassation.fr/jurisprudence\\_2/chambre\\_commerciale\\_574/732\\_29\\_16744.html](https://www.courdecassation.fr/jurisprudence_2/chambre_commerciale_574/732_29_16744.html) [Enforceability of limitation of liability clauses under French law]

**Facts:** The dispute arose from a group of contracts between Oracle and its client, Faurecia, for the license and maintenance of an ERP software and related training. Oracle first provided a provisional solution to its client, then failed to deliver the agreed software. Consequently, the client stopped paying the installments due under the contract. The factoring company, which had bought Oracle's receivables, launched legal

proceedings for payment against Faurecia. This latter called Oracle into the proceedings and counterclaimed that the contracts should be held void for deceit and, alternatively, cancelled for contractual breach.

**Decision:** In 2005, the Versailles Court of Appeal restricted the scope of Oracle's liability pursuant a limitation clause provided in the contracts.

In 2007, the Cour de cassation quashed this decision on the basis of the *Chronopost* case law, and held that the limitation clause was not enforceable due to Oracle's failure to comply with its essential obligation under the contract, i.e., to provide the agreed software to Faurecia. The case went to the Paris Court of Appeal for determination of Oracle's liability and the court rejected the Cour de cassation ruling, like the Versailles Court of Appeal had done.

On 29 June 2010, the Cour de cassation finally agreed with the lower court's decision to enforce the limitation clause contained in the contracts. Consequently, Oracle was ordered to pay 200,000 euros to Faurecia (i.e., the maximum amount set forth by the liability cap under the contracts), while this latter was claiming 60 million euros in damages. The Cour de cassation found that the limitation clause was balanced, *inter alia*, by the discount rate granted by Oracle and the favored position of Faurecia under the contracts.

#### GERMANY

**Forum:** Amtsgericht Nordhorn

**Date and reference:** 14 June 1994 Case No. 3 C 75/94 Unilex, available at <http://www.unilex.info/case.cfm?id=114>

**Facts:** An Italian seller and a German buyer entered into a contract for the sale of shoes. The contract provided, in a space entitled 'approximate delivery without commitment', the handwritten provision: 'before holidays, not later'. In Italy, this means before August. A first consignment of goods was sent to the buyer on 5 August 1993. The buyer paid the relating price on 30 November 1993. A second consignment was sent on 24 September 1993. On 28 September 1993 the buyer declared the contract avoided, by fax. The seller commenced action against the buyer claiming full payment of price plus interest, alleging that the buyer had no right to avoid the contract. The seller also claimed payment of an amount retained by the buyer the previous year following three declarations of partial lack of conformity, in respect of a previous sale. The buyer objected that a fixed term for delivery was provided in the contract and its violation by the seller entitled the buyer to declare the contract avoided. Referring to the previous year's sale, the buyer alleged that the seller never contested

the belated declarations of lack of conformity and accepted the return of the non-conforming goods. The different attitude displayed in asking for the price of these goods to be paid therefore was contrary to good faith.

**Decision:** The Court held that the contract was governed by CISG (Art. 1(1)(a) CISG).

The Court stated that the seller was entitled to payment of the full price according to Art. 62 CISG. The two consignments of goods had indeed been delivered after the agreed term had expired, but the buyer would have been entitled not to pay the price only if it had avoided the contract, according to Art. 49 CISG.

The Court found that the buyer's declaration of avoidance was not made according to a provision contained in the seller's general conditions of contract, which were printed on the back of the contract form, and which the Court found to have been incorporated in the contract. This clause provided that the buyer could only declare the contract avoided following an invitation to the seller to comply with the contract, and, even so, no sooner than 15 working days from the date the seller received such an invitation without complying with the contract.

The Court held that the question of validity of the seller's general conditions of contract fell outside the scope of CISG, according to Art. 4(a), and had to be determined according to the law governing the contract, which, according to German rules of private international law, was Italian law. The Court found that the clause was valid under Italian law. Thus, it held that the buyer's declaration of avoidance was without effect, as the buyer had failed to declare the contract avoided according to the contractually established procedure.

**Forum:** Oberlandes gericht Celle [Provincial Court of Appeal]

**Date and reference:** 2 September 1998 Case number: 3 U 246/97 <http://cisgw3.law.pace.edu/cases/980902g1.htm> | CLOUT case No. 318 (Vacuum cleaners case) [Validity of contract terms controlled by domestic law; term in seller's general conditions limiting damages not validly incorporated into contract]

**Facts:** A Dutch seller, plaintiff, delivered a batch of "noname" vacuum cleaners along with batches of branded vacuum cleaners to a German buyer, defendant. After having sold the vacuum cleaners, the buyer alleged that the vacuum cleaners did not perform up to standard, declared the contract avoided and asserted that as a result it had suffered damages. The buyer also refused to effect payment of the purchase price.

The seller sued the buyer for the outstanding purchase price and the buyer sought set-off with damages for loss of profit.

**Decision:** The first instance court allowed the claim and dismissed the set-off.

The appellate court found that the seller was entitled to claim the purchase price under article 53 CISG in conjunction with articles 14, 15, 18 CISG, because the buyer had failed to return the vacuum cleaners.

As to the admissibility of the buyer's counterclaim for loss of profit, the court found that such claim was not excluded under § 7(b) of the Seller's General Terms and Delivery Conditions. Under such term, the seller was not liable for damages and could, at its own choice, either cancel the entire contract or part of the contract, grant the buyer a corresponding credit, deliver substitute goods, or grant the buyer an adequate reduction in the purchase price (which the seller did).

However, under the German law applicable [Art. 27(1) EGBGB], the seller's standard terms had not been validly incorporated into the contract. As a result, the exclusion of the CISG by § 10(c) of the standard terms was unenforceable.

After admitting the counterclaim, the court dismissed it because the buyer had failed to properly prove its damages. The court held that under Article 74 the plaintiff must exactly calculate its damages. Under the circumstances, the loss of profit relied on was not properly substantiated.

The court noted that, if it had been provided with the vacuum cleaners' current market price, an abstract calculation would have been admissible under article 76 CISG. In such case, the damages would have been calculated on the basis of the difference between the price fixed by the contract and the current market price at the time of the avoidance of the contract. However, as the current market price of the "no-name" vacuum cleaners was missing, damages could only be established on the basis of a specific calculation under article 74 CISG, which had not been provided by the buyer.

The court found that the buyer had failed to mitigate the loss under article 77 CISG, as it had made only efforts to effect replacement purchases in its region, without taking into account other suppliers in Germany or abroad.

The court determined to grant to the buyer only reimbursement of the costs related to recovery of the goods and allowed set-off in the corresponding amount.

**Forum:** Landgericht Heilbronn [District Court]

**Date and reference:** 15 September 1997 Case number: 3 KfH O 653/93 <http://cisgw3.law.pace.edu/cases/970915g1.htm> 1 (*Film coating machine case*) CLOUT case No. 345 [Validity of standard term excluding liability determined by domestic law, but reference in domestic law to

nonmandatory rule replaced by reference to equivalent Convention provision]

**Facts:** A German seller, the defendant, delivered a film coating machine for kitchen furnishings to an Italian leasing company for the use of an Italian lessee, the plaintiff. The buyer paid the purchase price.

When problems occurred with the machine, the lessee commissioned an expert report which concluded that the machine was defective. The buyer assigned its rights to the lessee, who declared the contract avoided. The lessee sued the seller for the reimbursement of the purchase price and damages.

The contract negotiations had been conducted in Italian. On 23 May 1990, the managers of the parties signed a seller's form, headed "contratto di vendita", concerning the purchase of the machine. Above the signatures and handwritten adjustments, the form also contained pre-formulated standard trading conditions in Italian language. On 20 June 1990, the seller confirmed the order to the Plaintiff on an order confirmation form, which, in addition to a detailed explanation of the machine, contained preformulated standard sale and delivery conditions (in German language). Under these last general terms and conditions, the seller's liability was limited. A German seller, the defendant, delivered a film coating machine for kitchen furnishings to an Italian leasing company for the use of an Italian lessee, the plaintiff. The buyer paid the purchase price.

When problems occurred with the machine, the lessee commissioned an expert report which concluded that the machine was defective. The buyer assigned its rights to the lessee, who declared the contract avoided. The lessee sued the seller for the reimbursement of the purchase price and damages.

The contract negotiations had been conducted in Italian. On 23 May 1990, the managers of the parties signed a seller's form, headed "contratto di vendita", concerning the purchase of the machine. Above the signatures and handwritten adjustments, the form also contained pre-formulated standard trading conditions in Italian language. On 20 June 1990, the seller confirmed the order to the Plaintiff on an order confirmation form, which, in addition to a detailed explanation of the machine, contained preformulated standard sale and delivery conditions (in German language). Under these last general terms and conditions, the seller's liability was limited.

**Decision:** The court applied the CISG. It held that due to the defectiveness of the machine, the buyer was entitled to declare the contract avoided (Art. 49 CISG), to claim reimbursement under Art. 81(1),

Art. 81(2) and Art. 49(1) CISG and to claim damages under Art. 74 [sentence one], 45(1) and 45(2) CISG.

The court stated that the CISG had no special rules for the incorporation of general conditions. Therefore these rules had to be interpreted according to Art. 8 CISG. Following the underlying principles of Art. 8 CISG, general terms and conditions had to be drafted in the language of the contract, the Italian language in this case, because the negotiations had been conducted in Italian.

Consequently, the terms and conditions in German provided by the German seller were unenforceable and therefore the exclusion clause in German was also ineffective.

To assess the validity of the seller's terms and conditions, drafted in Italian, on the back of the *contratto di vendita* the court applied German law. The clause limited the seller's liability to the exchange or repair of defective parts "*escluso qualsiasi risarcimento di danni*" ("exclusion of any compensation"). The court found that complete exclusion amounted to an inappropriate disadvantage for the Plaintiff, and contradicted the legal provisions. Therefore such a term had to be considered as compulsorily invalid according to sect. 9 AGBG [Standard Terms of Business Act]. In the assessment it replaced the reference to German non-mandatory rules by reference to the rules of the CISG, namely Art. 74 [sentence two] CISG, and held that exclusion of liability in the terms and conditions to be void.

**Forum:** Oberlandes gericht Naumburg

**Date and reference:** 13 February 2013 Case number: 12 U 153/12 <http://www.unilex.info/case.cfm?id=1697> [Application of the principle of good faith under the CISG to consider that the mere reference to standard terms did not amount to their incorporation into a sales contract]

**Facts:** A German seller and Swiss buyer concluded a contract for the supply of poppy seeds to be used in the production of various bakery products. Soon after the first consignments, the buyer notified the seller that the seeds showed a strong, musty and rancid flavor and, as a result, it ceased production. Upon examination by an analysis laboratory, the seeds turned out not to be marketable.

The buyer brought an action against the seller claiming for damages.

**Decision:** The court of first instance dismissed the buyer's claim. In so doing, it declared not to have jurisdiction over the case on account of an arbitration clause that had become part of the contract by virtue of incorporation of the Netherlands Association for the Trade in Dried Fruit, Spices and Allied Products general conditions of sale into the parties' agreement (hereinafter: NZV General Conditions). The buyer appealed.



The appellate court reversed the first instance decision. In so doing, the Court asserted that the lower court had erroneously failed to declare that the contract between the parties was governed by CISG pursuant to its Art. 1(1)(a). Accordingly, the question as to whether the NZV General Conditions had been incorporated into the contract had to be resolved according to CISG's provisions dealing with contract formation and interpretation (Arts. 8, 14 and ff. CISG). In this respect, the Court noted that, although under German law a mere reference to standard terms can be sufficient in order for them to become part of the contract, and the same has been established by some foreign courts in relation to international disputes governed by CISG, under the Convention the view should be preferred that the party relying on such terms must submit the relevant document to the other party, or make them sufficiently available for it. In fact, as already ruled by the German Supreme Court (see Bundesgerichtshof, 09.01.2002, in Unilex) it would counter to the principle of good faith enshrined in Art. 7(1) CISG if the recipient were under a duty to investigate the content of the standard terms where the declaring party had failed to adopt sufficient steps to make them accessible to it. In the light of the above, also considering that the NZV General Conditions were exclusively designed for Dutch businessmen and therefore the buyer could not have expected them to be applicable to its contract with the seller, the Court upheld the buyer's claim but remanded the case to the first instance Court for further consideration.

