



**United Nations Commission
on International Trade Law**

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

Article 81

1. Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due. Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract.

2. A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently.

* 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 in general: “Consensual avoidance”

1. Article 81 governs the general consequences that follow if one of the parties avoids the contract or some part thereof.
2. Article 81 and the other provisions in Chapter V, Section V, dealing with the “Effects of avoidance” have been described as creating a “framework for reversal of the contract” that, at its core, contains a “risk distribution mechanism” overriding other risk allocation provisions of the CISG when the contract is avoided.¹ It has also been stated that, under article 81, an avoided contract “is not entirely annulled by the avoidance, but rather it is ‘changed’ into a winding-up relationship.”² Several decisions have held that article 81 does not apply to “consensual avoidance”—i.e. termination of the contract that occurs where the parties have, by mutual consent, agreed to cancel the contract and to release each other from contractual obligations—but rather is properly limited to cases where one party “unilaterally” avoids the contract because of a breach by the other party.³ In such cases of “consensual avoidance”, it has been asserted, the rights and obligations of the parties are governed by the parties’ termination agreement.⁴ Thus, where the parties agreed to cancel their contract and permit the seller to deduct its out-of-pocket expenses before refunding the buyer’s advance payment, the seller was allowed to make such deductions but was denied a deduction for its lost profit because that was not part of the parties’ agreement.⁵ Where an issue arises that is not expressly addressed in the parties’ termination agreement, however, a court has asserted that, pursuant to article 7 (2), the gap should be filled not by recourse to national law but by reference to the principles of article 81 and related provisions of the CISG.⁶

¹ Oberster Gerichtshof, Austria, 29 June 1999, Unilex.

² Id.; see also Landgericht Düsseldorf, Germany, 11 October 1995, Unilex (stating that avoidance “changes the contractual relationship into a restitutional relationship [winding up]”).

³ Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russia, 3 March 1997, Unilex; Oberster Gerichtshof, Austria, 29 June 1999, Unilex. Compare CLOUT case No. 288 [Oberlandesgericht München, Germany, 28 January 1998] (where seller “refunded” to buyer the purchase price of goods even though buyer’s check for payment of the price had been dishonoured, seller’s claim for restitution of the refund was not governed by article 81 (1) because article 81 (1) is limited to restitution of what is supplied or paid under the contract; seller’s “refund” had not been made under the contract); but see CLOUT case No. 136 [Oberlandesgericht Celle, Germany, 24 May 1995], where the tribunal appears to apply article 81 (2) even though the parties terminated the contract by mutual consent. See also the discussion of applying article 81 to fill gaps in the parties’ termination agreement in Oberster Gerichtshof, Austria, 29 June 1999, Unilex.

⁴ Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russia, 3 March 1997, Unilex; Oberster Gerichtshof, Austria, 29 June 1999, Unilex.

⁵ Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russia, 3 March 1997, Unilex.

⁶ Oberster Gerichtshof, Austria, 29 June 1999, Unilex.

Consequences of avoidance under article 81 (1): release from obligations; ineffective avoidance

3. Several decisions have recognized that valid avoidance of the contract releases the parties from their executory obligations under the contract.⁷ Thus it has been held that buyers who avoid the contract are released from their obligation to pay the price for the goods.⁸ It has also been held that avoidance by the seller releases the buyer from its obligation to pay⁹ and releases the seller from its obligation to deliver the goods.¹⁰ On the other hand, failure to effectively avoid the contract means that the parties remain bound to perform their contractual obligations.¹¹ Courts have found a failure of effective avoidance where a party failed to follow proper procedures for avoidance (i.e. lack of timely and specific notice of avoidance to the other party)¹² or where a party lacked substantive grounds for avoiding (e.g. lack of fundamental breach).¹³

⁷ For general statements regarding the parties' release from their obligations upon avoidance see, e.g. Oberster Gerichtshof, Austria, 29 June 1999, Unilex; CLOUT case No. 2 [Oberlandesgericht Frankfurt am Main, Germany, 17 September 1991] (see full text of the decision); CLOUT case No. 261 [Berzirksgericht der Sanne, Switzerland, 20 February 1997]; ICC Court of Arbitration, award No. 9887, August 1999, Unilex.

