



**United Nations Commission
on International Trade Law**

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

Article 73

(1) In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach of contract with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.

(2) If one party's failure to perform any of his obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.

(3) A buyer who declares the contract avoided in respect of any delivery may, at the same time, declare it avoided in respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract.

* 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.

1. This article provides special rules for instalment contracts. These rules set out when a seller or a buyer is entitled to declare the contract avoided with respect to a single instalment, future instalments, or the contract as a whole.¹ In accordance with article 26 a declaration of avoidance is effective only if the aggrieved party gives notice to the other party.

2. Article 73 does not preclude application of other articles of the Convention. When a party fails to deliver the goods or to pay for an instalment, the aggrieved party is entitled under article 47 or article 64 to give the breaching party an additional period of time and to avoid the instalment when that party fails to perform within the additional time.² When some but not all instalments are delivered article 51 on partial delivery and article 73 may be applicable.³ An aggrieved party may have the right to suspend its performance under article 71 (1) or to avoid the contract as to future instalments under article 73 (2).⁴ An aggrieved party may be able to avoid its contractual obligations to make further deliveries under either article 72 or article 73.⁵

What constitutes an instalment contract

3. An instalment contract is one that provides for delivery of goods in separate lots.⁶ The goods do not have to be fungible so that an instalment contract may cover

¹ See also ICC award No. 8740, 1996, Unilex (buyer duly avoided last instalment when total delivery of coal was less than contract amount).

² Schiedsgericht der Börse für Landwirtschaftliche Produkte—Wien, Austria, 10 December 1997, Unilex (buyer's failure to take delivery); CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997]; Arbitration award No. 273/95, Zürich Handelskammer, Switzerland, 31 May 1996, Unilex (buyer's failure to pay for instalment); Landgericht Ellwangen, Germany, 21 August 1995, Unilex (seller's failure to deliver to third party as agreed).

³ ICC award No. 9448, July 1999, Unilex (both arts. 51 and 73 applicable but buyer did not establish right to withhold payments); ICC award No. 8128, 1995, Unilex.

⁴ [Federal] Western District Court of Michigan, United States, 17 December 2001 (*Shuttle Packaging Systems v. Tsonakis*) (citing arts. 71–73 for remedies available in instalment transaction); ICC award No. 9448, July 1999 (buyer not entitled to suspend because had taken partial delivery of goods); CLOUT case No. 238 [Oberster Gerichtshof, Austria, 12 February 1998] (in addition to right to avoid instalments under art. 73, seller has right to suspend under art. 71 (1) but seller failed to establish its right in this case).

⁵ *EP S.A. v FP Oy*, Helsinki Court of Appeal, Finland, 30 June 1998, Unilex (where two separate orders for skincare ointment made from same mixture the aggrieved buyer could avoid second contract under either article 72 or under article 73 (2)); Arbitration award No. 273/95, Zürich Handelskammer, Switzerland, 31 May 1996, Unilex (fundamental breach as to future instalments is covered by both articles 72 and 73).

⁶ ICC award No. 9887, August 1999, Unilex (chemical substance); CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998] (lambskin coats); CLOUT case No. 293 [Arbitration—Schiedsgericht der Hamburger freundschaftlichen Arbitrage, 29 December 1998] (cheese); CLOUT case No. 238 [Oberster Gerichtshof, Austria, 12 February 1998] (umbrellas); CLOUT case No. 246 [Audiencia Provincial de Barcelona, Spain, 3 November 1997] (manufactured springs); CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997] (sunflower oil); CLOUT case No. 154 [Cour d'appel, Grenoble, France, 22 February 1995] (jeans); Arbitration award No. Vb 94124, Chamber of Commerce and Industry of Budapest, Hungary, 17 November 1995, Unilex (mushrooms); Chansha Intermediate Peoples' Court Economic Chamber, case No. 89, China,

delivery of different kinds of goods in each instalment (e.g., men's lambskin coats and women's lambskin coats).⁷ One decision states that an instalment contract need not determine the quantity of individual instalments under article 73 as precisely as partial deliveries under article 51.⁸

4. Several decisions have characterized separate contracts between parties that have an on-going relationship as an instalment contract governed by article 73⁹ or have concluded that the aggrieved party might act under either article 73 or another article, such as article 71¹⁰ or article 72.¹¹ One decision also applies article 73 to separate yearly supply contracts between same parties for the supply of aluminium.¹² Another decision, however, distinguishes an instalment contract from a distribution or framework agreement, which may provide for non-sales matters such as exclusive representation in a geographical area or an agreement without any determinable quantity.¹³

Avoidance of a single instalment

5. Paragraph (1) entitles a party to declare a contract avoided as to a single instalment if the other party commits a fundamental breach (see article 25) with respect to that instalment. The same standards for determining whether a party commits a fundamental breach apply both to a contract that requires a single delivery and to a contract that requires delivery by instalments. The aggrieved party was found to be entitled to avoid the instalment in the following cases: when the seller failed to deliver the promised goods;¹⁴ when the seller conditioned delivery of an instalment on satisfaction of new demands.¹⁵ On the other hand, the aggrieved

18 September 1995, Unilex (molybdenum iron alloy); Landgericht Ellwangen, Germany, 21 August 1995, Unilex (peppers); ICC award No. 8128, 1995, Unilex (chemical fertilizer).