*POLAND*

**Forum:** Court of Appeals of Warsaw

**Date and reference:** 20 November 2008 Case No. I ACa 1258/07 Unilex, available at <http://www.unilex.info/case.cfm?id=1721> CLOUT Case no. 1305

**Facts:** A Polish seller and a Ukrainian buyer concluded a contract for the sale of a Mercedes Actros truck. The contract contained a clause according to which "it was valid until 8 August 2006", which stood 90 days after its conclusion. The seller failed to deliver and refused to return the price paid by the Ukrainian party, who sued before a Polish court.

**Decision:** The court of first instance (District Court) dismissed the claim as premature. It found that the buyer had not set an additional period of time as required by Article 49(1)(b) CISG and had never declared the contract avoided. The court concluded that the parties were still bound by the contract and that the buyer could not yet request the reimbursement of the price.

The Court of Appeals reversed the decision and ordered the seller to reimburse the price. It found that Article 49(1)(b) cannot be relied upon in the case at hand because of the express clause in the contract providing for its termination within 90 days from its conclusion. The court reasoned that the parties were entitled under Article 6 CISG to shape the contract as they saw fit, which inter alia allowed them to introduce a provision for an automatic termination of the contract within a certain period of time. In the opinion of the Court of Appeals, the lower court wrongly assumed that the “90 days validity” clause had no meaning. Conversely, it found that the clause was dictated by the Ukrainian customs regulations, which require to complete any international business transaction within 90 days from the conclusion of the contract and which provide sanctions for violating that rule. Thus, the parties, having been aware of the said regulation at the time of the conclusion of the contract, consciously established a period, after expiry of which the contract was to come to an end.

The Court of Appeals further stated that the Convention does not expressly govern the consequences of the termination of a contract as a result of the lapse of contractually established time limit. However, in light of Article 7 CISG, which calls for the application of the general principles on which the Convention is based, the rules governing the effects of the avoidance of contract must be considered. More specifically, the issue is regulated by Article 81(2) CISG which provides that a party who has performed the contract may claim restitution of whatever it has paid under the contract to the other party. Consequently, the Court ordered the Polish seller to reimburse the full price to the Ukrainian buyer and to pay the interest from the date on which the price was paid, as required by Article 84(1) CISG.

*RUSSIAN FEDERATION*

**Forum:** Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce

**Date and reference:** 23 November 1994 Arbitral award No. 251/93  
<http://www.unilex.info/case.cfm?id=250>

**Facts:** The seller was to deliver certain goods for a sum which had been paid by the buyer in advance. The buyer received a smaller quantity of goods than had been agreed: 415 pieces of the goods were missing. The buyer requested the Tribunal, with reference to Art. 74 CISG, to order the seller to return the payment of the price of the undelivered goods and to award damages for the damage sustained by the buyer as a result of the seller's breach of the contract with regard to the time of deliver and to the

quality of the goods. Damages included the loss of profit on the sale of these goods to the buyer's customers, mainly because the goods were of a seasonal nature.

**Decision:** The Tribunal held that the buyer was entitled to be reimbursed the amount it had paid for the undelivered goods. As regards the claim for damages the Tribunal came to the conclusion that the clause in the contract which stipulated the payment of a penalty in case of a delay in delivery was of an exclusive nature and did not provide for payment of damages in excess of the sum due in accordance with this clause. The Tribunal decided to award damages for the delay only to the limited amount indicated in the penalty clause. The Tribunal refused to award damages relating to the poor quality of the goods since the buyer had not been able to prove the amount of the loss sustained as a result of the poor quality of the goods.

**Forum:** Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce

**Date and reference:** 4 April 1998 Arbitral award No. 387/95  
<http://www.unilex.info/case.cfm?id=377>

**Facts:** The Russian seller contracted with a UK buyer to deliver 5,000 tons of coal at option up to 10,000 tons to be exercised within one month after signing of the contract. The payments under the contract had to be effected no later than of 90 days after the bill of lading date. The seller's obligations were considered to be fulfilled after delivery of the coal in the quantity stipulated by the contract and the buyer's after full payment of the price. At the same time the parties concluded a confidential agreement containing their intent not to claim from each other damages, fines and penalties concerning the contractual performance.

In his claim the seller insisted on the buyer's payment for the coal delivered to him and interest. The buyer submitted a counterclaim asking for damages suffered as a consequence of the seller's failure to deliver the coal in the quantity required by the contract. In response the seller stated that the buyer had not exercised his right to the quantity option up to 10,000 tons of the goods.

**Decision:** The arbitral tribunal awarded the seller's claim for payment of the coal shipped to the buyer. It held that the conduct of the buyer, who had made the payment for the goods conditional to the seller's guarantee for complete performance of the contract and had refused to pay for the goods, sharply contradicted the contract and provisions of the CISG (Art. 53), under which the payment for the goods is an unconditional obligation of buyer. The buyer's breach of contract

amounted therefore to a fundamental breach pursuant to Art. 25 CISG and provided the seller with a right to declare the contract avoided.

The arbitral tribunal further held that the seller's right to interests on the overdue sum had not been excluded by the parties' confidential agreement. According to the arbitral tribunal, the seller's right to interest was neither a penalty nor damages, but had an autonomous basis (Art. 78 CISG).

*UNITED STATES*

**Forum:** *Barbara Berry, S.A. de C.V. v. Ken M. Spooner Farms, Inc.*, Federal District Court [State of Washington]

**Date and reference:** 13 April 2006. Case number: C055538FDB <http://cisgw3.law.pace.edu/cases/060413u1.htm> l>

**Facts:** The case involved a contract whereby Ken M. Spooner Farms, Inc. (Spooner Farms) agreed to provide viable raspberry roots to Barbara Berry S.A. de C.V. (Barbara Berry or Berry) for the purpose of planting and producing commercial quality raspberry fruit in Mexico. Berry alleged breach of contract in that the product sold by Spooner Farms was defective and caused Berry to incur damages. Plaintiff Berry is a corporation formed under the laws of Mexico with its principal place of business located in Los Reyes, Michoacan, Mexico. Defendant Ken M. Spooner Farms, Inc. (Spooner Farms) is a Washington corporation with its principal place of business located in Puyallup, Washington. Defendant Spooner Farms moved for summary judgment based on a written exclusionary clause that excluded Spooner Farms from all liability for Berry's Claim. Berry disputed the claim contending that what was involved was an oral contract for the sale of raspberry roots, that the warranty disclaimer was not negotiated, was unknown to Berry at the time the contract was formed, and was not delivered to Berry until after the roots were paid for and delivered to Mexico. Berry also contended that the contract was governed by CISG rather than the Uniform Commercial Code (UCC).

**Decision:** The court confirmed the application a disclaimer of liability that benefited the Washington seller in a dispute with its Mexican buyer. The court said that the validity of a disclaimer was not governed by the CISG citing Article 4. The court held the disclaimer to be valid and granted summary judgment to the defendant seller.

The court stated that the plaintiff asserted that an oral contract was formed that contained no disclaimers. Furthermore, the plaintiff asserted "that the warranty disclaimer was not negotiated, was unknown to Berry at the time the contract was formed, and was not delivered to Berry until

after the goods were paid for and delivered to Mexico." The court relied instead upon the following: "In Washington, the consistent rule has been that the exchange of purchase orders or invoices between merchants forms a written contract, and the terms contained therein are enforceable." The court recited means to avoid disclaimers based upon substantive or procedural unconscionability. The court agreed that the disclaimer was consistent with industry standards.

**Forum:** *Norfolk Southern Railway Company v. Power Source Supply, Inc.*, Federal District Court [Pennsylvania]

**Date and reference:** 25 July 2008 Case number: 07-140-JJf  
<http://cisgw3.law.pace.edu/cases/080725u1.html>

**Facts:** A buyer from Canada and a seller from the USA entered into a contract for the sale of locomotives. The parties' dispute included the following issues (1) counter-offer and acceptance of offer; (2) timeliness of delivery; (3) damages and (4) interest on damages.

**Decision:** The Court applied CISG articles 19(1), 33(c), 74 and 78, determining, in relevant part, that (1) the alleged verbal agreement for delivery was never incorporated into the contract; (2) the Plaintiff acted within a reasonable time after the conclusion of the contract to deliver the goods to the Defendant as there was no firm delivery date; (3) the final bill of sale materially altered the purchase order to exclude warranties, thereby constituting a counter-offer which was accepted via performance; (4) as delivery was timely, Defendant was held liable for damages pursuant to Article 74; and (5) Plaintiff was entitled to prejudgment interest, the rate of which was to be decided by the United States court.

It further held that that "[t]he validity of the disclaimer cannot be determined by reference to the CISG itself. CISG art 4(a). It is therefore necessary to turn to the forum's choice of law rules."

The Court then discussed the validity of the clause, which disclaimed all warranties (except that of marketable title) and liability, and read as follows: "THE EQUIPMENT BEING SOLD ON AN "AS, WHERE IS" BASIS AND WITH ALL FAULTS. EXCEPT AS SET FORTH HEREIN, THE SELLER MAKES NO REPRESENTATION OR WARRANTY, EITHER EXPRESS OR IMPLIED, AS TO THE CONDITION OF THE EQUIPMENT, INCLUDING WITHOUT LIMITATION ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND EXPRESSLY DISCLAIMS LIABILITY AND SHALL NOT BE LIABLE FOR LOST PROFITS OR FOR INDIRECT, INCIDENTAL CONSEQUENTIAL OR COMMERCIAL LOSSES OF ANY KIND."

The Court applied both Alberta and Pennsylvania laws – which, to that end, did not diverge – to consider the following elements of the disclaimer: "(1) the placement of the clause in the document; (2) the size of the disclaimer's print; and (3) whether the disclaimer was highlighted or called to the reader's attention by being in all caps ...." *Id.* Expressions such as "as is" or "with all faults" are approved by statute as language of exclusion. 13 Pa C.S.A. § 2316(c)(1). After examining the final, executed bills of sale, under the standards set forth above, the Court found the disclaimer to be valid.

### 3. FOOTNOTES

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<sup>1</sup> See e.g., Article 7.1.6 of the UNIDROIT Principles (2010) (n. 163) [hereinafter also referred to as « UPICC »] and its official comments, para. 2. This Opinion does not consider exemption clauses that permit a party to render a performance substantially different from what the other party reasonably expected, referred to by Article 7.1.6 of the UPICC and Section 3(2) (b) (i) of the English Unfair Contract Terms Act 1977. They appear to be incompatible with some of the main features of a contract for the international sale of goods governed by the CISG contract, which include legal certainty and a certain balance between the rights and obligations of the parties.

<sup>2</sup> In this regard, see generally: Fontaine, Marcel and De Ly, Filip – *Drafting international contracts: analysis of contract clauses*, Ardsley, NY: Transnational Publishers (2006) [hereinafter referred to as « Fontaine and De Ly on contract clauses »]; Ghestin, Jacques (ed.) – *Les clauses limitatives ou exonératoires de responsabilité en Europe – actes du colloque des 13 et 14 décembre 1990*, Paris: LGD, (1990) [hereinafter referred to as « Ghestin – actes du colloque »]; Alpa, Guido – *Droit italien*, in Ghestin – *actes du colloque*; Beale, Hugh – *Droit anglais*, in Ghestin – *actes du colloque*; Fontaine, Marcel – *Observations sur les clauses limitatives ou exonératoires de responsabilité en Europe*, in Ghestin – *actes du colloque*; Garcia-Cantero, Gabriel – *Droit espagnol*, in Ghestin – *actes du colloque*; Reich, Norbert – *La transparence des clauses limitatives dans le droit allemand*, in Ghestin – *actes du colloque*; Schmidt-Salzer, Joachim – *Droit allemand*, in Ghestin – *actes du colloque*; Stauder, Bernd – *Droit suisse*, in Ghestin – *actes du colloque*; Yates, David – *Exclusion clauses in contracts*, 2nd edition, London: Sweet and Maxwell (1982) [hereinafter referred to as « Yates on exclusion clauses »]; Lawson, Richard – *Exclusion clauses and unfair contract terms*, 5th edition, London: Sweet and Maxwell (1998) [hereinafter referred to as « Lawson on exclusion clauses »]; Prata, Ana – *Cláusulas de exclusão e limitação de responsabilidade contractual*, Reimpressão, Coimbra: Almedina (2005); Oliveira, Nuno Manuel Pinto – *Cláusulas acessórias ao contrato: cláusulas de exclusão e de limitação do dever de indenizar e cláusulas penais*, 2a. ed., Coimbra: Almedina (2005); Ponzanelli, Giulio – *Le clause di esonero dalla responsabilità civile*, studio di diritto comparato, Milano: Giuffrè (1984); Adriano, Germana Carlotta – *Clauseole di esonero e di limitazione della responsabilità civile*, Roma: Aracne (2009); Lata, Natalia Álvares – *Cláusulas restrictivas de responsabilidad civil*, Granada: Comares (1998); Larroumet, Christian – *Droit Civil*, Tome 3, *Les Obligations – Le Contrat*, 3e édition, Paris : Economica (1996) [hereinafter referred to as « Larroumet »]; Farnsworth, E. Allan – *Contracts*, 3rd edition, New York:

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Aspen Law & Business (1999) [hereinafter referred to as « Farnsworth on Contracts »]; Azevedo, Antonio Junqueira de Azevedo – Cláusula cruzada de não indenizar (cross waiver of liability), ou cláusula de não indenizar com eficácia para ambos os contratantes. Renúncia ao direito de indenização. Promessa de fato de terceiro. Estipulação em favor de terceiros. in *Estudos e pareceres de direito privado*, São Paulo: Saraiva (2004) [hereinafter referred to as « Azevedo, Antonio Junqueira de Azevedo – Cláusula cruzada de não indenizar (cross waiver of liability) »]; Fernandes, Wanderley – Cláusulas de Exoneração e de Limitação de Responsabilidade, São Paulo: Direito GV – Saraiva (2013) [hereinafter referred to as « Fernandes – Cláusulas de Exoneração e de Limitação »].

