

Article 76

(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under article 74. If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance.

(2) For the purposes of the preceding paragraph, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

OVERVIEW

1. Article 76 provides that an aggrieved party may recover damages measured by the difference between the contract price and the current price for the goods if the contract has been avoided, if there is a current price for the goods, and if the aggrieved party has not entered into a substitute transaction.¹ The article designates when and where the current price is to be determined. The last clause of the first sentence of paragraph (1) also provides that an aggrieved party may recover further damages under the general damage formula set out in article 74. The article 76 formula is a familiar one.²

RELATION TO OTHER ARTICLES

2. Article 76 is the second of two damage formulas applicable if the contract is avoided. Whereas article 75 calculates damages concretely by reference to the price in an actual substitute transaction, article 76 calculates damages abstractly by reference to the current market price. Under the Convention, a concrete calculation of damages is preferred.³ Paragraph (1) of article 76 provides that its damage formula is not available if an aggrieved party has concluded a substitute transaction.⁴ Where an aggrieved seller resold fewer goods than the contract quantity, one court calculated damages as to the resold goods under article 75 and damages as to the unsold goods under article 76.⁵ Another court calculated damages under article 76 rather than article 75 where an aggrieved seller resold the goods to a third party at significantly less than both the contract and market price.⁶ If there is an insufficient link between the contract and an alleged cover purchase, the buyer may claim damages based on article 76.⁷

3. The final clause of the first sentence of article 76 (1) provides that an aggrieved party may recover additional damages under the general damage formula set out in article 74. It has been held that an aggrieved party may choose to recover damages under article 74 even when it might recover under article 76.⁸ If the conditions for recovery under article 76 are not satisfied, damages may

nevertheless be recovered under article 74.⁹ One arbitral tribunal awarded the loss of profit under article 74 as damages where no evidence was available on the market price.¹⁰ Where compensation for loss of profit fully compensates the aggrieved party, it is not entitled to additional damages under article 76.¹¹

4. Damages recoverable under article 76 are reduced if it is established that the aggrieved party failed to mitigate these damages as provided in article 77.¹² The reduction is the amount by which the loss should have been mitigated. See paragraphs 10-11 below.

5. Pursuant to article 6, the seller and buyer may agree to derogate from or vary the formula set out in article 76. One tribunal has stated that a post-breach agreement settling a dispute with respect to a party's non-performance displaces the aggrieved party's right to recover damages under the damage provisions of the Convention.¹³

CONDITIONS FOR APPLICATION OF ARTICLE 76

6. Article 76 applies if the contract is avoided (see paragraph 7 below), if there is a current price for the goods (see paragraph 8 below), and if the aggrieved party has not concluded a substitute transaction (see paragraph 9 below).¹⁴

7. Article 76 is not applicable if the contract has not been avoided.¹⁵ Thus, the article will not apply if the aggrieved party has not declared the contract avoided when entitled to do so¹⁶ or if the aggrieved party has not made an effective declaration of avoidance.¹⁷

8. The formula of article 76 can only be applied if there is a current price. The current price is the price generally charged in the market for goods of the same kind under comparable circumstances.¹⁸ One tribunal declined to use published quotations in a trade magazine because the reported quotations were for a different market from that where the goods were to be delivered under the contract and adjustment of that price was not possible.¹⁹ The same tribunal accepted

as the current price a price negotiated by the aggrieved seller in a substitute contract that was not ultimately concluded.²⁰ Another tribunal found that the aggrieved party was unable to establish the current price for coal generally or for coal of a particular quality because the requirements of buyers vary and there is no commodity exchange.²¹ Another court suggested that the “auction realisation” value of goods held by an insolvent buyer might be relevant if the aggrieved seller were to seek to recover under article 76.²² Stating that the seller’s lost profit was to be established under article 76, a court affirmed an award of damages to an aggrieved seller in the amount of 10 per cent of the contract price because the market for the goods (frozen venison) was declining and the seller set its profit margin at 10 per cent, which was the lowest possible rate.²³ It has also been held that a current price for purposes of article 76 can be established using the methodology in article 55 for determining the price under a contract that does not expressly or implicitly fix or make provision for determining the price.²⁴

