



**United Nations Commission
on International Trade Law**

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

Article 75

If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74.

1. Article 75 provides that an aggrieved party may claim recovery of the difference between the contract price and the price in a substitute transaction if the original contract has been avoided and if the substitute transaction was concluded in a reasonable manner and within a reasonable time after avoidance¹. The last clause

¹ Articles 45 (1) (b) and 61 (1) (b) provide that the aggrieved buyer and the aggrieved seller, respectively, may recover damages as provided in articles 74 to 77 if the other party fails to perform as required by the contract or the Convention.

* 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.

of article 75 also provides that an aggrieved party may recover further damages under the general damage formula set out in article 74². The formula in article 75 is a familiar one and can be found in domestic sales laws³.

Relation to other articles

2. Article 75 sets out the first of two damage formulas applicable if the contract is avoided. Article 75 calculates damages as the difference between the contract price and the price of a substitute transaction, while article 76 calculates damages as the difference between the contract price and a market price when the aggrieved party does not enter into a substitute transaction. Article 76 (1) provides that an aggrieved party may not calculate damages under article 76 if it has concluded a substitute transaction⁴. If, however, an aggrieved party concludes a substitute transaction for less than the contract quantity, both articles 75 and 76 may apply. Thus, one decision found that an aggrieved seller who resells only some of the contract goods to a third party may recover damages as to these goods under article 75 and damages as to the unsold goods under article 76⁵. Where the aggrieved party failed to satisfy the conditions for application of article 75, one court applied the “abstract” calculation of article 76 instead⁶.

3. The final clause of article 75 provides that an aggrieved party may recover additional damages under article 74. If the aggrieved party fails to satisfy the conditions for application of article 75, the aggrieved party may nevertheless recover damages under article 74⁷. Even when it might recover under article 75, an aggrieved party may choose to claim damages under article 74 instead⁸. Damages recovered under article 74 may be calculated in much the same way they would be calculated under article 75⁹.

² See paragraph 13 below.

³ See, e.g., CLOUT case No. 102 [Arbitration—International Chamber of Commerce No. 6281 1989] (applying Yugoslav law but also analysing art. 75).

⁴ See ICC award No. 8574, September 1996, Unilex (no recovery under art. 76 because aggrieved party had entered into substitute transactions within the meaning of art. 75).

⁵ CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994]. See also ICC award No. 8740, 1996, Unilex (aggrieved buyer unable to establish market price is not entitled to recover under art. 76 and entitled to recover under art. 75 only to the extent it had made substitute purchases); but compare CIETAC award, China, 30 October 1991, available on the Internet at <http://cisgw3.law.pace.edu/cases/911030c1.html> (aggrieved buyer who had made purchases for only part of the contract quantity nevertheless awarded damages under art. 75 for contract quantity multiplied by the difference between the contract price and the price in the substitute transaction).

⁶ CLOUT case No. 227 [Oberlandesgericht Hamm, Germany, 22 September 1992] (damages calculated under art. 76 rather than art. 75 where aggrieved seller resold goods for one-fourth of contract price).

⁷ ICC award No. 8574, September 1996, Unilex (recovery allowed under art. 74 where aggrieved party not entitled to recover under art. 75 because it had concluded substitute transactions without having effectively avoided contract).

⁸ CLOUT case No. 427 [Oberster Gerichtshof, Austria, 28 April 2000] (aggrieved party may claim under art. 74 even if it could also claim under arts. 75 or 76).

⁹ CLOUT case No. 427 [Oberster Gerichtshof, Austria, 28 April 2000] (under art. 74 seller can recover difference between cost of acquisition and contract price); CLOUT case No. 243 [Cour d’appel, Grenoble, France, 4 February 1999] (citing art. 74 but quoting from art. 75) (see full

4. Damages recoverable under article 75 are reduced if it is established that the aggrieved party failed to mitigate these damages as provided in article 77. The reduction is the amount by which the loss should have been mitigated. See “Calculation of damages” below.

5. Pursuant to article 6, the parties may agree to derogate from or vary the formula set out in article 75. Several decisions implicitly rely on article 6 when finding that article 75 is not applicable. One decision found that where the parties had agreed that an aggrieved party was entitled to a “compensation fee” if the contract was avoided because of the acts of the other party, the aggrieved party was entitled to recover both the compensation fee and damages under article 75¹⁰. Another decision concluded that a post-breach agreement settling a dispute with respect to a party’s non-performance displaced the aggrieved party’s right to recover damages under the damage provisions of the Convention¹¹.

Conditions on application of article 75

6. Article 75 applies if the contract is avoided and if the aggrieved party concludes a substitute transaction in a reasonable manner and within a reasonable time after avoidance.

