



General Assembly

Distr.: General
8 June 2004

Original: English

United Nations Commission
on International Trade Law

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

Article 40

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

Overview of article 40

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

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

Article 40 in general

2. In an arbitral award that discusses article 40 at length, it is asserted that the provision expresses a principle of fair trading found in the domestic laws of many countries and underlying many other provisions of the CISG; that article 40 constitutes “a safety valve” for preserving the buyer’s remedies for non-conformity in cases where the seller has himself forfeited the right of protection, granted by provisions on the buyer’s timely examination and notice, against claims for such remedies; that the application of article 40 “results in a dramatic weakening of the position of the seller, who loses his absolute defences based on often relatively short-term time limits for the buyer’s examination and notice of non-conformity, and instead is faced with the risk of claims only precluded by . . . general prescription rules . . .”; and that article 40 should be restricted to “special circumstances” so that the protections offered by time limits for claims do not become “illusory.”¹ A dissenting opinion from the same arbitration would limit the application of article 40 even further to “exceptional circumstances”.² It has also been held that article 40 must be applied independently to each separate lack of conformity claimed by the buyer. Thus a seller can be precluded by article 40 from relying on articles 38 and 39 with respect to one non-conformity, but permitted to raise defences based on articles 38 and 39 with respect to a different non-conformity.³

Scope and effect of article 40

3. According to several court decisions, when its requirements are satisfied, article 40 prevents a seller from relying on a buyer’s non-compliance with article 38 and/or article 39⁴; in other cases, a buyer’s invocation of article 40 has failed.⁵ It

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

² *Id.*

³ CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998] (buyer’s late notice of non-conformity prevented it from asserting that the colour and weight of jackets that the seller had delivered did not conform to the contract; the seller, however, was aware that some jackets were a different model than specified in the contract, and article 40 precluded seller from relying on late notice with regard to this lack of conformity) (see full text of the decision); Landgericht Landshut, Germany, 5 April 1995, Unilex (seller admitted pre-delivery knowledge that the goods (clothes) suffered a shrinkage problem, so that art. 40 prevented seller from relying on arts. 38 and 39 as a defence to buyer’s claim for this lack of conformity; but buyer failed to prove that seller was aware or could not have been unaware that some items were missing from delivery boxes, and seller could use late notice as a defence as to this non-conformity).

⁴ In the following cases, the tribunal found that article 40 precluded the seller from relying on articles 38 and/or 39: CLOUT case No. 45 [Arbitration—International Chamber of Commerce No. 5713 1989]; CLOUT case No. 237 [Arbitration—Arbitration Institute of the Stockholm Chamber of Commerce, 5 June 1998]; CLOUT case No. 170 [Landgericht Trier, Germany, 12 October 1995]; Landgericht Landshut, Germany, 5 April 1995, Unilex. In the following cases, the tribunal found that further proceedings were required to determine whether article 40 prevented the seller from relying on articles 38 and 39: CLOUT case No. 98 [Rechtbank Roermond, the Netherlands, 19 December 1991].

⁵ In the following cases, the tribunal found that the requirements to apply article 40 had not been established: CLOUT case No. 285 [Oberlandesgericht Koblenz, Germany, 11 September 1998];

has also been found that article 40 applies to contractual examination and notice provisions agreed to in derogation of articles 38 and 39—*i.e.*, it excuses a buyer who has failed to comply with a contract clause governing examination of goods or a contractual provision requiring notice of non-conformity.⁶ Alternatively, it has been posited that, even if article 40 were not directly applicable to such contractual examination and notice provisions, the principle of article 40 would apply indirectly under CISG article 7 (2) to fill this gap in the Convention.⁷ A court has also concluded that the general principle embodied in article 40 prevents a seller who knowingly and fraudulently misrepresented the mileage and age of a used car from escaping liability under article 35 (3), a provisions that shields a seller from liability for a lack of conformity of which the buyer knew or could not have been unaware at the time of the conclusion of the contract.⁸

Requirement that the seller knew or could not have been unaware of facts related to a lack of conformity: in general