⁸ CLOUT case No. 235 [Bundesgerichtshof, Germany, 25 June 1997] (partial avoidance); CLOUT case No. 348 [Schweizerisches Bundesgericht, Switzerland, 28 October 1998]; CLOUT case No. 2 [Oberlandesgericht Frankfurt am Main, Germany, 17 September 1991] (see full text of the decision); ICC Court of Arbitration, award No. 7645, March 1995, Unilex. See also Landgericht Krefeld, Germany, 24 November 1992, English abstract available in the Unilex database (implying that in partial avoidance situation the buyer was released from its obligation to pay for the portion of the goods subject to avoidance); CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997] (in partial performance situation, court appears to presume that buyer's avoidance released both parties from remaining executory duties).

⁹ ICC Court of Arbitration, award No. 9887, August 1999, Unilex.

¹⁰ CLOUT case No. 261 [Berzirksgericht der Sanne, Switzerland, 20 February 1997]. See also Zürich Chamber of Commerce Arbitration Proceedings, Switzerland, 31 May 1996, Unilex, where the tribunal indicates that the buyer's action for avoidance and damages for non-delivery was an alternative to its action to require seller to deliver.

¹¹ In the following cases, the tribunal indicated that the buyer was not released from its obligation to pay because it had failed to avoid the contract: CLOUT case No. 284 [Oberlandesgericht Köln, Germany, 21 August 1997]; Landgericht München, Germany, 20 March 1995, Unilex; CLOUT case No. 229 [Bundesgerichtshof, Germany, 4 December 1996]; CLOUT case No. 79 [Oberlandesgericht Frankfurt am Main, Germany, 18 January 1994]. See also CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994] (implying that, because buyer did not validly avoid the contract it was not released from its obligation to pay) and CLOUT case No. 83 [Oberlandesgericht München, Germany, 2 March 1994] (same). It has also been found that a seller who fails to validly avoid the contract is not released from its obligation to deliver the goods. Zürich Chamber of Commerce Arbitration Proceedings, Switzerland, 31 May 1996, Unilex.

¹² CLOUT case No. 229 [Bundesgerichtshof, Germany, 4 December 1996] (buyer did not have right to avoid because its notice of lack of conformity was not sufficiently specific to satisfy article 39); Landgericht München, Germany, 20 March 1995, Unilex (buyer lost right to avoid because it did give sufficient notice of lack of conformity under article 39 and its notice of avoidance was untimely under article 49(2)); CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994] (buyer lacked right to avoid because its notice of lack of conformity was not timely under article 39) (see full text of the decision); CLOUT case No. 83 [Oberlandesgericht München, Germany, 2 March 1994] (buyer did not have right to avoid because its declaration of avoidance was untimely under article 49 (2)); ICC Court of

Preservation of right to damages and of provisions governing the settlement of disputes and the consequences of avoidance

4. As one decision has noted, under article 81 an avoided contract “is not entirely annulled by the avoidance,”¹⁴ and certain contractual obligations remain viable even after avoidance. Thus, the first sentence of article 81 (1) states that avoidance releases the parties from their contractual obligations “subject to any damages which may be due”. Many decisions have recognized that responsibility for damages for breach survives avoidance, and have awarded damages to the avoiding party against the party whose breach triggered the avoidance.¹⁵ One court commented, “[w]here ... the contract is terminated and damages for failure to perform are claimed under Art. 74 CISG et seq., one uniform right to damages comes into existence ... and prevails over the consequences of the termination of a contract provided for in Arts. 81-84 CISG”.¹⁶ The second sentence of article 81 (1) provides that “[a]voidance does not affect any provision of the contract for the settlement of disputes”. This has been applied to an arbitration clause contained in a written contract, and has been characterized as making the arbitration clause “severable” from the rest of the contract.¹⁷ The same sentence of article 81 (2) also

Arbitration Case No. 9887, August 1999, Unilex (seller’s delivery of non-conforming goods did not release buyer from its obligation to pay because buyer did not give notice declaring the contract avoided as required by article 49 (2) (b) (i) (although seller’s subsequent avoidance released both parties from their obligations)).