<sup>3</sup> “Compensatory damages” are the most common breach of contract remedy. When compensatory damages are awarded, a court orders the person that breached the contract to pay the other person enough money to get what they were promised in the contract elsewhere. “Restitution”: When a court orders restitution, it orders the person who breached the contract to pay the other person back. “Punitive damages” are a sum of money intended to punish the breaching party, and are usually reserved for cases in which something morally reprehensible happened, such as a manufacturer deliberately selling a retailer unsafe or substandard goods. “Liquidated damages” are those that the parties agree to pay in the event a contract is breached.

<sup>4</sup> For examples of limitation of liability clauses in sale contracts see « Fontaine and De Ly on contract clauses » (n. 2), Ch. 7, and Annex 2 of this Opinion.

<sup>5</sup> For more information on “agreed sums clauses”, see CISG-AC Opinion No. 10, Agreed Sums Payable upon Breach of an Obligation in CISG Contracts, Rapporteur: Dr. Pascal Hachem, Bar & Karrer AG, Zurich, Switzerland. Adopted by the CISG-AC following its 16th meeting in Wellington, New Zealand on 3 August 2012.

<sup>6</sup> Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russian Federation, 23 November 1994 (Arbitral award No. 251/93, Unilex, available at <http://www.unilex.info/case.cfm?id=250> (accessed on 15 Jan. 2015). The seller was to deliver certain goods for a sum which had been paid by the buyer in advance. The buyer received a smaller quantity of goods than had been agreed: 415 pieces of the goods were missing. The buyer requested the Tribunal, with reference to Art. 74 CISG, to order the seller to return the payment of the price of the undelivered goods and to award damages for the damage sustained by the buyer as a result of the seller's breach of the contract with regard to the time of deliver and to the quality of the goods. Damages included the loss of profit on the sale of these goods to the buyer's customers, mainly because the goods were of a seasonal nature. The Tribunal held that the buyer was entitled to be reimbursed the amount it had paid for the undelivered goods. As regards the claim for damages the Tribunal came to the conclusion that the clause in the contract which stipulated the payment of a penalty in case of a delay in delivery was of an exclusive nature and did not provide for payment of damages in excess of the sum due in accordance with this clause. The Tribunal decided to award damages for the delay only to the limited amount indicated in the penalty clause. The Tribunal refused to award damages relating to the poor quality of the goods since the buyer had not been able to prove the amount of the loss sustained as a result of the poor quality of the goods.

<sup>7</sup> The goal of damages provisions is to place the aggrieved party in the same economic position it would have been in had the breach not occurred. According to E. A. Farnsworth (*apud* Gotanda, John Y., p. 991, n. 1, in : Kroll, S. , Mistelis, L. and Viscasillas, Pilar P. (eds.), UN Convention on Contracts for the International Sale of Goods (CISG), Munich/Oxford: C.H. Beck/ Hart Publishing (2011) [hereinafter referred to as « Kroll,

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Mistelis and Viscasillas on CISG ») such provisions are designed to give the aggrieved party the benefit of the bargain or its expectations/performance interest.

<sup>8</sup> See CISG-AC Opinion No. 6, Calculation of Damages under CISG Article 74, Rapporteur: Prof. John Y. Gotanda, Villanova University School of Law, Villanova, Pennsylvania, USA. Adopted by the CISG-AC at its Spring 2006 meeting in Stockholm, Sweden; esp. at paragraphs 1.2 and 1.3. See also Zeller, Bruno – Damages Under the Convention on Contracts for the International Sales of Goods, 2nd edition, Oxford: Oxford University Press (2009) [hereinafter referred to as « Zeller on Damages »], Ch. 6, esp. p. 82. See also Honnold, John O. (edited and updated by Flechtner, Harry M.) – Uniform Law for International Sales under the 1980 United Nations Convention, 4th edition, Alphen aan den Rijn: Kluwer Law International (2009) [hereinafter referred to as « Honnold on CISG »] para. 403.

<sup>9</sup> Zeller on Damages (n. 8), p. 81. See also Mackaay, Ejan - Law and Economics for Civil Law Systems, Cheltenham (U.K.) : Edward Elgar (2013) [hereinafter referred to as « Mackaay on Law and Economics »] p. 442, on the topic of “risk allocation” between the contracting parties.

<sup>10</sup> See Article 74 CISG, Zeller on Damages (n. 8), p. 82, and Gotanda, Kroll, Mistelis and Viscasillas on CISG (n. 7), Art. 74 CISG, paras. 4 and 37-73. There are other limitations on damages. Under the CISG, damages: a) are limited to monetary relief; b) and to material loss (and do not include moral damages, as set forth in Article 7.4.2. of the UNIDROIT Principles); c) do not permit the recovery of punitive damages; d) nor does it permit the recovery of damages for death and bodily injury (Article 5 CISG). See also Schwenger, in : Schwenger (ed.), Schlechtriem & Schwenger – Commentary on the UN Convention on the International Sale of Goods, 3rd edition, Oxford : Oxford University Press (2010) [hereinafter referred to as « Commentary »], Art. 74 CISG, para. 2 and 45-57; and Schlechtriem, P. and Butler, P., UN Law on International Sales – The UN Convention on the International Sale of Goods, Berlin: Springer-Verlag (2009) [hereinafter referred to as « Schlechtriem & Butler », p. 209-16.

<sup>11</sup> See Article 4 CISG and Schwenger/Hachem, Commentary (n. 10), Art. 4 CISG, paras. 17 and 43; and Honnold on CISG (n. 8), Art. 74, para. 408.1. See also Djordjevic, Kroll, Mistelis and Viscasillas on CISG (n. 7), Art. 4 CISG, paras. 8 and 26. The same reasoning presented by the author in para. 26 applies to exemption and limitation of liability clauses.

<sup>12</sup> See Article 7(2) CISG and Schwenger/Hachem, Commentary (n. 10), Art. 7, par. 27-30, 34. See also Viscasillas, Kroll, Mistelis and Viscasillas on CISG (n. 7), Art. 7 CISG, paras. 52-53. In accordance with Article 7(2) CISG, matters governed by the Convention that are not expressly provided for in it (internal gaps) are to be dealt with exclusively by the Convention, despite their characterization under domestic law. Once an internal gap is detected, the first step is to apply the specific provisions of the CISG directly, by way of analogy created by scholars and case law. If the gap cannot be filled, resort is to be had to the general principles on which the CISG is based (internal principles) or in their absence to other external principles. Finally, if the gap still remains, domestic law may then be applied.

<sup>13</sup> See Article 4 CISG and Schwenger/Hachem, Commentary (n. 10), Art. 4, par. 17 and Art. 7, par. 30. See also Djordjevic, Kroll, Mistelis and Viscasillas on CISG (n. 7), Art. 4 CISG, para. 8.

<sup>14</sup> According to Schlechtriem & Butler (n. 10), par. 209, p. 157: “the CISG recognizes that the contract can stipulate further duties for the buyer (compare Articles 61(1), 62 CISG “other obligations”); for example: to provide security, to obtain data, drawings, and technical specifications, to deliver certain materials or components, to comply with



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export or re-import prohibitions etc. The agreement of Incoterms can constitute another ancillary duty. Article 54 CISG stipulates that necessary measures and formalities which are requirements for the payment are part of the duty to pay. Specification of the goods can be part of the duty to accept the goods. However, Article 65(1) CISG grants the seller a specific remedy in that regard.”

<sup>15</sup> See Schwenger/Hachem, Commentary (n. 10), Art. 4, par. 43.

<sup>16</sup> In some jurisdictions such a situation qualifies as a purely potestative condition, i.e. a condition made in a contract the fulfillment of which is entirely in the control of one of the parties to the contract. It subjects the contract performance to the free will of one of the parties only. For example: there is a purely potestative condition where the buyer is left with the option to fix the price of the goods sold at its own will. Not only are purely potestative conditions null and void under many domestic laws but also the underlying contracts where they have been included (*e.g.*, Art. 1174 of the Belgian Civil Code; Articles 122 and 489 of the Brazilian Civil Code; Article 1500 Quebec Civil Code).

<sup>17</sup> See Article 74 CISG and Schwenger, Commentary (n. 10), Art. 74, and Zeller on Damages (n. 8), p. 102.

<sup>18</sup> This corresponds to the common law maxim according to which: “*for every right, there is a remedy; where there is no remedy, there is no right*”, which also applies to the civil law and other contemporary legal traditions.

<sup>19</sup> See Article 6 CISG and Schwenger/Hachem, Commentary (n. 10), Art. 6, par. 28. See also Mistelis, Kroll, Mistelis and Viscasillas on CISG (n. 7), Art. 6 CISG, para. 8.

<sup>20</sup> See Article 4 CISG and Schwenger/Hachem, Commentary (n. 10), Art. 4, par. 17.

<sup>21</sup> CISG-AC Opinion No. 13, Inclusion of Standard Terms under the CISG, Rapporteur: Professor Sieg Eiselen, College of Law, University of South Africa, Pretoria, South Africa. Adopted by the CISG-AC following its 17th meeting in Villanova, Pennsylvania, USA, on 20 January 2013.

<sup>22</sup> See Article 8 and 9 CISG and Schmidt-Kessel, Commentary (n. 10), Arts. 8 and 9. See also Zuppi and Viscasillas, respectively, Mistelis, Kroll, Mistelis and Viscasillas on CISG (n. 7), Arts. 8 and 9 CISG; and Honnold on CISG (n. 8), Arts. 8 and 9, paras. 104-122.

<sup>23</sup> In line with the modern approach to private international law rules, this Opinion understands that the “otherwise applicable law” includes not only the otherwise domestic law applicable but also “rules of law”, which do not originate from formal State sources of law. For more information on this topic, see Choice of Law in International Contracts, Hague Conference of Private International Law, esp. Draft Commentary on the Draft Hague Principles on the Choice of Law in International Contracts at [http://www.hcch.net/upload/wop/princ\\_com.pdf](http://www.hcch.net/upload/wop/princ_com.pdf) (accessed on April 26, 2014).

<sup>24</sup> See Article 4 CISG and Schwenger/Hachem, Commentary (n. 10), Art. 4, par. 38 and 43.

<sup>25</sup> For examples of limitation of liability clauses in sale contracts see Annex 2.

<sup>26</sup> See generally Fontaine and De Ly on contract clauses » (n. 2), Ch. 7.

<sup>27</sup> For more information on “agreed sums clauses”, see CISG-AC Opinion No. 10, Agreed Sums Payable upon Breach of an Obligation in CISG Contracts, Rapporteur: Dr. Pascal Hachem, Bar & Karrer AG, Zurich, Switzerland. Adopted by the CISG-AC following its 16th meeting in Wellington, New Zealand on 3 August 2012.

<sup>28</sup> See Schwenger/Hachem, Commentary (n. 10), Art. 4, par. 43.

<sup>29</sup> See, for example, Sections 305 to 310 of the German Civil Code (BGB), which govern standard contract terms. Those provisions have replaced the Standard Contract Terms Act (Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen, AGB-Gesetz). For an English translation,

see: <http://www.iuscomp.org/gla/statutes/BGB.htm#b2s2> (accessed on April 27, 2014). See also CISG-AC Opinion No. 13, Inclusion of Standard Terms under the CISG (n. 21).

<sup>30</sup> In this regard see Article 4.6 of the UNIDROIT Principles (2010).

