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

ANNEX 3 – TABLE OF CASES CITED

Forum	Date and reference	Facts	Decision
AUSTRALIA			
Darlington Futures Ltd v. Delco Australia Pty Ltd, High Court of Australia [Supreme Court]	1986 Case reference: 161 CLR 500 http://www.austlii.edu.au/au/cases/cth/HCA/1986/82.html	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	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

		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.	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.
AUSTRIA			
Oberster Gerichtshof [Supreme Court]	7 September 2000 Case No. 8 Ob 22/00v Unilex, available at http://www.unilex.info/case.cfm?id=473	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	The Court stated that even though the buyer, according to Art. 49(1) CISG, has the right to avoid the contract under certain

		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	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.

		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.	
Oberster Gerichtshof [Supreme Court]	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]	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	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,

		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.	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.
Arbitral award Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft - Wien	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]*	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.	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			
Hof van Beroep, Gent	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]	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'.	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

		When the buyer, after subsequent market changes, denied the existence of a binding contract the seller sued the buyer for breach of contract.	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			
Tercon Contractors Ltd. v. British Columbia	12 February 2010 2010 SCC 4 [2010] 1 SCR 69 Case number: 32460 http://scc-	The Province of British Columbia issued a request for expressions of interest ("RFEI") for the design and construction of a	In respect of the doctrine of fundamental breach, the Supreme Court described it as follows:

(Transportation and Highways), Supreme Court of Canada	csc.lexum.com/scc-csc/scc-csc/en/item/7843/index.do *(Doctrine of fundamental breach)*	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	"… 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.

		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	
CHINA			
China International Economic and Trade Arbitration Commission (CIETAC)	1 April 1993, Arbitral award No. 75, Unilex, available at http://www.unilex.info/case.cfm?id=429	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	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

		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.	(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.
COLOMBIA			
Constitutional Court	9 December 2010 Case number: C-1008 http://www.unilex.info/case.cfm?id=1591	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 non-performance. They argued that such limitation violated, 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).

ENGLAND			
Hadley v. Baxendale, Court of Exchequer	1854 EWHC J70 9 Exch. 341, 156 Eng. Rep. 145	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.	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			
Alsthom Atlantique SA v Compagnie de constructio n mécanique	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 -	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 ECJ held that article 29 EC applied to restrictions on intra-Community trade which placed the export trade at a disadvantage for the benefit of domestic trade. Accordingly, the

Sulzer SA, European Court of Justice, Second Chamber	Liability for defective products. [Liability for defective products and free movement of goods]	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.	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			
UTC GmbH v. S P Ky, Turku Court of Appeal	12 April 2002 S 97/324 http://cisgw3.law.pace.edu/cases/020412f5.html (*Forestry equipment case*)	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 machine-tooling and the design.	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 non-conformities. 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			
Cour de Cassation, Chambre civile 1 [Supreme court]	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]	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 non-restitution 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".	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.
Chronopost Cour de cassation, Chambre commerciale [Supreme court]	22 October 1996 Case number: 93-18632 https://www.courdecassation.fr/IMG///CO_arret9318632_961022_EN.pdf [Unenforceability of limitation of liability clauses – failure to fulfill a main obligation arising from the contract]	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.	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

		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.	dismissed Banchereau's claims. Il 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.
Faurecia v. Oracle France, Cour de cassation, Chambre commerciale, financière et économique [Supreme court]	29 June 2010 Case number: 732 https://www.courdecassation.fr/jurisprudence_2/chambre_commerciale_574/732_29_16744.html [Enforceability of limitation of liability clauses under French law]	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	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

		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.	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			
Amtsgericht Nordhorn	14 June 1994 Case No. 3 C 75/94 Unilex, available at http://www.unilex.info/case.cfm?id=114	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 hand-written 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	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

		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.	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.

Oberlandes gericht Celle [Provincial Court of Appeal]	2 September 1998 Case number: 3 U 246/97 http://cisgw3.law.pace.edu/cases/980902g1.html 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]	A Dutch seller, plaintiff, delivered a batch of "no-name" 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.	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.
Landgericht Heilbronn [District Court]	15 September 1997 Case number: 3 KfH O 653/93 http://cisgw3.law.pace.edu/cases/970915g1.html (*Film coating machine case*) CLOUT case No. 345 [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]	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 pre-formulated 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	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 quasiasi*

		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 pre-formulated standard sale and delivery conditions (in German language). Under these last general terms and conditions, the seller's liability was limited.	*risacrimento 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.
Oberlandes gericht Naumburg	13 February 2013 Case number: 12 U 153/12 http://www.unilex.info/case.cfm?id=1697 [Application of the	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	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

	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]	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.	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 standards 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			
Court of Appeals of Warsaw	20 November 2008 Case No. I ACa 1258/07 Unilex, available at http://www.unilex.info/case.cfm?id=1721 CLOUT Case no. 1305	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.	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			
Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce	23 November 1994 Arbitral award No. 251/93 http://www.unilex.info/case.cfm?id=250	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	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

		of profit on the sale of these goods to the buyer's customers, mainly because the goods were of a seasonal nature.	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.
Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce	4 April 1998 Arbitral award No. 387/95 http://www.unilex.info/case.cfm?id=377	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.	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			
Barbara Berry, S.A. de C.V. v. Ken M. Spooner Farms, Inc., Federal District Court [State of Washington]	13 April 2006 Case number: C05-5538FDB http://cisgw3.law.pace.edu/cases/060413u1.html>	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).	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 roots 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.

Norfolk Southern Railway Company v. Power Source Supply, Inc., Federal District Court [Pennsylvania]	25 July 2008 Case number: 07-140-JJf http://cisgw3.law.pace.edu/cases/080725u1.html	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.	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 pre-judgment 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.