4. Article 40 applies with respect to a lack of conformity that relates to “facts of which [the seller] knew or could not have been unaware.” The nature of this requirement of seller awareness has been examined in several decisions. It was discussed at length in an arbitration decision in which a majority of the arbitrators indicated that the level of seller awareness required by the provision was not clear, although in order to prevent the protections of article 39 from becoming illusory article 40 required something more than a general awareness that goods manufactured by a seller “are not of the best quality or leave something to be desired.”⁹ The decision states that there is a “general consensus that fraud and similar cases of bad faith” will meet the requirements of article 40, and that the requisite awareness exists if the facts giving rise to the lack of conformity “are easily apparent or detected.” With respect to situations in which the seller does not have actual knowledge of a lack of conformity, the arbitration decision indicates that there is a split between those who assert that the requirements of article 40 are met if the seller’s ignorance is due to “gross or even ordinary negligence”, and those who would require something more, approaching “deliberate negligence”.¹⁰ Similarly, according to the tribunal, there is a split between those who argue that a seller is under no obligation to investigate for possible non-conformities, and those who assert that the seller must not “ignore clues” and may have a duty to examine

CLOUT case No. 341 [Ontario Superior Court of Justice, Canada, 31 August 1999]; CLOUT case No. 232 [Oberlandesgericht München, Germany, 11 March 1998]; Landgericht Landshut, Germany, 5 April 1995, Unilex (re some but not all non-conformities); CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (see full text of the decision); Arbitration Case 56/1995 of the Bulgarska turgosko-promishlena palata, Bulgaria, 24 April 1996, Unilex; CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997]; CLOUT case No. 270 [Bundesgerichtshof, Germany, 25 November 1998].

⁶ CLOUT case No. 237 [Arbitration—Arbitration Institute of the Stockholm Chamber of Commerce, 5 June 1998].

⁷ *Id.*

⁸ CLOUT case No. 168 [Oberlandesgericht Köln, Germany 21 March 1996].

⁹ CLOUT case No. 237 [Arbitration—Arbitration Institute of the Stockholm Chamber of Commerce, 5 June 1998] (see full text of the decision).

¹⁰ *Id.*

the goods for lack of conformity “in certain cases”.¹¹ A majority of the tribunal concluded that the level of seller awareness of non-conformities that is required to trigger Article 40 is “conscious disregard of facts that meet the eyes and are of evident relevance to the non-conformity”. A dissenting arbitrator agreed with the standard, although he believed that it required a higher degree of “subjective blameworthiness” on the seller’s part than had been proven in the case.¹² One court has indicated that the requirements of Article 40 are satisfied if the seller’s ignorance of a lack of conformity is due to gross negligence.¹³ Another decision asserts that article 40 requires that the seller have notice not only of the facts giving rise to the lack of conformity, but also that those facts would render the goods non-conforming.¹⁴

Requirement that the seller knew or could not have been unaware of facts related to a lack of conformity: burden of proof

5. Several decisions have indicated that the buyer bears the burden of proving that the seller knew or could not have been unaware of a lack of conformity.¹⁵ At least two decisions have noted, however, that the “could not have been unaware” language of article 40 reduces the evidentiary burden associated with proving the seller’s actual knowledge of a lack of conformity.¹⁶ An arbitral tribunal has asserted that the result of this language is a shifting burden of proof: “If the evidence [adduced by the buyer] and the undisputed facts show that it is more likely than not that the seller is conscious of the facts that relate to the non-conformity, it must be up to the seller to show that he did not reach the requisite state of awareness”.¹⁷ According to another decision, the buyer must prove that the seller had notice not only of the facts underlying a lack of conformity, but also that those facts rendered the goods non-conforming.¹⁸

¹¹ *Id.*

¹² *Id.* (dissenting opinion).

¹³ CLOUT case No. 232 [Oberlandesgericht München, Germany, 11 March 1998] (see full text of the decision).

¹⁴ CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997]; CLOUT case No. 270 [Bundesgerichtshof Germany 25 November 1998].