- ¹³ CLOUT case No. 284 [Oberlandesgericht Köln, Germany, 21 August 1997] (buyer lacked right to avoid because it either failed to prove or had waived its right to complain of lack of conformity); CLOUT case No. 79 [Oberlandesgericht Frankfurt am Main, Germany, 18 January 1994], (buyer did not have right to avoid for late delivery because it did not fix an additional period of time for seller to perform under articles 47 and 49 (1) (b), and buyer lacked right to avoid for lack of conformity because it failed to prove the defects constituted a fundamental breach) (see full text of the decision); CLOUT case No. 83 [Oberlandesgericht München, Germany, 2 March 1994] (buyer had no right to avoid because the inferior quality of the goods did not constitute a fundamental breach); Zürich Chamber of Commerce Arbitration Proceedings, Switzerland, 31 May 1996, Unilex (seller lacked right to avoid because buyer’s failure to make one instalment payment did not constitute a fundamental breach of the contract, buyer had not committed an anticipatory repudiation of the contract, and seller had not fixed an additional deadline period under article 64 for buyer to pay); ICC Court of Arbitration, award No. 9887, August 1999, Unilex (seller’s late delivery did not release buyer from its obligation to pay because buyer did not grant seller additional time for performance under article 47 (1) (although seller’s subsequent avoidance released both parties from their obligations)).
- ¹⁴ Oberster Gerichtshof, Austria, 29 June 1999, Unilex; see also Landgericht Düsseldorf, Germany, 11 October 1995, Unilex (stating that avoidance “changes the contractual relationship into a restitutional relationship [winding up]”).
- ¹⁵ CLOUT case No. 253 [Cantone del Ticino Tribunale d’appello, Switzerland, 15 January 1998] (see full text of the decision); CLOUT case No. 345 [Landgericht Heilbronn, Germany, 15 September 1997]; CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997]; CLOUT case No. 348 [Oberlandesgericht Hamburg, Germany, 26 November 1999]; Oberster Gerichtshof, Austria, 29 June 1999, Unilex; Zürich Chamber of Commerce Arbitration Proceedings, Switzerland, 31 May 1996, Unilex; CLOUT case No. 166 [Arbitration-Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996] (see full text of the decision).
- ¹⁶ CLOUT case No. 166 [Arbitration-Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996] (see full text of the decision).
- ¹⁷ CLOUT case No. 23 [Federal District Court, Southern District of New York, United States, 14 April 1992] (see full text of the decision).

provides that avoidance does not affect “any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract”. This has been applied to preserve, despite avoidance of the contract in which it was contained, the legal efficacy of a “penalty” clause requiring a seller who failed to deliver to make certain payments to a buyer.¹⁸ It has also been asserted that article 81 (1) preserves other contractual provisions connected with the undoing of the contract, such as clauses requiring the return of delivered goods or other items received under the contract.¹⁹

Restitution under article 81 (2)

5. For parties that have wholly or partially performed their contractual obligations, the first sentence of article 81(2) creates a right to claim restitution from the other side of whatever the party has “supplied or paid under the contract”. It has been suggested that the restitutionary obligation imposed on a buyer by article 81 is not intended to put the seller into the position it would have been in had the contract been fully performed or had not been concluded, but instead requires the restitution of the actual goods delivered, even if those goods are damaged during that return.²⁰ Note that under article 82, a buyer’s inability to make restitution of delivered goods “substantially in the condition in which he received them” will, subject to important exceptions, forfeit the buyer’s right to avoid the contract (or to require the seller to deliver substitute goods).²¹ Under article 84 (2), a buyer who must make restitution of goods to a seller must also “account to the seller” for all benefits it derived from the goods before making such restitution;²² similarly, a seller who must refund the price to the buyer must also, under article 84 (1), pay interest on the funds until they are restored,²³ although it has been held that, beyond such right to interest, a seller is not liable in damages for losses caused when it refused to give restitution of the price to the buyer.²⁴ It has been almost universally recognized that avoidance of the contract is a precondition for claiming restitution under article 81 (2).²⁵ One decision stated that an obligation of the seller for the repayment of the purchase price exists under article 81 (2) CISG only after an

¹⁸ ICC Court of Arbitration, award No. 9978, March 1999, Unilex.