9. Damages may not be recovered under article 76 if the aggrieved party has purchased substitute goods. Where a seller failed to deliver the goods and the aggrieved buyer bought no substitute goods, the buyer’s damages were to be calculated under article 76.²⁵

CALCULATION OF DAMAGES

10. An aggrieved party is entitled to recover the difference between the contract price and the current price at the time and place indicated by article 76.²⁶ The time at which the current price is to be determined is the date of effective avoidance of the contract;²⁷ if the aggrieved party has taken over the goods before avoidance, however, the relevant

time is this earlier date.²⁸ It has been held that, if notice of avoidance is unnecessary because a seller has “unambiguously and definitely” declared that it will not perform its obligations, the time of avoidance for purposes of article 76 is determined by the date of the obligor’s declaration of the intention not to perform.²⁹ For cases determining what constitutes evidence of a current price, see paragraph 8 above. One arbitral tribunal awarded a reasonable amount of damages where the parties failed to establish the market price.³⁰ Where the current market price is lower than the contract price, the buyer suffers no damages if the claim is based on article 76.³¹ One arbitral tribunal used the contract price as the basis for determining the current price where no other evidence was available.³² Another arbitral tribunal refused to use the prices in similar contracts of the buyer, and instead used the international price of the commodity.³³ Where the parties have made provision for the calculation of the current price in their contract, that price will be deemed to be the current price.³⁴

11. Paragraph (2) of article 76 indicates the relevant place for determining the current price. Applying this provision, one arbitral tribunal held that the relevant place for determining the current price was the port of delivery.³⁵ Under a CIF (“cost, insurance, freight”) contract, the place of delivery is the port of departure.³⁶ In another case the court determined the place of delivery to be the final port of destination under a CFR contract.³⁷

BURDEN OF PROOF

12. Although article 76 is silent on which party has the burden of establishing the elements of that provision, decisions have placed this burden on the party claiming damages.³⁸

Notes

¹ Articles 45 (1) (b) and 61 (1) (b) provide that an aggrieved buyer and an 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.

² Arbitration Court of the International Chamber of Commerce, November 1996 (Arbitral award No. 8502), Unilex (reference to both article 76 of the Convention and article 7.4.6 of Unidroit Principles of International Commercial Contracts); China International Economic and Trade Arbitration Commission, People’s Republic of China, September 2004 (Steel products case), English translation available on the Internet at www.cisg.law.pace.edu.

³ CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, Germany, 21 March, 21 June 1996] (Convention favours concrete calculation of damages) (see full text of the decision).

⁴ See Arbitration Court of the International Chamber of Commerce, September 1996 (Arbitral award No. 8574), Unilex (no recovery under article 76 because aggrieved party concluded substitute transactions, although it did so before it avoided the contract and hence the substitute transactions could not be used to measure damages under article 75). See also CLOUT case No. 348 [Oberlandesgericht Hamburg, Germany, 26 November 1999] (damages not calculated under article 76 because damages could be calculated by reference to actual transactions); Tallinna Ringkonnakohus, Estonia, 19 February 2004 (Novia Handelsgesellschaft mbH v. AS Maseko), English translation available on the Internet at www.cisg.law.pace.edu (no substitute transaction had been concluded to sell tomato paste that buyer refused to order); Oberlandesgericht Graz, Austria 24 January 2002 (Excavator case), English translation available on the Internet at www.cisg.law.pace.edu (buyer resold machinery at the same price that it acquired it and claimed a loss of profit).