<sup>31</sup> BGB, Section 309. For more information on the German law of standard terms, see: Zerres, Thomas. *Principles of the German Law on Standard Terms of Contract*, available at: [http://www.jurawelt.com/sunrise/media/mediafiles/14586/German\\_Standard\\_Terms\\_of\\_Contract\\_Thomas\\_Zerres.pdf](http://www.jurawelt.com/sunrise/media/mediafiles/14586/German_Standard_Terms_of_Contract_Thomas_Zerres.pdf) (access on 5 Sept. 2015).

<sup>32</sup> For example, Article 2.1.20 of the UNIDROIT Principles (2010) establishes that surprising terms in standard contract terms are not effective.

<sup>33</sup> See Farnsworth on Contracts (n. 2), para. 4.26, in which the author states that “a number of cases support discharge of a duty to pay damages for partial breach of contract by renunciation, written or oral, by the obligee on acceptance from the obligor of some performance under the contract” and para. 9.1. See also Yates on exclusion clauses (n. 2), p. 197 and Lawson on exclusion clauses (n. 2).

<sup>34</sup> The doctrine of fundamental breach started with a 1956 judgment of the English Court of Appeal. The Supreme Court of Canada in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)* (2010) described the doctrine as follows:

“... where the defendant had so egregiously breached the contract so as to deny the plaintiff substantially the whole of its benefit ... the innocent party was excused from further performance but the defendant could still be held liable for the consequences of its ‘fundamental breach’ even if the parties had excluded liability by clear and express language”. See Annex 3 for more details.

<sup>35</sup> In the past the English and US courts developed a criterion for the validity assessment of exemption clauses that rendered such clauses unenforceable where they compromised “the very core and essence of the contract”, which became known as “fundamental breach” or “breach of a fundamental term”. However, this validity requirement has lost its appeal more recently. On this topic, see Fernandes – Cláusulas de Exoneração e de Limitação (n. 2), p. 394-395.

<sup>36</sup> See Article 2(a) CISG and Schwenzler/Hachem, Commentary (n. 10), Art. 2, par. 4-7.

<sup>37</sup> The PECL provision reads as follows:

“Article 8:109: Clause Excluding or Restricting Remedies Remedies for non-performance may be excluded or restricted unless it would be contrary to good faith and fair dealing to invoke the exclusion or restriction.”

See also a revised version of PECL, as presented by Fauvarque-Cosson, Bénédicte and Mazeaud, Denis (eds.) – *European Contract Law, Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules*, Munich: Sellier (2008), p. 603, which reads as follows:

“Article 9:109: Clause Excluding or Restricting Remedies

Remedies for non-performance may be excluded or restricted by a contractual clause. This clause is without effect if its implementation is contrary to good faith, for example in the case of non-performance which is deliberate or of particular gravity.”

<sup>38</sup> For the full text of Article 7.1.6 of the 2010 UNIDROIT Principles and the official comments, see Annex 2.

<sup>39</sup> See Article 7.1.6 of the 2010 UNIDROIT Principles and the official comments. See also Schelhaas, Harriet, in Vogenauer, Stefan (ed.). *Commentary on the UNIDROIT Principles of International Commercial Contracts*, 2<sup>nd</sup> ed., Oxford: OUP (2015) [hereinafter referred to as « Commentary on the UNIDROIT Principles »], p. 858-863, esp. 861.

<sup>40</sup> See Article 6 CISG and Schwenzer/Hachem, Commentary (n. 10), Art. 6, par. 7 and 8. See also Mistelis, Kroll, Mistelis and Viscasillas on CISG (n. 7), Art. 6, paras. 1, 7-10, 23; and Honnold on CISG (n. 8), Art. 6, para. 74. On the principle of freedom of contract in the CISG, see also CISG-AC Opinion No. 16, Exclusion of the CISG under Article 6, Rapporteur: Doctor Lisa Spagnolo, Monash University, Australia. Adopted by the CISG-AC following its 19th meeting in Pretoria, South Africa on 30 May 2014.

<sup>41</sup> See Schwenzer/Hachem, Commentary (n. 10), Art. 74, par. 60.

<sup>42</sup> See note 16 *supra* on “purely potestative condition”.

<sup>43</sup> For overview comments on the principle of reasonableness and extensive doctrinal reference, see Kritzer, A. H. at <<http://cisgw3.law.pace.edu/cisg/text/reason.html#view>> (accessed: 15 January 2015). Specifically mentioned in thirty-seven provisions of the CISG and clearly referred to elsewhere in the Convention, reasonableness is a general principle of the CISG, and one of the most fundamental principles on which the Convention is based. The CISG does not contain a definition of reasonableness, which appears at Article 1:302 of the Principles of European Contract Law, as follows:

“Under these Principles reasonableness is to be judged by what persons acting in good faith and in the same situation as the parties would consider to be reasonable. In particular, in assessing what is reasonable the nature and purpose of the contract, the circumstances of the case and the usages and practices of the trades or professions involved should be taken into account.”

Which is why it is said that such a definition also fits the manner in which this concept is used in the CISG. As a general principle of the CISG, reasonableness has a strong bearing on the proper interpretation of all provisions of the CISG.

<sup>44</sup> See the reported decisions at the UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods (2012 Edition) [hereinafter referred to as « CISG Digest 2012 »], p. 343, para. 6, n. 8 and n. 11, available online at: <http://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf> (accessed on April 27, 2014)

<sup>45</sup> Finland 12 April 2002 Turku Court of Appeal (*Forestry equipment case*) [translation available] [Cite as: <http://cisgw3.law.pace.edu/cases/020412f5.html>], reported at the CISG Digest 2012 (n. 44) p. 343, para. 6, n. 8.

<sup>46</sup> China International Economic and Trade Arbitration Commission, People’s Republic of China, 1 April 1993, Arbitral award No. 75, Unilex, available at <http://www.unilex.info/case.cfm?id=429> (accessed on April 27, 2014), reported at the CISG Digest 2012 (n. 44) p. 343, para. 6, n. 11.

<sup>47</sup> Oberster Gerichtshof, Austria, 7 September 2000, Case No. 8 Ob 22/00v, Unilex, available at <http://www.unilex.info/case.cfm?id=473> (accessed on 15 Jan. 2015).

<sup>48</sup> Amtsgericht Nordhorn, Germany, 14 June 1994, Case No. 3 C 75/94, Unilex, available at <http://www.unilex.info/case.cfm?id=114> (accessed on 15 Jan. 2015).

<sup>49</sup> Court of Appeals of Warsaw, Poland, 20 November 2008, Case No. I ACa 1258/07, Unilex, available at <http://www.unilex.info/case.cfm?id=1721> (accessed on 15 Jan. 2015). CLOUT case 1305.

<sup>50</sup> See Articles 6 and 74 CISG and Schwenzer, Commentary (n. 10), Art. 74, paras. 58, 60. See also Honnold on CISG (n. 8), Art. 74, para. 408.1.

<sup>51</sup> See Article 74 and Schwenzer/Hachem, Commentary (n. 10), Art. 7, para. 35, and Art. 74, para. 3; and Gotanda, Kroll, Mistelis and Viscasillas on CISG (n. 7), Art. 74, paras. 1-5. See also CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002] (see full text of the decision); CLOUT case No. 93 [Internationales Schiedsgericht der

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Bundeskammer der gewerblichen Wirtschaft-Wien, Austria, 15 June 1994] (citing article 74 for general principle within meaning of article 7 (2)), reported at the CISG Digest 2012 (n. 44) p. 343, para. 5, n. 5.

<sup>52</sup> See Schwenger, Commentary (n. 10), Art. 79, paras. 57-58, and Art. 80, para. 2; Atamer, Kroll, Mistelis and Viscasillas on CISG (n. 7), Art. 79, para. 89, 93; and Honnold on CISG (n. 8), Art. 79, para. 424. See also the reported decisions at the CISG Digest 2012 (n. 44), p. 393, para. 23.

<sup>53</sup> For the same reason, an exemption or limitation clause should impact the obligation to pay interest on the refund price set out in Article 84 CISG. In this regard, see Bacher, Commentary (n. 10), Art. 78, para. 1. While the right to interest (Article 78) may be limited or excluded by agreement of the parties (*ius dispositivum*), an arbitral award has stated that it had not been excluded by the parties' confidential agreement containing their intent not to claim from each other damages, fines and penalties concerning contractual performance. The tribunal held that the seller's right to interest on the overdue sum was neither a penalty nor damages, but had an autonomous basis (Art. 78 CISG) under which the creditor is entitled to interest, without prejudice to any claim for damages recoverable under Art. 74 CISG (Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russian Federation, 04 April 1998 (Arbitral award No. 387/95, Unilex, available at <http://www.unilex.info/case.cfm?id=377> (accessed on 15 Jan. 2015)).

<sup>54</sup> See Schwenger, Commentary (n. 10), Art. 79, paras. 57-58, and Art. 80, para. 2; Atamer, Kroll, Mistelis and Viscasillas on CISG (n. 7), Art. 79, para. 89, 93; and Honnold on CISG (n. 8), Art. 79, para. 424. See also the reported decisions at the CISG Digest 2012 (n. 44), p. 393, para. 23.

<sup>55</sup> Schlechtriem & Butler (n. 10), par. 64, p. 61.

<sup>56</sup> See Article 11 CISG and Schlechtriem/Schmidt-Kessel, Commentary (n. 10), Art. 4, para. 29 and Art. 11, par. 4; Viscasillas, Kroll, Mistelis and Viscasillas on CISG (n. 7), Art. 11, paras. 1-10; and Honnold on CISG (n. 8), Art. 11, para. 127.

<sup>57</sup> See comments and cases reported at the CISG Digest 2012 (n. 44), Art. 11, p. 73-76.

<sup>58</sup> Article 96 CISG authorizes a Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing to make a declaration in accordance with Article 12 CISG. Article 12 states that the freedom from form requirement does not apply where any party to a sales contract has its place of business in a Contracting State which has made a declaration under Article 96. In other words, Article 96 reservation excludes the Contracting State's obligation to apply the Convention's freedom of form provisions. Thus, the CISG no longer governs the formal validity of the international sales contract. Currently only 8 out of the 83 CISG Contracting States have made an Article 96 reservation. These countries include: Argentina, Armenia, Belarus, Chile, Hungary, Paraguay, the Russian Federation and Ukraine. For more information on reservations under Articles 95 and 96 CISG, see the CISG-AC Opinion No. 15, Reservations under Articles 95 and 96 CISG, Rapporteur: Professor Doctor Ulrich G. Schroeter, University of Mannheim, Germany. Adopted by the CISG-AC following its 18<sup>th</sup> meeting in Beijing, China on 21 and 22 October 2013.

<sup>59</sup> See Article 11 CISG and Schlechtriem/Schmidt-Kessel, Commentary (n. 10), Art. 11, par. 4, 6, 9.

<sup>60</sup> A warranty is an assurance by a party of the existence of a fact upon which the other party may rely. The intended purpose is to relieve the party of any duty to determine facts independent from the warranty which is a part of the transaction. The seller typically provides a warranty to the buyer. A warranty constitutes a promise to indemnify the other

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party if the warranted fact proves untrue (Glower W. Jones, *Warranties in International Sales: UN Convention on Contracts for the International Sale of Goods Compared to the US Uniform Commercial Code on Sales*, 17 *International Business Lawyer* (1989) p. 497-500). The word "warranty" typically refers to the "express warranty" mentioned in the UCC, which consists of affirmative promises about the quality and features of the goods being sold. These promises also include descriptions of the goods being sold or samples shown to the buyer. In addition to express warranties, the UCC also creates a second kind of warranty, called an "implied warranty", which is effective regardless of whether or not it is specifically mentioned. The implied warranty created by the UCC ended the old rule of 'caveat emptor' ("Let the buyer beware"). The two implied warranties under the UCC are: (i) the warranty of "merchantability" of the goods being sold, and (ii) the warranty that the goods are "fit for a particular purpose." Generally, a seller who wants to disclaim UCC warranties must do so specifically. A general statement that there are "no warranties, express or implied" is usually ineffective. Just how express a disclaimer needs to be depends on the kind of warranty being disclaimed. Section 2-316(2) and (3) of the UCC articulate the requirements a seller must meet to effectively disclaim the implied warranties of merchantability and fitness for particular purpose. Subsection 2 provides, generally, that to be effective, a disclaimer must be conspicuous, and in the case of the warranty of merchantability, it must mention 'merchantability'. Subsection 3 articulates other ways in which the implied warranties can be effectively disclaimed (i.e. – [a] through the use of language like "as is" or "with all faults" which is commonly understood to mean that the buyer assumes all risks related to the quality of the goods; [b] through the buyer's inspection of the goods; and [c] through trade usage). The UCC also requires all disclaimers of implied warranties to be in writing. However, a warranty disclaimer hidden in the fine print of a three-page sales contract will not be enforced because the UCC also requires that a disclaimer be conspicuous. A section of a contract is conspicuous if it clearly stands out from the rest of the contract and draws the eye of the reader (e.g., bold type, different colored type, larger type, or in all capitals). For a distinction between "breach of contract" and "breach of warranties" under the UCC, see Timothy Davis, *UCC Breach of Warranty and Contract Claims: Clarifying the distinction*, *Baylor Law Review* vol. 61:3 (2009) p. 783-817. For a status of the enforceability of disclaimers of implied warranties, see *Cate v. Dover Corp.* 790 S.W.2d 559 (1990) decided by the Texas Supreme Court, available at: [http://www.leagle.com/decision/19901349790SW2d559\\_11296/CATE%20v.%20DOVER%20CORP](http://www.leagle.com/decision/19901349790SW2d559_11296/CATE%20v.%20DOVER%20CORP).