¹⁹ Oberster Gerichtshof, Austria, 29 June 1999, Unilex.

²⁰ Id.

²¹ See Digest article 82.

²² See *infra* Digest article 84 (2).

²³ See *infra* Digest article 84 (1).

²⁴ ICC Court of Arbitration, award No. 9978, March 1999, Unilex; but see also Landgericht Landshut, Germany, 5 April 1995, Unilex, where the court apparently held a breaching seller liable for failing to make restitution to a buyer that had properly avoided the contract (although the remedy granted for this liability, if any, is unclear).

²⁵ CLOUT case No. 293 [Arbitration-Schiedsgericht der Hamburger freundschaftlichen Arbitrage, 29 December 1998] (“The claimant’s claim as buyer under Art. 81 (2) first sentence CISG for reimbursement of the prepayment first requires contract avoidance (article 81 (1) first sentence CISG)”) (see full text of the decision); CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997] (see full text of the decision); Landgericht Düsseldorf, Germany, 11 October 1995, Unilex (denying buyer restitution because it had not properly avoided the contract); CLOUT case No. 345 [Landgericht Heilbronn, Germany, 15 September 1997]; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russia, 15 April 1994, Unilex; Landgericht Krefeld, Germany,

avoidance of the sales contract by the buyer and that the avoidance of the contract is thus a constitutive right of the buyer, which changes the contractual relationship into a restitutional relationship.²⁶

6. In many cases where the buyer has properly avoided the contract, tribunals have awarded the aggrieved buyer restitution of the price (or part thereof) that it had paid to the seller.²⁷ A breaching seller is entitled to the restitution of the goods it delivered to a buyer who thereafter avoided the contract,²⁸ and it has been held that an avoiding buyer has a right, under article 81 (2), to force the seller to take back goods it delivered.²⁹ A seller who properly avoided the contract has also been awarded restitution of the goods it delivered,³⁰ and it has been recognized that breaching buyers are entitled to restitution of the portion of the price actually paid if the seller subsequently avoids.³¹ It has been held, however, that not all restitution claims arising out of a terminated sales contract are governed by the CISG. In one decision³² the parties had mutually agreed to cancel their contract and the seller had

24 November 1992, Unilex; but see *Compromex* arbitration, Mexico, 4 May 1993, Unilex (invoking article 81 (2) to justify the seller's claim for the price of delivered goods where it does not appear the contract was avoided).

²⁶ Landgericht Düsseldorf, Germany, 11 October 1995, Unilex.

²⁷ Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russia, 15 April 1994, Unilex; CLOUT case No. 302 [Arbitration-International Chamber of Commerce no. 7660, 1994] (see full text of the decision); CLOUT case No. 312 [Cour d'appel Paris, France, 14 January 1998] (see full text of the decision); China International Economic and Trade Arbitration Commission (CIETAC), People's Republic of China, 30 October 1991, Unilex; CLOUT case No. 345 [Landgericht Heilbronn, Germany, 15 September 1997]; CLOUT case No. 253 [Cantone del Ticino Tribunale d'appello, Switzerland, 15 January 1998] (see full text of the decision); CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997]; CLOUT case No. 103 [Arbitration-International Chamber of Commerce no. 6653 1993] (without citing art. 81); CLOUT case No. 136 [Oberlandesgericht Celle, Germany, 24 May 1995]; Cour d'appel Aix-en-Provence, France, 21 November 1996, Unilex (affirmed in CLOUT case No. 315 [Cour de Cassation, France, 26 May 1999]; Landgericht Düsseldorf, Germany, 11 October 1995, Unilex; Kärjäoikeus Kuopio, Finland, 5 November 1996, available on the Internet at <http://www.utu.fi/oik/tdk/xcisg/tap6.html>; ICC Court of Arbitration, award No. 9978, March 1999, Unilex; CLOUT case No. 293 [Arbitration-Schiedsgericht der Hamburger freundschaftlichen Arbitrage, 29 December 1998] (awarding restitution of the buyer's prepayment for a delivery because "[t]he rendered prepayment is, in the meaning of art. 81 (2) first sentence CISG, performance of the contract on the part of the claimant as buyer") (see full text of the decision).