¹⁵ CLOUT case No. 98 [Rechtbank Roermond, the Netherlands, 19 December 1991]; CLOUT case No. 237 [Arbitration—Arbitration Institute of the Stockholm Chamber of Commerce, 5 June 1998] (see full text of the decision). Other decisions have implied that the buyer bore the burden of proving that seller was on notice of a lack of conformity with the meaning of article 40: CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (see full text of the decision); CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997]; Landgericht Landshut, Germany, 5 April 1995, Unilex. The last case distinguishes between the burden of proving that the seller knew or could not have been unaware of a lack of conformity (which the buyer bears) and the burden of proving that the seller disclosed the lack of conformity to the buyer (which the court suggests the seller bears).

¹⁶ CLOUT case No. 237 [Arbitration—Arbitration Institute of the Stockholm Chamber of Commerce, 5 June 1998] (see full text of the decision); CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997] (see full text of the decision).

¹⁷ CLOUT case No. 237 [Arbitration—Arbitration Institute of the Stockholm Chamber of Commerce, 5 June 1998] (see full text of the decision).

¹⁸ CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997].

Requirement that the seller knew or could not have been unaware of facts related to a lack of conformity: application (evidence)

6. Although producing sufficient evidence that the seller knew or had reason to know of a lack of conformity can be a difficult task, buyers in several cases have successfully borne the burden. Where the seller admitted that it was aware of a defect, obviously, a court found that the requirement of article 40 was satisfied.¹⁹ Even without such an admission, a buyer succeeded in establishing the awareness element where the seller, while manufacturing a complex piece of industrial machinery (a rail press), had replaced a critical safety component (a lock plate) with a part that the seller had not previously used for such an application: the fact that the seller drilled several unused trial holes for positioning the substitute lock plate on the rail press evidenced both that it was aware that it was improvising by using a part that did not fit properly, and that it realized proper positioning of the substitute plate was critical, yet the seller never tried to ascertain that the buyer properly installed the plate; as a result, the majority concluded, the seller had “consciously disregarded apparent facts which were of evident relevance to the non-conformity”, and article 40 excused the buyer’s failure to give timely notice of the defect.²⁰ The tribunal also indicated that the article 40 “knew or could not have been unaware” requirement would be satisfied where the non-conformity in identical or similar goods had previously resulted in accidents that had been reported to the seller or to the “relevant branch” of the seller’s industry.²¹ In another decision, a court found that the seller “could not have been unaware” that wine it sold had been diluted with water, because the non-conformity resulted from an intentional act.²² Another court found that, because of the nature of the non-conformity (some of the jackets that seller had shipped were not the models that the buyer had ordered), the seller necessarily knew of the lack of conformity.²³ In another decision, the court continued the proceedings in order to permit the buyer to prove that the seller knew or could not have been unaware that the cheese it sold was infested with maggots: the court stated that the buyer would carry its burden by proving that the maggots were present when the cheese was frozen before shipment.²⁴

7. In several other decisions, however, the court concluded that the article 40 requirement concerning seller’s awareness of a lack of conformity had not been met. This was the case where the buyer simply failed to produce evidence that the seller

¹⁹ Landgericht Landshut, Germany, 5 April 1995, Unilex.

²⁰ CLOUT case No. 237 [Arbitration—Arbitration Institute of the Stockholm Chamber of Commerce, 5 June 1998] (see full text of the decision).

²¹ *Id.*

²² CLOUT case No. 170 [Landgericht Trier, Germany, 12 October 1995] (see full text of the decision).

²³ CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998] (see full text of the decision).