<sup>61</sup> The language of Article 35 CISG closely tracks the UCC provisions of the implied warranty of merchantability and the implied warranty of fitness for a particular purpose. Section 2-314 of the Uniform Commercial Code (UCC) reads as follows:

“§ 2-314. Implied Warranty: Merchantability; Usage of Trade.

(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

- (a) pass without objection in the trade under the contract description; and
- (b) in the case of fungible goods, are of fair average quality within the description; and
- (c) are fit for the ordinary purposes for which such goods are used; and
- (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

- (e) are adequately contained, packaged, and labeled as the agreement may require; and
  - (f) conform to the promise or affirmations of fact made on the container or label if any.
- (3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.”

<sup>62</sup> Section 2-315 of the Uniform Commercial Code (UCC) reads as follows:

“§ 2-315. Implied Warranty: Fitness for Particular Purpose.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.”

<sup>63</sup> Section 2-316 of the American Uniform Commercial Code (UCC) reads as follows:

“§ 2-316. Exclusion or Modification of Warranties.

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (Sections 2-718 and 2-719).”

<sup>64</sup> Contra. In 2008 a U.S. District Court understood that “[t]he validity of the disclaimer cannot be determined by reference to the CISG itself. CISG art 4(a). It is therefore necessary to turn to the forum's choice of law rules.” The Court discussed the validity of a clause contained in a CISG contract concluded between a Canadian buyer and an American seller, which disclaimed all warranties (except that of marketable title) and liability. The clause read as follows: “THE EQUIPMENT BEING SOLD ON AN "AS, WHERE IS" BASIS AND WITH ALL FAULTS. EXCEPT AS SET FORTH HEREIN, THE SELLER MAKES NO REPRESENTATION OR WARRANTY, EITHER EXPRESS OR IMPLIED, AS TO THE CONDITION OF THE EQUIPMENT, INCLUDING WITHOUT LIMITATION ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND EXPRESSLY DISCLAIMS LIABILITY AND SHALL NOT BE

LIABLE FOR LOST PROFITS OR FOR INDIRECT, INCIDENTAL CONSEQUENTIAL OR COMMERCIAL LOSSES OF ANY KIND.”

The Court applied both Alberta and Pennsylvania laws – which, to that end, did not diverge – to consider the following elements of the disclaimer: "(1) the placement of the clause in the document; (2) the size of the disclaimer's print; and (3) whether the disclaimer was highlighted or called to the reader's attention by being in all caps ...." *Id.* Expressions such as "as is" or "with all faults" are approved by statute as language of exclusion. 13 Pa C.S.A. § 2316(c)(1). After examining the final, executed bills of sale, under the standards set forth above, the Court found the disclaimer to be valid. United States 25 July 2008 Federal District Court [Pennsylvania] (*Norfolk Southern Railway Company v. Power Source Supply, Inc.*), available at: <http://cisgw3.law.pace.edu/cases/080725u1.html>.

<sup>65</sup> See, for example, Lookofsky, J. The 1980 United Nations Convention on Contracts for the International Sale of Goods – Articles 11 and 12 No Writing Requirement for CISG Contract; Declaration in Derogation. In J. Herbots (ed.) R. Blanpain (gen. ed.). *International Encyclopaedia of Laws - Contracts*, Suppl. 29 (December 2000) 1-192, at <<http://www.cisg.law.pace.edu/cisg/biblio/loo11.html>> (accessed on 19 Jan. 2015). The author states:

“92. Some legal systems require that (certain) sales contracts be in writing. Dispensing with that kind of 'formal validity' requirement in the international sales context, Article 11 of the CISG provides as follows: (...)

Relation to Formal Requirements Under Domestic Law

In most CISG Contracting States, Article 11 serves to override the formal validity requirements of domestic law. On the hand, it should be noted that the rule does not bar the parties from imposing formal requirements, nor does it necessarily negate certain regulations (and sanctions) in States which require a writing for purposes of administrative control or for enforcement of exchange control laws.

Declarations in Derogation of Article 11

Just as the general rule in Article 11 is that CISG sales contracts need not be in writing, other Convention rules dispense with writing requirements as regards contract formation and contract modification. However, many States still attach great importance to requirements such as these, and in order to make the Convention acceptable for those States, Article 12 of the CISG provides as follows: (...).”

<sup>66</sup> See comments and cases reported at the CISG Digest 2012 (n. 44), Art. 11, p. 73-76. See also the cases reported at UNILEX on Article 11 CISG, at: <http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13356&x=1> (access on Sept. 11, 2015).

<sup>67</sup> See comments to Rule 2 *supra*.

<sup>68</sup> See, e.g., Article 7.1.6 of the 2010 UNIDROIT Principles and the official comments and Commentary on the UNIDROIT Principles (n. 39), p. 762-764.

<sup>69</sup> Fontaine and De Ly on contract clauses (n. 2), p. 384-385. See, for example, Article 1229 of the Italian Civil Code. In some countries, the professional seller is presumed to have acted in bad faith, which affects the validity of clauses limiting liability.

<sup>70</sup> Fontaine and De Ly on contract clauses (n. 2), p. 385. While the laws of Italy, Germany and France preclude the application of the clause in case of gross negligence, the laws of Belgium and Mexico enforce such clauses even in cases of gross negligence.

<sup>71</sup> Fontaine and De Ly on contract clauses (n. 2), p. 385. In the past the English and US courts developed a criterion for the validity assessment of exemption clauses that rendered such clauses unenforceable where they compromised “the very core and

essence of the contract”, which became known as “fundamental breach” or “breach of a fundamental term”. However, this validity requirement has lost its appeal more recently. On this topic, see Fernandes – Cláusulas de Exoneração e de Limitação (n. 2), p. 256-261.

<sup>72</sup> E.g., Article 1229 of the Italian Civil Code.

<sup>73</sup> Fontaine and De Ly on contract clauses (n. 2), p. 386. See, for example, Section 2-316 of the American Uniform Commercial Code, and Section 3 of the 1977 United Kingdom Unfair Contract Terms Act.

<sup>74</sup> Fontaine and De Ly on contract clauses (n. 2), p. 386. See, for example, Article 11 of the Brazilian Civil Code, Article 1474 of the Québec Civil Code, and the 1977 United Kingdom Unfair Contract Terms Act.

<sup>75</sup> Fontaine and De Ly on contract clauses (n. 2), p. 386. Article 1152 of the French Civil Code empowers the judge not only to reduce an excessive penalty clause but also to increase one that would be manifestly insufficient to compensate for the loss.

<sup>76</sup> In this regard, see the 1977 United Kingdom Unfair Contract Terms Act.

<sup>77</sup> German law, for example, expressly prohibits standard terms excluding liability for willful intent and gross negligence, as well as liability for death or injury to body and health caused by the issuer (BGB, Section 309). For more information on the German law of standard terms, see: Zerres, Thomas. *Principles of the German Law on Standard Terms of Contract*, available at: [http://www.jurawelt.com/sunrise/media/mediafiles/14586/German\\_Standard\\_Terms\\_of\\_Contract\\_Thomas\\_Zerres.pdf](http://www.jurawelt.com/sunrise/media/mediafiles/14586/German_Standard_Terms_of_Contract_Thomas_Zerres.pdf) (access on 5 Sept. 2015).

<sup>78</sup> Article 7.1.6 of the 2010 UNIDROIT Principles.

<sup>79</sup> [79] See § 2-719 of the UCC (n. 143). Under Washington law, for example, a limitation of liability clause is enforceable unless it is unconscionable. There are two types of unconscionability in contracts in Washington: (1) substantive unconscionability, involving those cases where a clause in the contract is "shocking to the conscience." and (2) procedural unconscionability, which relates to impropriety during the process of forming the contract. ... With regard to "substantive unconscionability," the Washington Supreme Court stated: "As an initial matter, it is questionable whether clauses excluding consequential damages in a commercial contract can ever be substantively unconscionable." *Mortenson*. 140 Wn.2d at 586. The Court in *Mortenson* cited *Tacoma Boatbuilding Co. v. Delta Fishing Co.*, 28 U.C.C. Rep. Serv. 26, 35 (W.D. Wash 1980) where the District Court stated in rejecting an argument that the limitation clause therein was unconscionable: 'Comment 3 to [U.C.C.] § 2-719 generally approves consequential damage exclusions as "merely an allocation of unknown or undeterminable risks.'" Thus, the presence of latent defects in the goods cannot render these clauses unconscionable. The need for certainty in risk-allocation is especially compelling where, as here, the goods are experimental and their performance by nature less predictable.

With regard to "procedural unconscionability" in commercial transactions, the concern is that there is no "unfair surprise" to the detriment of one of the parties. *Puget Sound Financial*, 146 Wn.2d at 439-41. The Washington Supreme Court uses a "totality of the circumstances" approach to making the determination of procedural unconscionability. *Mortenson*, 140 Wn.2d at 588. There is a non-exclusive list of factors for assessing the totality of the circumstances, which include: (1) the conspicuousness of the clause in the agreement, which includes whether the important terms were "hidden in a maze of fine print"; (2) the manner in which the parties entered into the contract, which includes whether the parties had reasonable opportunity to understand the terms of the contract; (3) the custom and usage of the trade; and (4) the course of dealing between the parties.



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*Puget Sound Financial*, 146 Wn.2d at 442-44. Source: United States 13 April 2006 Federal District Court [State of Washington] (*Barbara Berry, S.A. de C.V. v. Ken M. Spooner Farms, Inc.*), at <<http://cisgw3.law.pace.edu/cases/060413u1.html>>.

<sup>80</sup> See Article 4 CISG and Schwenzler/Hachem, Commentary (n. 10), Art. 4, par. 43; Djordjevic, Kroll, Mistelis and Viscasillas on CISG (n. 7), Art. 4, para. 26 (same reasoning applies to exemption and limitation of liability clauses); and Honnold on CISG (n. 8), Art. 4, para. 64.

<sup>81</sup> Determining what are ‘validity issues’ under the Convention has been recognized as ‘complicated and uncertain’ due to the intricate language of Article 4 CISG (See, e.g. Schlechtriem & Butler (n. 10), par. 36, p. 34). According to Schwenzler/Hachem – Commentary (n. 10), Art. 4, par. 31 –, the term “validity” must be interpreted autonomously, using a functional approach in deciding from the perspective of the Convention whether it intends to govern the question in dispute. Matters of validity are those where a contract is void *ab initio* (e.g., “initial impossibility”) by operation of law or rendered so either retroactively by a legal act of the State or of the parties, such as rescission from mistake or ‘withdrawal’ or ‘revocation’ of consent under special provisions, or by a ‘resolutive’ condition or a denial of approval of relevant authorities. On the other hand, a novel two-step approach based instead on the requirements of internationality and uniform interpretation set out in Article 7(1) might be useful to delineate the Convention’s reach. According to this approach, a domestic law rule is displaced by the Convention if (1) it is triggered by a factual situation to which the CISG also applies (the ‘factual criterion’) and (2) it pertains to a matter that is also regulated by the CISG (the ‘legal criterion’). Only if both criteria are cumulatively fulfilled will the domestic law provision be displaced in favor of the Convention. On this novel approach, see Schroeter, U. G. The Validity of International Sales Contracts: The Irrelevance of the ‘Validity Exception’ in Article 4 Vienna Sales Convention and a Novel Approach to Determining the Convention’s Scope, in : Schwenzler, I. and Spagnolo, L. (eds.), *Boundaries and Intersections: The 5th Annual MAA Schlechtriem CISG Conference*, The Hague: Eleven International Publishing (2014), p. 95-117.

<sup>82</sup> Where the otherwise applicable law or rules of law provide for restrictive or *contra preferentem* interpretation of the exemption or limitation clause contained in standard terms, CISG-AC Opinion No. 13 on Inclusion of Standard Terms under the CISG (n. 21) must be taken into consideration.