²⁸ See Landgericht Landshut, Germany, 5 April 1995, Unilex (ordering breaching seller to make restitution of price to avoiding buyer concurrently with buyer making restitution of goods to seller); China International Economic and Trade Arbitration Commission (CIETAC), People's Republic of China, 30 October 1991, Unilex; CLOUT case No. 165 [Oberlandesgericht Oldenburg, Germany, 1 February 1995] (stating that buyer who avoided contract for the purchase of furniture must make restitution of defective furniture it received under the contract) (citing art. 84) (see full text of the decision). See also article 82 (stripping a buyer of the right to avoid the contract if it cannot make restitution of the goods substantially in the condition in which it received them, unless one of the exceptions in art. 82 (2) applies). Article 82 is discussed in the next section of this Digest.

²⁹ Landgericht Krefeld, Germany, 24 November 1992, Unilex.

³⁰ CLOUT case No. 308 [Federal Court of Australia, 28 April 1995] (see full text of the decision).

³¹ CLOUT case No. 261 [Berzirksgericht der Sanne, Switzerland, 20 February 1997]; CLOUT case No. 308 [Federal Court of Australia, 28 April 1995] (see full text of the decision).

³² CLOUT case No. 288 [Oberlandesgericht München, Germany, 28 January 1998].

given the buyer a refund for a payment check that was later dishonoured. When the seller sued to recover the refund, the court found that the seller's claim was not governed by article 81 (2) because that provision deals only with what a party has "supplied or paid under the contract", whereas the seller was seeking reimbursement for a refund made after the contract was cancelled. Instead, the court held, the seller's claim was based on unjust enrichment principles and was governed by applicable national law.

Place of restitution; jurisdiction over actions for restitution; risk of loss for goods being returned; currency of restitution of payments

7. Several decisions address the problem of where the obligation to make restitution under article 81 (2) should be performed. This question has arisen either as a direct issue, or as a subsidiary matter related to a court's jurisdiction or to the question of who bears risk of loss for goods that are in the process of being returned by the buyer. Thus, in determining whether an avoiding buyer offered the breaching seller restitution of delivered goods at the proper location, a court has held that the issue of the place for restitution is not expressly settled in the CISG, nor can the CISG provision dealing with the place for seller's delivery (art. 31) be applied by analogy, so that the matter must be resolved by reference to national law—specifically (in this case), the law governing the enforcement of a judgement ordering such restitution.³³ Employing somewhat similar reasoning for purposes of determining its jurisdiction under article 5 (1) of the 1968 Brussels Convention on Jurisdiction, a court has held that the CISG does not expressly settle where a seller must make restitution of the price under article 81 (2), that the CISG provision governing the place for buyer's payment of the price (art. 57 (1)) did not contain a general principle of the Convention that can be used to resolve the issue, and thus that the matter must be referred to applicable national law.³⁴ In contrast to the reasoning of the foregoing decisions, which led to the application of national law to the issue of the place for restitution, another decision asserted that jurisdiction under article 5 (1) of the Brussels Convention over a buyer's claim for restitution of the price should be determined by reference to the place of the delivery obligation under article 31 of the CISG.³⁵ Another court has found that the CISG does not expressly deal with the question of where, for purposes of determining who bore risk of loss, an avoiding buyer makes restitution of goods that are returned via third party carrier, but it resolved the issue by reference to the CISG itself without recourse to national law: it filled the "gap" pursuant to article 7 (2) by identifying a general principle that the place for performing restitutionary obligations should mirror the place for performing the primary contractual obligations, and found that buyer made its delivery (and thus risk of loss transferred to the seller) when it handed the goods over to the carrier for return shipment, because under the contract risk had passed to buyer in the original delivery when the manufacturer handed the goods over to the

³³ Landgericht Landshut, Germany, 5 April 1995, Unilex.