²⁴ CLOUT case No. 98 [Rechtbank Roermond, the Netherlands, 19 December 1991]. In an arbitral award, the tribunal found that article 40 excused the buyer from failing to perform its obligations under articles 38 and 39 because the seller knew or could not have been unaware of the lack of conformity but the decision does not specify the facts that supported this conclusion, indicating only very generally that “it clearly transpires from the file and the evidence that the Seller knew and could not be unaware” of the lack of conformity; see CLOUT case No. 45 [Arbitration—International Chamber of Commerce No. 5713 1989].

was or should have been aware of the lack of conformity.²⁵ Where the seller sold a standard product suitable for use in modern equipment, but the product failed when processed by the buyer in unusually-old machinery, the court found that the buyer had not shown that the seller knew or could not have been unaware of the problem because the buyer had not informed the seller that it planned to employ obsolete processing equipment.²⁶ In another decision, the court relied on the fact that the buyer had re-sold the goods to its own customers in order to conclude that the defects complained of were not obvious; the buyer, therefore, had failed to show that the seller could not have been unaware of the lack of conformity.²⁷ Another court found that, although some of the picture frame mouldings supplied by the seller were non-conforming, it was not clear whether the number exceeded the normal range of defective mouldings tolerated in the trade, and there was insufficient evidence to conclude that the seller was aware, or should have been aware, of the defects.²⁸ Another decision by an arbitral tribunal rejected a buyer's argument that the nature and volume of the defects in the goods and the seller's procedure for inspecting its production established that the article 40 prerequisites relating to the seller's awareness of a lack of conformity were satisfied.²⁹

Requirement that the seller knew or could not have been unaware of facts related to a lack of conformity: time as of which seller's awareness is determined

8. Article 40 does not specify the time as of which it should be determined whether the seller knew or could not have been unaware of a lack of conformity. One decision has indicated that this determination should be made as of the time of delivery.³⁰

Seller's disclosure of lack of conformity

9. Article 40 states that the relief it provides a buyer that has failed to comply with its obligations under articles 38 and/or 39 does not apply if the seller disclosed the lack of conformity to the buyer. The seller's obligation under article 40 to disclose known non-conformities on pain of losing its protections under articles 38 and 39 has been discussed in only a small number of decisions,³¹ and actually

²⁵ Landgericht Landshut, Germany, 5 April 1995, Unilex.

²⁶ CLOUT case No. 285 [Oberlandesgericht Koblenz, Germany, 11 September 1998] (see full text of the decision).

²⁷ CLOUT case No. 232 [Oberlandesgericht München, Germany, 11 March 1998].

²⁸ CLOUT case No. 341 [Ontario Superior Court of Justice, Canada, 31 August 1999] (see full text of the decision). This situation may illustrate a seller's "general awareness" of defects that, as mentioned in para. 4 *supra*, an arbitration tribunal has indicated is insufficient to satisfy the requirements of Article 40; see CLOUT case No. 237 [Arbitration—Arbitration Institute of the Stockholm Chamber of Commerce, 5 June 1998] (see full text of the decision).

²⁹ Arbitration 054/1999, International Court of Commercial Arbitration of the Chamber of Commerce and Industry, Russian Federation, 24 January 2000, Unilex.

³⁰ Landgericht Landshut, Germany, 5 April 1995, Unilex.

³¹ CLOUT case No. 285 [Oberlandesgericht Koblenz, Germany, 11 September 1998] (recognizing a seller's duty to warn of known non-conformities under art. 40, but finding no such duty in the case because the goods were in fact conforming); CLOUT case No. 237

applied in even fewer. In one arbitral proceeding, the majority opinion asserted that, “to disclose in the sense of Article 40 is to inform the buyer of the risks resulting from the non-conformity”.³² Thus where the seller, when manufacturing a complex industrial machine, had replaced a critical safety component (a lock plate) with a different part that required careful installation to function properly, the tribunal found that the seller had not adequately disclosed the lack of conformity for purposes of article 40 where the disclosure to the buyer was limited to a difference in the part numbers appearing on the substitute lock plate and in the service manual: “even if [seller] had informed [buyer] of the exchange as such (and without any further information on proper installation or the risks involved in the arrangement, etc.) this would not be enough . . .”.³³ In another arbitration proceeding, however, the tribunal held that the seller had made adequate disclosure of a lack of conformity to prevent the buyer from invoking article 40, although the particular facts that supported this conclusion are unclear.³⁴ Another decision suggested that, although the buyer bears the burden of proving that the seller “knew or could not have been unaware” of a lack of conformity within the meaning of article 40, it is the seller who bears the burden of proving adequate disclosure to the buyer.³⁵