– Avoidance of contract

7. Recovery of damages under article 75 is available only if the contract has been effectively avoided¹² by the aggrieved party.¹³ Substitute transactions concluded before avoidance do not fall within the coverage of article 75.¹⁴ Notwithstanding the

text of the decision); CLOUT case No. 140 [Arbitration-Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, award No. 155/1994 of 16 March 1995] (citing art. 74 but determining damages as difference between contract price and price in substitute transaction). See also CLOUT case No. 304 [Arbitration—International Chamber of Commerce No. 7531 1994] (citing art. 75, award of damages to aggrieved buyer for preserving and selling goods pursuant to arts. 86, 87 and 88 (1); buyer did not purchase substitute goods).

¹⁰ CLOUT case No. 301 [Arbitration—International Chamber of Commerce No. 7585 1992].

¹¹ CIETAC award No. 75, China, 1 April 1993, Unilex.

¹² CLOUT case No. 424 [Oberster Gerichtshof, Austria, 9 March 1998] (no declaration of avoidance); CLOUT case No. 474 [Arbitration-Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, award No. 54/1999 of 24 January 2000] (no avoidance); CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997]; CLOUT case No. 294 [Oberlandesgericht Bamberg, Germany, 13 January 1999]; CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (declaration of avoidance equivocal so not effective) (see full text of the decision).

¹³ See CLOUT case No. 362 [Oberlandesgericht Naumburg, Germany, 27 April 1999] (a seller, who resold goods after the aggrieved buyer had declared the contract avoided, not entitled to recover damages under art. 75).

¹⁴ ICC award No. 8574, September 1996, Unilex (purchases by aggrieved buyer before it had avoided contract not substitute transactions under art. 75); CLOUT case No. 85 [Federal District Court, Northern District of New York, United States, 9 September 1994], *affirmed* CLOUT case No. 138 [Federal Court of Appeals for the Second Circuit, United States, 6 December 1995] (substitute compressors had been ordered before breach)

the condition that the contract be avoided, one court has concluded that, with reference to the need to promote observance of good faith in international trade, the aggrieved party did not have to establish that it had declared the contract avoided when the other party made it clear that it could not perform within the time fixed.¹⁵

– **Substitute transaction**

8. An aggrieved party seeking damages calculated under article 75 must conclude a substitute transaction. If the seller is the aggrieved party, the substitute transaction is the sale to some other buyer of the goods identified to the avoided contract. An aggrieved buyer concludes a substitute transaction when it buys goods to replace those promised in the avoided contract¹⁶.

9. Article 75 requires that the substitute transaction be entered into “in a reasonable manner and within a reasonable time after avoidance”. There is no express requirement that the price in the substitute transaction be reasonable. Nevertheless, one decision concluded that where an aggrieved seller resold the goods for approximately one-fourth of the contract price the resale was not a reasonable substitute and the court calculated damages under article 76 rather than article 75¹⁷. If there is a significant difference between the contract price and the price in the substitute transaction the damages recoverable under article 75 may be reduced pursuant article 77 because of the aggrieved party’s failure to mitigate damages¹⁸.

– **Substitute transaction—reasonable manner**

10. An aggrieved party must conclude the substitute transaction in a reasonable manner. An arbitral tribunal described the requirement that there be a “substitute” transaction as being one where the aggrieved buyer acts as a prudent and careful businessperson who sells goods of the same kind and quality, ignoring unimportant small differences in quality¹⁹. A sale at market value on approximately the same freight terms was found to be a reasonable substitute sale²⁰.

¹⁵ CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997].

¹⁶ CLOUT case No. 85 [Federal District Court, Northern District of New York, United States, 9 September 1994], *affirmed* CLOUT case No. 138 [Federal Court of Appeals for the Second Circuit, United States, 6 December 1995] (delivery of compressors ordered from another supplier before seller’s breach not substitute goods under art. 75).

¹⁷ CLOUT case No. 227 [Oberlandesgericht Hamm, Germany, 22 September 1992].

¹⁸ ICC award No. 8128, 1995, Unilex (higher price paid by aggrieved buyer in substitute transaction justified because of buyer’s obligation to deliver goods promptly to sub-buyer).

¹⁹ ICC award No. 8128, 1995, Unilex.

²⁰ Supreme Court of Queensland, Australia, 17 November 2000, [2000] *QSC* 421.

– Substitute transaction—reasonable time

11. An aggrieved party must conclude the substitute transaction within a reasonable time after avoidance of the contract²¹. What time is reasonable will depend on the nature of the goods and the circumstances. Noting that a reasonable time begins to run only when the contract is avoided, a court found that the aggrieved seller acted within a reasonable time when it resold shoes made for the winter season within two months where it was established that most potential buyers had already bought winter shoes by the time the contract was avoided²². Another court found that an aggrieved seller who resold the printing press within six months after the additional period given the buyer to perform was within a reasonable time²³. These decisions assume that the aggrieved party must conclude the substitute transactions within the reasonable time but one decision has apparently construed the reasonable time requirement to mean that a reasonable time must elapse after avoidance before the substitute transaction may be concluded²⁴.