³⁴ CLOUT case No. 312 [Cour d'appel Paris, France, 14 January 1998].

³⁵ CLOUT case No. 295 [Oberlandesgericht Hamm, Germany, 5 November 1997] (see full text of the decision).

carrier.³⁶ The court also found this result consistent with the principles of article 82, which creates very broad exceptions to an avoiding buyer's obligation to return goods in their original condition and thereby suggests that the seller bears the risk that the condition of the goods will deteriorate. Finally, it has been concluded that an avoiding buyer's refund of the price was due in the same currency in which the price had been duly paid, and at the exchange rate specified in the contract for payment of the price to the seller.³⁷

Requirement that mutual restitution be concurrent

8. The second sentence of article 81 (2) specifies that, where both parties are required under the first sentence of the provision to make restitution (i.e. where both parties have "supplied or paid" something under an avoided contract), then mutual restitution is to be made "concurrently". An arbitration panel has ordered simultaneous restitution of the goods by an avoiding buyer and restitution of the price by a breaching seller.³⁸ Consistently with the principle of mutual restitution, a court has ruled that a breaching seller was not in default of its obligation to give the avoiding buyer restitution of the price until the buyer actually offered to return the goods seller had delivered, and it ordered the parties to make concurrent restitution.³⁹ Another decision stated that an avoiding seller need not make restitution of the buyer's payments until delivered goods were returned.⁴⁰

Interaction between right to restitution under article 81 (2) and rights under national law

9. An avoiding seller's right to restitution of delivered goods under article 81 (2) can come into conflict with the rights of third parties (e.g. the buyer's other creditors) in the goods. Such conflicts are particularly acute where the buyer has become insolvent, so that recovery of the goods themselves is more attractive than a monetary remedy (such as a right to collect the price or damages) against the buyer. Several decisions have dealt with this conflict. In one, a court found that an avoiding seller's restitutionary rights under article 81(2) were trumped by the rights of one of buyer's creditors that had obtained and perfected, under national law, a security interest in the delivered goods: the court ruled that the question of who had priority rights in the goods as between the seller and the third party creditor was, under CISG article 4, beyond the scope of the Convention and was governed instead by applicable national law, under which the third party creditor prevailed.⁴¹ This was the result even though the sales contract included a clause reserving title to the

³⁶ Oberster Gerichtshof, Austria, 29 June 1999, Unilex.

³⁷ CLOUT case No. 302 [Arbitration-International Chamber of Commerce no. 7660, 1994].

³⁸ China International Economic and Trade Arbitration Commission (CIETAC), People's Republic of China, 30 October 1991, Unilex (ordering avoiding buyer to return goods and breaching seller to return price); see also Cour d'appel Aix-en-Provence, France, 21 November 1996, Unilex ("the avoidance of the sale has, as a consequence, the restitution of the goods against restitution of the price").

³⁹ Landgericht Landshut, Germany, 5 April 1995, Unilex.

⁴⁰ CLOUT case No. 308 [Federal Court of Australia, 28 April 1995] (see full text of the decision).

⁴¹ [Federal] Court of Appeals for the Northern District of Illinois, United States, 28 March 2002 (Usinor Industeel v. Leeco Steel Products, Inc.).

goods in the seller until the buyer had completed payment (which buyer had not done), because the effect of that clause with respect to a non-party to the sales contract was also governed by national law rather than the CISG, and under the applicable law the third party's claim to the goods had priority over seller's. Another court, in contrast, found that an avoiding seller could recover goods from a buyer that had gone through insolvency proceedings after the goods were delivered.⁴² In this case, however, the seller had a retention of title clause that was valid under applicable national law and that had survived the buyer's now-completed insolvency proceedings, and there apparently was no third party with a claim to the goods that was superior to seller's under national law. Thus the two cases described in this section do not appear to be inconsistent. Indeed, the later case cited the earlier case in support of its analysis.

⁴² CLOUT case No. 308 [Federal Court of Australia, 28 April 1995] (see full text of the decision).