Derogation and waiver

10. Nothing in the CISG expressly excepts article 40 from the power of the parties, under article 6, to “derogate from or vary the effect of any of [the Convention’s] provisions”. An arbitration panel, however, has concluded that, because article 40 expresses fundamental “principles of fair dealing” found in the domestic laws of many countries and underlying many provisions of the CISG itself, a derogation from article 40 should not be implied from a contractual warranty clause that derogates from articles 35, 38 and 39³⁶—even though the provisions expressly derogated from are closely associated and generally work in tandem with article 40. Indeed, the majority opinion suggests that, despite article 6, “even if an explicit derogation was made—a result of drafting efforts and discussions that stretch the imagination—it is highly questionable whether such derogation would be valid or enforceable under various domestic laws or any general principles for international trade”.³⁷ On the other hand, a buyer was found to have waived its right to invoke article 40 when the buyer negotiated with the

[Arbitration—Arbitration Institute of the Stockholm Chamber of Commerce, 5 June 1998] (see full text of the decision); Arbitration Case 56/1995 of the Bulgarian Chamber of Commerce and Industry, 24 April 1996, Unilex. See also Landgericht Landshut, Germany, 5 April 1995, Unilex, which indicates that the seller bears the burden of proving adequate disclosure.

³² CLOUT case No. 237 [Arbitration—Arbitration Institute of the Stockholm Chamber of Commerce, 5 June 1998] (see full text of the decision).

³³ *Id.* (see full text of the decision).

³⁴ Arbitration Case 56/1995 of the Bulgarian Chamber of Commerce and Industry, 24 April 1996, Unilex.

³⁵ Landgericht Landshut, Germany, 5 April 1995, Unilex.

³⁶ CLOUT case No. 237 [Arbitration—Arbitration Institute of the Stockholm Chamber of Commerce 5 June 1998] (see full text of the decision).

³⁷ *Id.* (see full text of the decision). Note that, under CISG article 4 (a), questions concerning the “validity” of a contract or its provisions are beyond the scope of the Convention, and thus are governed by other law as determined by the rules of private international law.

seller a price reduction based on certain defects in the goods, but did not at that time seek a reduction for other defects of which it then had knowledge.³⁸

Article 40 as embodying general principles underlying the CISG

11. Under article 7 (2) of the CISG, questions within the scope of the Convention that are not expressly settled in it are to be resolved “in conformity with the general principles on which [the Convention] is based . . .”.³⁹ Several decisions have identified article 40 as embodying a general principle of the Convention applicable to resolve unsettled issues under the CISG. According to an arbitration panel, “Article 40 is an expression of the principles of fair trading that underlie also many other provisions of CISG, and it is by its very nature a codification of a general principle”.⁴⁰ Thus, the decision asserted, even if article 40 did not directly apply to a lack of conformity under a contractual warranty clause, the general principle underlying article 40 would be indirectly applicable to the situation by way of article 7 (2). In another decision, a court derived from article 40 a general CISG principle that even a very negligent buyer deserves more protection than a fraudulent seller, and then applied the principle to conclude that a seller could not escape liability under article 35 (3)⁴¹ for misrepresenting the age and mileage of a car even if the buyer could not have been unaware of the lack of conformity.⁴²

³⁸ CLOUT case No. 343 [Landgericht Darmstadt, Germany, 9 May 2000].

³⁹ In the absence of general CISG principles that would settle an unresolved issue, article 7 (2) directs that the question be settled “in conformity with the law applicable by virtue of the rules of private international law”.

⁴⁰ CLOUT case No. 237 [Arbitration—Arbitration Institute of the Stockholm Chamber of Commerce, 5 June 1998] (see full text of the decision).

⁴¹ Article 35 (3) provides that a seller is not liable for a lack of conformity under article 35 (2) “if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity”.

⁴² CLOUT case No. 168 [Oberlandesgericht Köln, Germany, 21 March 1996].