<sup>83</sup> See CLOUT case No. 318 [Oberlandesgericht Celle, Germany, 2 September 1998] (term in seller’s general conditions limiting damages not validly incorporated into contract) (see full text of the decision); CLOUT case No. 345 [Landgericht Heilbronn, Germany, 15 September 1997] (validity of standard term excluding liability determined by domestic law, but reference in domestic law to non-mandatory rule replaced by reference to equivalent Convention provision), reported at the CISG Digest 2012 (n. 44), Art. 74, p. 346, para. 4.

<sup>84</sup> CLOUT case No. 345 [Landgericht Heilbronn, Germany, 15 September 1997] (validity of standard term excluding liability determined by domestic law, but reference in domestic law to non-mandatory rule replaced by reference to equivalent Convention provision), reported at the CISG Digest 2012 (n. 44), Art. 74, p. 346, para. 4.

<sup>85</sup> United States 13 April 2006 Federal District Court [State of Washington] (*Barbara Berry, S.A. de C.V. v. Ken M. Spooner Farms, Inc.*), at <<http://cisgw3.law.pace.edu/cases/060413u1.html>>. The court stated, *inter alia*, that “the CISG does not govern the enforceability of the exclusionary clause pursuant to an express provision in the CISG. The CISG provides at Article 4 in pertinent part ....

Whether a clause in a contract is valid and enforceable is decided under domestic law, not the CISG. ... In Washington, the consistent rule has been that the exchange of purchase orders or invoices between merchants forms a written contract, and the terms contained therein are enforceable. ... A limitation of liability clause is enforceable unless it is unconscionable.” See also United States 25 July 2008 Federal District Court [Pennsylvania] (*Norfolk Southern Railway Company v. Power Source Supply, Inc.*) (n. 65), available at: <http://cisgw3.law.pace.edu/cases/080725u1.html>.

<sup>86</sup> See Article 1 CISG and Schwenger/Hachem, Commentary (n. 10), Introduction to Articles 1-6, par. 3, and Art. 1, par. 35.

<sup>87</sup> See note 80 supra. (Washington law on the validity of limitation clauses)

<sup>88</sup> See Article 7.1.6 of the UNIDROIT Principles and its official comments, para. 2.

<sup>89</sup> See Article 7(1) CISG and Schwenger/Hachem, Commentary (n. 10), Art. 7, paras. 7-9; Viscasillas, Kroll, Mistelis and Viscasillas on CISG (n. 7), Art. 7, paras. 18-20; and Honnold on CISG (n. 8), Art. 7, paras. 85-93.

<sup>90</sup> According to Schwenger/Hachem, Commentary (n. 10), Art. 7, par. 9, n. 24, “examples include the notions of ‘stocks, shares, investment securities’ and ‘ships’ in Article 2 CISG, as well as the foreseeability rule in Article 74, sentence 2 which has its role model in the English case *Hadley v. Baxendale* [1854] 9 Ex 341.

<sup>91</sup> See Article 7 CISG and Schwenger/Hachem, Commentary (n. 10), Art. 7, paras. 6, 16 and 17. In favor of the direct application of the principle of good faith to the formation and performance of the contract, see Viscasillas, Kroll, Mistelis and Viscasillas on CISG (n. 7), Art. 7, paras. 24-30. As to case law, see the UNILEX database, Article 7, “good faith as a general principle of the Convention”. In particular, see the judgment where the Belgium’s Hof van Beroep in Gent considered the good faith principle in the context of the CISG to establish the binding nature of the contract. Decision of 15.05.2002 available at: <http://www.unilex.info/case.cfm?id=940>. See also the 2013 German Oberlandesgericht Naumburg’s decision that applied the principle of good faith under the CISG to consider that the mere reference to standard terms did not amount to their incorporation into a sales contract. It affirmed that the user was required under the principle of good faith in international trade (Art. 7(1) CISG) to submit the relevant document or make such terms accessible in another way to the recipient. Case 12 U 153/12, 13.2.2013, available at: <http://www.unilex.info/case.cfm?id=1697>.

<sup>92</sup> For overview comments on the principle of *reasonableness* and extensive doctrinal reference, see Kritzer, A. H. at <<http://cisgw3.law.pace.edu/cisg/text/reason.html#view>> (accessed: 15 January 2015). Among the thirty-seven CISG provisions that mention reasonableness and those others that clearly refer to it, a definition of the principle is nowhere to be found, which is why the definition in Article 1:302 PECL is said to fit the manner in which this concept is used in the CISG. The relevant PECL provision reads as follows: “Under these Principles reasonableness is to be judged by what persons acting in good faith and in the same situation as the parties would consider to be reasonable. In particular, in assessing what is reasonable the nature and purpose of the contract, the circumstances of the case and the usages and practices of the trades or professions involved should be taken into account.”

<sup>93</sup> See e.g. CISG-AC Opinion No. 5, The buyer's right to avoid the contract in case of non-conforming goods or documents 7 May 2005, Badenweiler (Germany). Rapporteur: Professor Dr. Ingeborg Schwenger, LL.M., Professor of Private Law, University of Basel; CISG-AC Opinion No. 6, Calculation of Damages under CISG Article 74 (n. 8); CISG-AC Opinion No. 8, Calculation of Damages under CISG Articles 75 and 76. Rapporteur:

Professor John Y. Gotanda, Villanova University School of Law, Villanova, Pennsylvania, USA. Adopted by the CISG-AC following its 12<sup>th</sup> meeting in Tokyo, Japan, on 15 November 2008; CISG-AC Opinion No. 9, Consequences of Avoidance of the Contract. Rapporteur: Professor Michael Bridge, London School of Economics, London, United Kingdom. Adopted by the CISG-AC following its 12<sup>th</sup> meeting in Tokyo, Japan, on 15 November 2008; CISG-AC Opinion No. 10, Agreed Sums Payable upon Breach of an Obligation in CISG Contracts (n. 27); and CISG-AC Opinion No. 13 on Inclusion of Standard Terms under the CISG (n. 21).

<sup>94</sup> See Article 7 CISG and Schwenzler/Hachem, Commentary (n. 10), Art. 7, par. 32; and Magnus, Ulrich. General Principles of UN-Sales Law, in *Rabels Zeitschrift for foreign and international Private Law - Hein Kötz in honor of his 60th Birthday*, Part I, volume 59 (1995) Issue 3-4 (October), Hamburg: Max-Planck-Institute for foreign and international Private Law, available online at: <http://www.cisg.law.pace.edu/cisg/biblio/magnus.html> (accessed on April 27, 2014).

“[T]he need to promote ... the observance of good faith in international trade” set out in Article 7(1) CISG, read in conjunction with the gap-filling rule of Article 7(2), which refers unsettled matters to the general principles on which the CISG is based, states at least a general prohibition against the abuse of rights (and a prohibition against contradictory behavior - *venire contra factum proprium*).

<sup>95</sup> See Kritzer, A. H. at <http://cisgw3.law.pace.edu/cisg/text/reason.html#view> (accessed: 15 January 2015).

<sup>96</sup> See Article 7 CISG and Schwenzler/Hachem, Commentary (n. 10), Art. 7, para. 8; and Viscasillas, Kroll, Mistelis and Viscasillas on CISG (n. 7), Art. 7, paras. 16-17.

<sup>97</sup> See Schlechtriem & Butler (n. 10), par. 49, p. 53.

<sup>98</sup> The author of this Opinion would like to thank Professor Claude Witz for his valuable comments and suggestions in respect of this topic.

<sup>99</sup> See, e.g., Cour de Cassation, Chambre civile 1, 20 décembre 1998, n° 87-16369 (delivery of kiwi plants of a different kind).

<sup>100</sup> See, e.g., Cour de Cassation, Chambre civile 1, 24 février 1993, D. 1993.IR.78, available at

<https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007028954> (access on 15.4.2016). In regard to exemption and limitation of liability clauses under French law, see Larroumet (n. 2), paras. 694-695. The new Article 1170 of the French Civil Code reads as follows: “*Toute clause qui prive de sa substance l’obligation essentielle du débiteur est réputée non écrite*”. This provision codifies the famous *Chronopost* (Cass. com., 22 octobre 1996, n° 93-18632) and *Faurecia II* (Cass. com., 29 juin 2010, n° 09-11841) cases.

<sup>101</sup> Article 1171 of the Civil Code now reads as follows : « *Dans un contrat adhésion, toute clause qui crée un déséquilibre significatif entre les droits et obligations des parties au contrat est réputée non écrite. L’appréciation du déséquilibre significatif ne porte ni sur l’objet principal du contrat ni sur l’adéquation du prix à la prestation.* ».

<sup>102</sup> For more information on this topic, see : Witz, Claude. « *Forces et faiblesses du droit interne français de la vente par rapport à la Convention de Vienne* », in CREDA et Philippe Delebecque (dir.), *L’entreprise et la vente internationale de marchandises*. Brussels : Larcier , 2016, pp. 102 et. ss.

<sup>103</sup> See Fontaine and De Ly on contract clauses (n. 2), p. 385.

<sup>104</sup> *Idem*, p.386. However, exemption and limitation of liability for damages caused by third parties, even in the event of a grossly negligent conduct, may be valid under a combination of Articles 276 and 278 of the BGB. On this subject, see Fernandes – Cláusulas de Exoneração e de Limitação (n. 2), p. 383.

<sup>105</sup> See, for example, Sections 305 to 310 of the German Civil Code (BGB), which govern standard contract terms. Those provisions have replaced the Standard Contract Terms Act (Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen, AGB-Gesetz). For an English translation, see: <http://www.iuscomp.org/gla/statutes/BGB.htm#b2s2> (accessed on April 27, 2014). For more information on the German law of standard terms, see: Zerres, Thomas. *Principles of the German Law on Standard Terms of Contract*, available at: [http://www.jurawelt.com/sunrise/media/mediafiles/14586/German\\_Standard\\_Terms\\_of\\_Contract\\_Thomas\\_Zerres.pdf](http://www.jurawelt.com/sunrise/media/mediafiles/14586/German_Standard_Terms_of_Contract_Thomas_Zerres.pdf) (access on 5 Sept. 2015).

<sup>106</sup> Vogenauer, S., Commentary on the UNIDROIT Principles (n. 39), p. 26.

<sup>107</sup> Italian Civil Code, Art. 1229 Clausole di esonero da responsabilità

“E' nullo qualsiasi patto che esclude o limita preventivamente la responsabilità del debitore per dolo o per colpa grave (1490, 1579, 1681, 1694, 1713, 1784, 1838, 1900).

E' nullo (1421 e seguenti) altresì qualsiasi patto preventivo di esonero o di limitazione di responsabilità per i casi in cui il fatto del debitore o dei suoi ausiliari (1580) costituisca violazione di obblighi derivanti da norme di ordine pubblico (prel. 31).”

On this subject, see Fernandes – Cláusulas de Exoneração e de Limitação (n. 2), p. 384.

<sup>108</sup> Italian Civil Code, Art. 1341 Condizioni generali di contratto

“Le condizioni generali di contratto predisposte da uno dei contraenti sono efficaci nei confronti dell'altro, se al momento della conclusione del contratto questi le ha conosciute o avrebbe dovuto conoscerle usando l'ordinaria diligenza (1370, 2211).

In ogni caso non hanno effetto, se non sono specificamente approvate per iscritto, le condizioni che stabiliscono, a favore di colui che le ha predisposte, limitazioni di responsabilità, (1229), facoltà di recedere dal contratto (1373) o di sospenderne l'esecuzione, ovvero sanciscono a carico dell'altro contraente decadenze (2964 e seguenti), limitazioni alla facoltà di opporre eccezioni (1462), restrizioni alla libertà contrattuale nei rapporti coi terzi (1379, 2557, 2596), tacita proroga o rinnovazione del contratto, clausole compromissorie (Cod. Proc. Civ. 808) o deroghe (Cod. Proc. Civ. 6) alla competenza dell'autorità giudiziaria.”

<sup>109</sup> Swiss Code of Obligations, Article 100

“1 Any agreement purporting to exclude liability for unlawful intent or gross negligence in advance is void.

2 At the discretion of the court, an advance exclusion of liability for minor negligence may be deemed void provided the party excluding liability was in the other party's service at the time the waiver was made or the liability arises in connection with commercial activities conducted under official licence.

3 The specific provisions governing insurance policies are unaffected.”

On this subject see Fontaine and De Ly on contract clauses (n. 2), p. 383.