⁷ CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998] (see full text of the decision).

⁸ CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996] (see full text of the decision).

⁹ Schiedsgericht der Börse für Landwirtschaftliche Produkte—Wien, Austria, 10 December 1997, Unilex (from economic perspective two instalment contracts for barley concluded same day to be delivered during same time period are part of same transaction and therefore governed by art. 73).

¹⁰ CLOUT case No. 238 [Oberster Gerichtshof, Austria, 12 February 1998] (attempted suspension under art. 73 rather than art. 71).

¹¹ *EP S.A. v FP Oy*, Helsinki Court of Appeal, Finland, 30 June 1998, Unilex (where two separate orders for skincare ointment made from same mixture the aggrieved buyer could avoid second contract under either article 72 or under article 73 (2)); Arbitration award No. 273/95, Zürich Handelskammer, Switzerland, 31 May 1996, Unilex (fundamental breach as to future instalments is covered by both articles 72 and 73).

¹² Arbitration award No. 273/95, Zürich Handelskammer, Switzerland, 31 May 1996, Unilex (fundamental breach as to future instalments is covered by both articles 72 and 73).

¹³ CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg 21 March, 21 June 1996] (leaving open whether contract in case before the court is an instalment contract) (see full text of the decision).

¹⁴ CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997].

¹⁵ CLOUT case No. 293 [Arbitration—Schiedsgericht der Hamburger freundschaftlichen Arbitrage, 29 December 1998].

party was found not to be entitled to avoid the instalment where the buyer had not paid the price for an instalment.¹⁶

Avoidance of contract as to future instalments

6. Paragraph (2) of article 73 entitles an aggrieved party to avoid the contract as to future instalments if the party has good grounds to conclude that the other party will commit a fundamental breach (see article 25) of contract with respect to future instalments.

7. An aggrieved buyer was found to be entitled to avoid the contract as to future instalments in the following cases: the seller made no delivery despite taking payment;¹⁷ the seller failed to deliver first instalment;¹⁸ when the seller stated that it would not make further deliveries;¹⁹ when the seller refused to deliver further cherries because of dramatic increase in market price for the cherries;²⁰ late delivery of three instalments caused disruption of buyer's production;²¹ delivery of poor quality goods;²² the buyer had good grounds to believe that seller would be unable to deliver peppers that satisfied food safety regulations.²³

8. In the following cases it was found that the seller had good grounds to avoid the contract: failure to open letter of credit gave good grounds to conclude that the buyer would not pay;²⁴ the buyer would continue to breach a contract term that prohibited the buyer from reselling the goods in specified markets.²⁵

9. If a party declares the contract avoided as to future instalments under paragraph (2), it must notify the other party of the avoidance within a reasonable time. A buyer who was entitled to avoid the contract as to future instalments effectively avoided the contract when it gave notice to the seller within 48 hours of the third late delivery.²⁶

Avoidance of contract as a whole

10. Paragraph (3) sets out rules for the avoidance of past or future instalments when the instalments are so interdependent that the purpose contemplated by the

¹⁶ Arbitration award No. 273/95, Zürich Handelskammer, Switzerland, 31 May 1996, Unilex.

¹⁷ CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997].

¹⁸ Arbitration award No. 273/95, Zürich Handelskammer, Switzerland, 31 May 1996, Unilex (failure to deliver first instalment good grounds for concluding later instalments would not be delivered).

¹⁹ CLOUT case No. 293 [Arbitration—Schiedsgericht der Hamburger freundschaftlichen Arbitrage, 29 December 1998].

²⁰ CLOUT case No. 265 [Arbitration—Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 25 May 1999].

²¹ CLOUT case No. 246 [Audiencia Provincial de Barcelona, Spain, 3 November 1997].

²² ICC award No. 9887, August 1999, Unilex.

²³ Landgericht Ellwangen, Germany, 21 August 1995, Unilex.

²⁴ Arbitration award No. Vb 94124, Chamber of Commerce and Industry of Budapest, Hungary, 17 November 1995, Unilex.

²⁵ CLOUT case No. 154 [Cour d'appel, Grenoble, France, 22 February 1995] (resale of jeans in Africa and South America; also citing art. 64 (1)).

²⁶ CLOUT case No. 246 [Audiencia Provincial de Barcelona, Spain, 3 November 1997].

parties at the time the contract was concluded is frustrated. A party may avoid the contract as to these instalments only if it has avoided the contract as to a present instalment under paragraph (1). If a party avoids the contract as to these instalments under paragraph (3), it must notify the other party at the same time as it notifies the party of the avoidance of the present instalment. There are no reported cases applying this paragraph.