Calculation of damages

12. If the conditions for application of article 75 are satisfied, the aggrieved party may recover “the difference between the contract price and the price in the substitute transaction”. This amount may be adjusted by adding further damages recoverable under article 74 or by deducting the loss that could have been avoided if the aggrieved party had mitigated its damages in accordance with article 77. Most courts have had little difficulty applying the damage formula set out in article 75.²⁵

13. Several decisions have awarded additional damages under article 74 to compensate for incidental damages arising from the breach.²⁶ There will, of course, be no additional recovery if further damages are not established.²⁷

²¹ But see CLOUT case No. 308 [Federal Court of Australia, 28 April 1995] (where a seller is unable to resell goods until the breaching buyer returns them the seller has a reasonable time to resell from the time they are returned and damages should be calculated as of the date of the return) (see full text of the decision).

²² CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994] (avoidance on 7 August; resale on 6 and 15 October).

²³ *Bielloni Castello S.p.A. v. EGO S.A.*, Corte di Appello di Milano, Italy, 11 December 1998, Unilex.

²⁴ ICC award No. 8574, September 1996, Unilex (reasonable time must pass after avoidance before an aggrieved buyer may purchase substitute goods). But see *FCF S.A. v. Adriafile Commerciale S.r.l.*, Bundesgericht, Switzerland, 15 September 2000, available on the Internet at <http://www.bger.ch> (aggrieved buyer made reasonable substitute purchase even though it concluded promptly after avoidance).

²⁵ See, e.g., CLOUT case No. 140 [Arbitration-Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, award No. 155/1994 of 16 March 1995]; CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994]; CLOUT case No. 301 [Arbitration—International Chamber of Commerce No. 7585 1992]. But see CLOUT case No. 217 [Handelsgericht des Kantons Aargau, Switzerland, 26 September 1997] (majority of judges awarded seller of custom-made cutlery ten percent of purchase price as damages, a sum which included losses incurred on the resale of the cutlery).

²⁶ CLOUT case No. 217 [Handelsgericht des Kantons Aargau, Switzerland, 26 September 1997] (recovery of transportation costs) (see full text of the decision); CLOUT case No. 130

14. Several decisions have reduced the aggrieved party's recovery under article 75 because the aggrieved party failed to mitigate its losses. An aggrieved seller who resold the goods to a third party at a price significantly below not only the original purchase price but also a modified price proposed by the buyer failed to mitigate its damages and the seller was consequently entitled to recover only the difference between the purchase price and the proposed modified price.²⁸ There is no reduction if there is no failure to mitigate.²⁹ In particular, an aggrieved seller who has the capacity and market to sell similar goods may resell the goods intended for the defaulting buyer to a third party and the aggrieved party need not reduce its damages on the ground that the resale was mitigation pursuant to article 77.³⁰

Burden of proof; consideration of evidence

15. Although none of the damage formulas in articles 74, 75 and 76 expressly allocates the burden of proof, one court has concluded that the Convention recognizes the general principle that the party who invokes a right bears the burden of establishing that right and that this principle excludes application of domestic law with respect to burden of proof.³¹ The same opinion concluded, however, that domestic law rather than the Convention governs how a judge should reach its opinion (e.g. the weight to be given evidence) as this was a matter not covered by the Convention.³²

[Oberlandesgericht Düsseldorf, Germany, 14 January 1994] (recovery of interest on bank loan); Landgericht Berlin, Germany, 30 September 1992, Unilex (recovery of legal fees but not sales commission which would have been paid if the buyer had performed).

²⁷ CLOUT case No. 294 [Oberlandesgericht Bamberg, Germany, 13 January 1999] (aggrieved buyer failed to prove additional costs were foreseeable under art. 74).

²⁸ CLOUT case No. 395 [Tribunal Supremo, Spain, 28 January 2000].

²⁹ CLOUT case No. 427 [Oberster Gerichtshof, Austria, 28 April 2000] (see full text of the decision); CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994].

³⁰ CLOUT case No. 427 [Oberster Gerichtshof, Austria, 28 April 2000] (damages recovered under art. 74). See also *Bielloni Castello S.p.A. v. EGO S.A.*, Corte di Appello di Milano Italy, 11 December 1998, Unilex (evidence did not establish that aggrieved seller had lost a sale by its resale to a third party).

³¹ *FCF S.A. v. Adriafile Commerciale S.r.l.*, Bundesgericht, Switzerland, 15 September 2000, available on the Internet at <http://www.bger.ch> (breaching party failed to indicate measures aggrieved party should have taken in mitigation). See also CLOUT case No. 217

[Handelsgericht des Kantons Aargau, Switzerland, 26 September 1997] (aggrieved party has burden of establishing loss) (see full text of the decision); ICC award No. 7645, March 1995, Unilex ("Under general principles of law" the party claiming damages has burden of establishing existence and amount of damages caused by the breach of the other party).

³² *FCF S.A. v. Adriafile Commerciale S.r.l.*, Bundesgericht, Switzerland, 15 September 2000, available on the Internet at <http://www.bger.ch> (construing art. 8 of Swiss Civil Code). See also CLOUT case No. 261 [Bezirksgericht der Sanne, Switzerland, 20 February 1997] (domestic law, rather than Convention, determines how damages are to be calculated if the amount cannot be determined).