<sup>110</sup> Artículo 1102

“La responsabilidad procedente del dolo es exigible en todas las obligaciones. La renuncia de la acción para hacerla efectiva es nula.”

On this subject, see Fernandes – Cláusulas de Exoneração e de Limitação (n. 2), p. 386.

<sup>111</sup> Turkish Code of Obligations (Law No. 6098 of January 11, 2011). See also: Schwimann, Ceyda Akbal. *The Turkish Code of Obligations*, available at: <http://www.specht-partner.com/wp-content/uploads/2012/11/SpechtBoehm-The-Turkish-Code-of-Obligations.pdf> (access on 10.11.2015).

<sup>112</sup> Schwimann, Ceyda Akbal. *The Turkish Code of Obligations* (n. 117), p. 3.

<sup>113</sup> E.g. Article 51, I, of the Consumer Protection Code, which expressly forbids this type of clauses in consumer contracts.

<sup>114</sup> In this regard see Azevedo, Antonio Junqueira de Azevedo – Cláusula cruzada de não indenizar (*cross waiver of liability*) (n. 2) and Fernandes – Cláusulas de Exoneração e de Limitação (n. 2), Ch. 5.

<sup>115</sup> The reasons for subjecting exemption and limitation of liability clauses to strict construction are twofold: first, these clauses derogate from the legal liability regime set out in the Brazilian Civil Code; second, in this type of agreement, the obligee relinquishes the right to full compensation in case of breach. In this regard, see Fernandes – Cláusulas de Exoneração e de Limitação (n. 2), p. 343.

<sup>116</sup> The relevant provision of the Colombian Civil Code reads as follows:

“ARTICULO 1604. RESPONSABILIDAD DEL DEUDOR. El deudor no es responsable sino de la culpa lata en los contratos que por su naturaleza solo son útiles al acreedor; es responsable de la leve en los contratos que se hacen para beneficio recíproco de las partes; y de la levisima en los contratos en que el deudor es el único que reporta beneficio.

El deudor no es responsable del caso fortuito, a menos que se haya constituido en mora (siendo el caso fortuito de aquellos que no hubieran dañado a la cosa debida, si hubiese sido entregado al acreedor), o que el caso fortuito haya sobrevenido por su culpa.

La prueba de la diligencia o cuidado incumbe al que ha debido emplearlo; la prueba del caso fortuito al que lo alega.

Todo lo cual, sin embargo, se entiende sin perjuicio de las disposiciones especiales de las leyes, y de las estipulaciones expresas de las partes.”

<sup>117</sup> Colombia Constitutional Court, case C-1008, Enrique Javier Correa de la Hoz et al., 09.12.2010, available at: UNILEX <http://www.unilex.info/case.cfm?id=1591> (accessed on April 27, 2014).

In a challenge of the constitutionality of Article 1616 of the Colombian Civil Code according to which, except in case of willful misconduct or gross negligence, a party in breach is liable on for the harm it had foreseen or should have foreseen as a consequence of its non-performance, on the ground that such limitation violates, among others, the parties' fundamental right to full compensation, the Constitutional Court rejected the claim. In so doing the Court pointed out that not only was the provision in question neither irrational or arbitrary but was inspired by basic criteria of justice and contractual fairness, and moreover was in conformity with important international instruments such as the Vienna Sales Convention (Article 74) and the UNIDROIT Principles (Article 7.4.4).

<sup>118</sup> Gual Acosta, José Manuel – Cláusulas restrictivas de responsabilidad – Observaciones al régimen vigente y propuestas de reforma, Univ. Sergio Arboleda. Bogotá (Colombia) 8 (15): 15-34, julio-diciembre de 2008, available online at: <http://www.usergioarboleda.edu.co/civilizar/revista15/cLAUSULAS%20RESTRICTIVAS.pdf> (accessed on April 27, 2014).

<sup>119</sup> Law no. 26.994 of October 8, 1994. For the influence of the CISG in the new Civil and Commercial Code of Argentina, see Garro, Alejandro and Zuppi, Alberto L.. *The New Civil and Commercial Code of Argentina (2015) and the Vienna Convention on Contracts for the Sale of Goods*, available at [http://www.sbm.com.ar/assets/pdf/prensa/nuevo\\_codigo/final\\_the\\_new\\_CCiv\\_com\\_Argentina\\_and\\_the\\_cisg4.pdf](http://www.sbm.com.ar/assets/pdf/prensa/nuevo_codigo/final_the_new_CCiv_com_Argentina_and_the_cisg4.pdf) (access on Sept. 5, 2015).

<sup>120</sup> Article 1743 of the new Civil and Commercial Code reads as follows:

“ARTICULO 1743.- Dispensa anticipada de la responsabilidad. Son inválidas las cláusulas que eximen o limitan la obligación de indemnizar cuando afectan derechos indisponibles, atentan contra la buena fe, las buenas costumbres o leyes imperativas, o

son abusivas. Son también inválidas si liberan anticipadamente, en forma total o parcial, del daño sufrido por dolo del deudor o de las personas por las cuales debe responder. »

<sup>121</sup> Article 421 of the Russian Civil Code reads as follows:

“Article 421. The Freedom of the Contract

1. The citizens and the legal entities shall be free to conclude contracts. Compulsion to conclude contracts shall be inadmissible, with the exception of the cases, when the duty to conclude the contract has been stipulated by the present Code, by the law or by a voluntarily assumed obligation.

2. The parties shall have the right to conclude a contract, both stipulated and unstipulated by the law or by the other legal acts.

3. The parties shall have the right to conclude a contract, in which are contained the elements of different contracts, stipulated by the law or by the other legal acts (the mixed contract). Toward the relationships between the parties in the mixed contract shall be applied in the corresponding parts the rules on the contracts, whose elements are contained in the mixed contract, unless otherwise following from the agreement between the parties or from the substance of the mixed contract.

4. The contract terms (provisions) shall be defined at the discretion of the parties, with the exception of the cases, when the content of the corresponding term (provision) has been stipulated by the law or by the other legal acts (Article 422). In the cases, when the contract provision has been stipulated by the norm, applied so far as it has not been otherwise stipulated by the agreement between the parties (the dispositive norm), the parties may by their own agreement exclude its application, or may introduce the provision, distinct from that, which has been stipulated by it. In the absence of such an agreement, the contract provision shall be defined by the dispositive norm.”

<sup>122</sup> Article 400 of the Russian Civil Code reads as follows:

“Article 400. Limitation of the Scope of Liability by Obligations

1. By the individual kinds of obligations and by those obligations, which are related to a definite type of activity, the right to the full compensation of the losses may be limited by the law (the limited responsibility).

2. The agreement on limiting the scope of the debtor's responsibility by the contract of affiliation or by another kind of contract, in which the creditor is the citizen, coming out in the capacity of the consumer, shall be insignificant, if the scope of responsibility for the given kind of obligations or for the given violation has been defined by the law and if the agreement has been concluded before the setting in of the circumstances, entailing the responsibility for the non-discharge or for an improper discharge of the obligation.”

<sup>123</sup> Articles 401 and 402 of the Russian Civil Code reads as follows:

“Article 401. The Grounds of Responsibility for the Violation of the Obligation

1. The person, who has not discharged the obligation or who has discharged it in an improper way, shall bear responsibility for this, if it has happened through his fault (an ill intention or carelessness on his part), with the exception of the cases, when the other grounds of the responsibility have been stipulated by the law or by the contract. The person shall be recognized as not guilty, if, taking into account the extent of the care and caution, which has been expected from him in the face of the nature and the terms of the circulation, he has taken all the necessary measures for properly discharging the obligation.

2. The absence of the guilt shall be proven by the person, who has violated the obligation.

3. Unless otherwise stipulated by the law or by the contract, the person, who has failed to discharge, or has discharged in an improper way, the obligation, while performing the business activity, shall bear responsibility, unless he proves that the proper discharge has

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been impossible because of a force-majeure, i.e., because of the extraordinary circumstances, which it was impossible to avert under the given conditions. To such kind of circumstances shall not be referred, in particular, the violations of obligations on the part of the debtor's counter-agents, or the absence on the market of commodities, indispensable for the discharge, or the absence of the necessary means at the debtor's disposal.

4. An agreement on eliminating or limiting the liability for an intentional violation of the obligation, concluded at an earlier date, shall be insignificant.”

“Article 402. The Debtor's Responsibility for His Employees

The actions of the debtor's employees, involved in the discharge of his obligation, shall be regarded as those of the debtor himself. The debtor shall be answerable for these actions, if they have caused the non-discharge or an improper discharge of the obligation.”

(Available at <http://www.russian-civil-code.com/PartI/SectionIII/Subsection1/Chapter25.html>)

<sup>124</sup> Articles 454 to 538 of the Russian Civil Code.

<sup>125</sup> Articles 461 of the Russian Civil Code reads as follows:

“Article 461. The Liability of the Seller in Case of the Withdrawal of Goods from the Buyer

1. If goods are withdrawal from the buyer by third persons on the grounds that arose before the execution of the contract of sale, the seller shall be obliged to compensate the buyer's losses, unless he proves that the buyer knew or should have known about these grounds.

2. The agreement of the parties thereto about the release of the buyer of the liability in case third persons reclaim the acquired goods from the buyer or about its restriction shall be null and void.”

(Available at <http://www.russian-civil-code.com/PartI/SectionIII/Subsection1/Chapter30.html>)

<sup>126</sup> An English version of the 1999 People's Republic of China Contract Law may be found at [http://www.npc.gov.cn/englishnpc/Law/2007-12/11/content\\_1383564.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/11/content_1383564.htm) (accessed on April 17, 2014). For an overview of the PRC Contract Law see Zhang, Yuqing and Huang, Danhan - The New Contract Law in the People's Republic of China and the UNIDROIT Principles of International Commercial Contracts : A Brief Comparison – *Revue de Droit Uniforme / Uniform Law Review*, Rome: UNIDROIT, 2000-3, p. 429-440.

<sup>127</sup> The Supreme People's Court Interpretation clarifies that this obligation of alerting and explanation is satisfied if the party who provides the standard clauses uses scripture, symbols, signs, or other means that sufficiently draw the other party's attention to the limitation or exclusion clause. The party using standard terms bears the burden of proving that it has fulfilled this obligation of alerting and explanation. The Interpretation provides that, if a party fails to comply with the obligation of alerting and explanation, the other party may petition a people's court to void the relevant clause. The Supreme People's Court has rendered two general (and binding) interpretations since the enactment of the 1999 PRC Contract Law.

<sup>128</sup> The Japanese Civil Code was enacted in 1896. It was influenced not only by German and French law, but also by English law (see, e.g., the foreseeability rule on Art. 416). While partial amendments on the guarantee system were legislated along with modernization of the language of the Civil Code in 2004, the contents of the law of obligations which are mainly compiled in the Book III remain basically intact. Ministry

of Justice, Japan. Civil Code Reform (Law of Obligations), available at: [http://www.moj.go.jp/ENGLISH/ccr/CCR\\_00001.html](http://www.moj.go.jp/ENGLISH/ccr/CCR_00001.html) (access on 12 Sept. 2015). For accounts of the reform process, see Kamo, Akira (2010). "Crystallization, Unification, or Differentiation? The Japanese Civil Code (Law of Obligations) Reform Commission and Basic Reform Policy (Draft Proposals)." *Columbia Journal of Asian Law* 24: 171-212; Uchida, Takashi (2011). "Contract Law Reform in Japan and the UNIDROIT Principles." *Uniform Law Review* 2011: 705-717, available at : <http://www.unidroit.org/english/publications/review/articles/2011-3/705-717-uchida.pdf>; Ishikawa, Hiroyasu (2013). "Codification, Decodification, and Recodification of the Japanese Civil Code." *University of Tokyo Journal of Law and Politics* 10: 61-80; Sono, Hiroo (2014). "Integrating Consumer Law into the Civil Code: A Japanese Attempt at Re-Codification" in Keyes, Mary and Therese Wilson eds. *Codifying Contract Law: International and Consumer Law Aspects*, Ashgate: 107-129; and Kozuka, Souichirou and Luke Nottage (2014), "Policy and Politics in Contract Law Reform in Japan" in Adams, Maurice and Dirk Heirbaut eds., *The Method of Culture of Comparative Law*, Hart: 235-253. The author of this Opinion would like to thank Professor Hiroo Sono for his valuable comments and suggestions in respect of this topic.

<sup>129</sup> For an English translation of the 1896 Japanese Civil Code see: <http://www.moj.go.jp/content/000056024.pdf> (access on 12 Sept. 2015).

<sup>130</sup> On this topic see Okino, Masami (2012). "Recent Developments in Consumer Protection in Japan", *UT Soft Law Review* 4: 10-18, available at : <http://www.gcoe.ju-tokyo.ac.jp/en/publications/UTsoftlaw4.pdf>; Sono, Hiroo (2012). "Private Enforcement Of Consumer Law: A Sketch Of The Japanese Landscape" *Hokkaido Journal of New Global Law and Policy* 16: 63-80, available at : [http://lex.juris.hokudai.ac.jp/gcoe/journal/LPG\\_vol16/16\\_4.pdf](http://lex.juris.hokudai.ac.jp/gcoe/journal/LPG_vol16/16_4.pdf); and Sono, Hiroo (2014). "Integrating Consumer Law into the Civil Code: A Japanese Attempt at Re-Codification" in Keyes, Mary and Therese Wilson eds. *Codifying Contract Law: International and Consumer Law Aspects*, Ashgate: 107-129. More generally, see Karaiskos, Antonio (2010). "Regulation of Unfair Contract Terms in Japan", *Waseda Bulletin of Comparative Law* vol. 28: 13-44, available at: <https://www.waseda.jp/flaw/icl/assets/uploads/2014/05/A02859211-00-000280013.pdf> (access on 12 Sept. 2015).

<sup>131</sup> The relevant provision of the Civil Act reads as follows:

"Article 105 (Optional Provisions)

If the parties to a juristic act have declared an intention which differs from any provisions of Acts or subordinate statutes, which are not concerned with good morals or other social order, such intention shall prevail."

The author of this Opinion would like to thank H. E. Chang-ho Chung, Judge of the International Criminal Court for his valuable comments and suggestions in respect of this topic.

<sup>132</sup> See, for example: Act on the Regulation of Terms and Conditions

"Article 7 (Prohibition on Exemption Clause)

A clause in terms and conditions concerning the liability of contracting parties that falls under any of the following subparagraphs shall be null and void:

A clause which exempts an enterpriser from liability for intentional or gross negligence on the part of the enterpriser, his/her agents, or his/her employees."

See also: Commercial Act

"Article 659 (Reasons for Insurer's Non-liability)



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"If a peril insured against has occurred due to bad faith or gross negligence of a policyholder, the insured or beneficiary, the insurer is not liable to pay the insured amount."

<sup>133</sup> Catarina af Sandeberg. "Exemption of Liability – Where to Draw the Line", Stockholm Institute for Scandinavian Law 1957-2009 pp. 279-291, available at: <http://www.scandinavianlaw.se/pdf/45-16.pdf> (access on 14 April 2016).

<sup>134</sup> See Farnsworth on Contracts (n. 2), para. 4.26, in which the author states that "a number of cases support discharge of a duty to pay damages for partial breach of contract by renunciation, written or oral, by the obligee on acceptance from the obligor of some performance under the contract" and para. 9.1. See also Yates on exclusion clauses (n. 2), p. 197 and Lawson on exclusion clauses (n. 2).

<sup>135</sup> The doctrine of fundamental breach started with a 1956 judgment of the English Court of Appeal. The Supreme Court of Canada in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)* (2010) described the doctrine as follows:

"... where the defendant had so egregiously breached the contract so as to deny the plaintiff substantially the whole of its benefit ... the innocent party was excused from further performance but the defendant could still be held liable for the consequences of its 'fundamental breach' even if the parties had excluded liability by clear and express language".

<sup>136</sup> For the language contained in § 2-316 of the UCC (EXCLUSION OR MODIFICATION OF WARRANTIES), see n. 64 supra. § 2-719 of the UCC reads as follows:

"§ 2-719. CONTRACTUAL MODIFICATION OR LIMITATION OF REMEDY.

(1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not."

<sup>137</sup> See Farnsworth on Contracts (n. 2), para. 4.28. The provision of the UCC read as follows:

"§ 2-302. UNCONSCIONABLE CONTRACT OR CLAUSE.

(1) If the court as a matter of law finds the contractor any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contractor any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination."

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<sup>138</sup> For the language of § 2-314 of the UCC (IMPLIED WARRANTY: MERCHANTABILITY; USAGE OF TRADE), see n. 62 *supra*.

<sup>139</sup> For the language of § 2-315 of the UCC (IMPLIED WARRANTY: FITNESS FOR PARTICULAR PURPOSE), see n. 63 *supra*.

<sup>140</sup> For the language of § 2-316 of the UCC (EXCLUSION OR MODIFICATION OF WARRANTIES), see n. 64 *supra*.

<sup>141</sup> The Unfair Contract Terms Act 1977 is an Act of Parliament of the United Kingdom that regulates contracts by restricting the operation and legality of some contract terms. It extends to nearly all forms of contract and one of its most important functions is limiting the applicability of disclaimers of liability. The terms extend to both actual contract terms and notices that are seen to constitute a contractual obligation. The Act renders terms excluding or limiting liability ineffective or subject to reasonableness, depending on the nature of the obligation purported to be excluded and whether the party purporting to exclude or limit business liability is acting against a consumer. It is normally used in conjunction with the Unfair Terms in Consumer Contracts Regulations 1999, as well as the Sale of Goods Act 1979 and the Supply of Goods and Services Act 1982.

<sup>142</sup> The five guidelines to interpreting "reasonableness" laid down in Schedule 2 to UCTA are, in summary:

- the relative strengths of the parties' bargaining positions;
- whether the customer received any inducement to accept the term;
- whether the customer knew or should have known that the term was included;
- in the case of a term excluding liability if a condition is not complied with, the likelihood of compliance with that condition at the time the contract was made; and
- whether the goods were a special order.

<sup>143</sup> That is, where the clause (a) excludes liability for breach of contract; or (b) claims to permit a contractual performance substantially different from what is expected; or (c) in respect of the whole or any part of a contractual obligation, claims to allow no performance at all (e.g. if a condition precedent is not satisfied); unless in each case the clause satisfies the reasonableness test.

<sup>144</sup> For example, a seller who is unable to pass good title should therefore agree with the buyer to transfer only such title as it has, rather than purporting to transfer good title then trying to exclude liability for the breach. The Sale of Goods Act 1979 (as amended by the Sale and Supply of Goods Act 1994) implies warranties as to the quality of goods into contracts for the sale of goods. Similar terms are implied into hire-purchase contracts by the Supply of Goods (Implied Terms) Act 1973. Under section 6(2) of UCTA, liability for breach of these implied terms cannot be excluded as against a consumer. It is, however, possible to exclude or restrict liability for breach against other persons, but only in so far as the clause in question satisfies the requirement of reasonableness. It is likely to be reasonable if the buyer is given the chance to inspect the goods or to provide input into their design and/or manufacture.

<sup>145</sup> Supreme Court of Canada. *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)* (2010). The court in *Tercon* did not however set out what the unconscionability test should be. In *Titus v. William F. Cooke Enterprises Inc.* (2007), MacPherson J. adopted the four-part test applied in an earlier Alberta Court of Appeal decision:

1. a grossly unfair and improvident transaction;

2. the victim's lack of independent legal advice or other suitable advice;
3. an overwhelming imbalance in bargaining power caused by victim's ignorance of business, illiteracy, ignorance or the language of the bargain, blindness, deafness, illness, senility, or similar disability; and
4. the other party's knowingly taking advantage of this vulnerability.

<sup>146</sup> *Darlington Futures Ltd v. Delco Australia Pty Ltd* (1986) 161 CLR 500, available at: <http://www.austlii.edu.au/au/cases/cth/HCA/1986/82.html> (access on 15 April 2016).

<sup>147</sup> Quebec Civil Code, Article 1474

A person may not exclude or limit his liability for material injury caused to another through an intentional or gross fault; a gross fault is a fault which shows gross recklessness, gross carelessness or gross negligence.

He may not in any way exclude or limit his liability for bodily or moral injury caused to another.

1991, c. 64, a. 1474.

<sup>148</sup> Lerm, Henry – A Critical Analysis of Exclusionary Clauses in Medical Contracts, Doctoral Thesis, Faculty of Law, University of Pretoria (2008), p. 809-810. Available at: <http://upetd.up.ac.za/thesis/available/etd-05252009-215044/unrestricted/06chapter12.pdf> (accessed on April 27, 2014).

<sup>149</sup> *Idem* at 810.

<sup>150</sup> See Article 2(a) CISG and Schwenger/Hachem, Commentary (n. 10), Art. 2, par. 4-7.

<sup>151</sup> Official Journal, April 21, 1993, L. 95/29.

<sup>152</sup> Official Journal, July 7, 1999, L. 171/12.

<sup>153</sup> DIRECTIVE 2011/83/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 October 2011 (accessed on April 17, 2014 at [http://ec.europa.eu/justice/consumer-marketing/rights-contracts/directive/index\\_en.htm](http://ec.europa.eu/justice/consumer-marketing/rights-contracts/directive/index_en.htm)).

<sup>154</sup> Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on a Common European Sales Law (COM/2011/0635 final - 2011/0284 (COD)) (accessed on April 17, 2014 at [http://ec.europa.eu/justice/contract/cesl/index\\_en.htm](http://ec.europa.eu/justice/contract/cesl/index_en.htm)). Specifically on the CESL provisions limiting the debtor's liability, namely: foreseeability of loss, loss attributable to the creditor, and mitigation, see the in-depth analysis by Zimmermann, Reinhard, in *Limitation of Liability for Damages in European Contract Law. The Edinburgh Law Review* 18.2 (2014), p. 193-224.

<sup>155</sup> The PECL provision reads as follows:

“Article 8:109: Clause Excluding or Restricting Remedies

Remedies for non-performance may be excluded or restricted unless it would be contrary to good faith and fair dealing to invoke the exclusion or restriction.”

See also a revised version of PECL, as presented by Fauvarque-Cosson, Bénédicte and Mazeaud, Denis (eds.) – *European Contract Law, Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules*, Munich: Sellier (2008), p. 603, which reads as follows:

“Article 9:109: Clause Excluding or Restricting Remedies

Remedies for non-performance may be excluded or restricted by a contractual clause. This clause is without effect if its implementation is contrary to good faith, for example in the case of non-performance which is deliberate or of particular gravity.”

<sup>156</sup> Article 7.1.6 of the 2010 UNIDROIT Principles reads as follows:

“(Exemption clauses)

A clause which limits or excludes one party's liability for non-performance or which permits one party to render performance substantially different from what the other party reasonably expected may not be invoked if it would be grossly unfair to do so, having regard to the purpose of the contract.”

<sup>157</sup> See Article 7.1.6 of the 2010 UNIDROIT Principles and the official comments. See also Schelhaas, Harriet, Commentary on the UNIDROIT Principles (n. 39),, p. 858-863, esp. 861.

<sup>158</sup> Especially Articles 17 to 28. The Montreal Convention (formally, the Convention for the Unification of Certain Rules for International Carriage by Air) is a multilateral treaty adopted by a diplomatic meeting of ICAO member states in 1999. The full text of the Montreal Convention is available at:

<http://www.jus.uio.no/lm/air.carriage.unification.convention.montreal.1999/26.html> (accessed on April 17, 2014).

<sup>159</sup> The CMR Convention (full title Convention on the Contract for the International Carriage of Goods by Road) is a United Nations convention that was signed in Geneva on 19 May 1956. It relates to various legal issues concerning transportation of cargo by road. It has been ratified by the majority of European states. As of 2013, it has been ratified by 55 states. For more information see:

[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XI-B-11&chapter=11&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-B-11&chapter=11&lang=en) (access on 14 April 2016)

<sup>160</sup> For the text and status of the Rotterdam Rules, see the UNCITRAL website at: [http://www.uncitral.org/uncitral/en/uncitral\\_texts/transport\\_goods/2008rotterdam\\_rules.html](http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/2008rotterdam_rules.html) (accessed on April 27, 2014).

<sup>161</sup> In this regard, see Article 79 of the Rotterdam Rules :

“Validity of contractual terms

*Article 79 General provisions*

1 . Unless otherwise provided in this Convention, any term in a contract of carriage is void to the extent that it:

- (a) Directly or indirectly excludes or limits the obligations of the carrier or a maritime performing party under this Convention;
- (b) Directly or indirectly excludes or limits the liability of the carrier or a maritime performing party for breach of an obligation under this Convention; or
- (c) Assigns a benefit of insurance of the goods in favour of the carrier or a person referred to in article 18.

2 . Unless otherwise provided in this Convention, any term in a contract of carriage is void to the extent that it:

- (a) Directly or indirectly excludes, limits or increases the obligations under this Convention of the shipper, consignee, controlling party, holder or documentary shipper; or
- (b) Directly or indirectly excludes, limits or increases the liability of the shipper, consignee, controlling party, holder or documentary shipper for breach of any of its obligations under this Convention.