⁵ CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994] (see full text of the decision). See also Arbitration Court of the International Chamber of Commerce, October 1996 (Arbitral award No. 8740), Unilex (aggrieved buyer unable to establish market price was not entitled to recover under article 76, and only entitled to recover under article 75 to the extent it had made substitute purchases); but compare China International Economic and Trade Arbitration Commission, People’s Republic of China, 30 October 1991, English translation available on the Internet at www.cisg.law.pace.edu (aggrieved buyer who had made purchases for only part of the contract quantity nevertheless awarded damages under article 75 for contract quantity times the difference between the unit contract price and the unit price in the substitute transaction).

⁶ CLOUT case No. 227 [Oberlandesgericht Hamm, Germany, 22 September 1992].

⁷ China International Economic and Trade Arbitration Commission, People's Republic of China, 11 February 2000 (Silicon metal case), English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 981 [China International Economic and Trade Arbitration Commission, People's Republic of China, 25 December 1998 (Basic pig iron case)] (alleged cover purchase was concluded before avoidance of the contract).

⁸ CLOUT case No. 427 [Oberster Gerichtshof, Austria, 28 April 2000] (aggrieved party may claim under article 74 unless party regularly concludes similar transactions and has designated one as a substitute within article 75); CLOUT case No. 140 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 16 March 1995 (Arbitral award No. 155/1994)] (citing article 74 but determining damages as difference between contract price and price in substitute transaction).

⁹ China International Economic and Trade Arbitration Commission, People's Republic of China, October 2007 (CD-R and DVD-R production systems case), English translation available on the Internet at www.cisg.law.pace.edu (no evidence to prove the market price, but evidence of loss of profit); Landgericht München, Germany, 20 February 2002 (Shoes case), English translation available on the Internet at www.cisg.law.pace.edu (buyer did not afford the seller an additional period of time (*Nachfrist*) where the seller was late in delivery, and was therefore not entitled to avoid the contract); CLOUT case No. 866 [China International Economic and Trade Arbitration Commission, People's Republic of China, 24 April 1997 (Oxidized aluminum case)] (contract was not avoided and no substitute transaction had been made).

¹⁰ China International Economic and Trade Arbitration Commission, People's Republic of China, October 2007 (CD-R and DVD-R production systems case), English translation available on the Internet at www.cisg.law.pace.edu (no evidence to prove the market price, but evidence of loss of profit).

¹¹ Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 5 March 1998 (Arbitral award No. 160/1997), English translation available on the Internet at www.cisg.law.pace.edu.

¹² Oberlandesgericht Graz, Austria 24 January 2002 (Excavator case), English translation available on the Internet at www.cisg.law.pace.edu (seller alleged that the buyer sold under the market price, but failed to prove this allegation).

¹³ China International Economic and Trade Arbitration Commission, People's Republic of China, 1 April 1993 (Arbitral award No. 75), Unilex, English translation available on the Internet at www.cisg.law.pace.edu.

¹⁴ Tallinna Ringkonnakohus, Estonia, 19 February 2004 (Novia Handelsgesellschaft mbH v. AS Maseko), English translation available on the Internet at www.cisg.law.pace.edu; China International Economic and Trade Arbitration Commission, People's Republic of China, 30 November 1997 (Canned oranges case), English translation available on the Internet at www.cisg.law.pace.edu (buyer had concluded two cover purchases).

¹⁵ CLOUT case No. 474 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 24 January 2000 (Arbitral award No. 54/1999)] (article 76 not applicable when the contract had not been avoided); Tallinna Ringkonnakohus, Estonia, 19 February 2004 (Novia Handelsgesellschaft mbH v. AS Maseko), English translation available on the Internet at www.cisg.law.pace.edu (buyer refused to place orders for tomato paste and contract was avoided by seller); Landgericht München, Germany, 20 February 2002 (Shoes case), English translation available on the Internet at www.cisg.law.pace.edu (buyer did not afford the seller an additional period of time (*Nachfrist*) where the seller was late in delivery).

¹⁶ CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (no avoidance) (see full text of the decision).

¹⁷ CLOUT case No. 238 [Oberster Gerichtshof, Austria, 12 February 1998] (declaration of avoidance too early) (see full text of the decision).

¹⁸ CLOUT case No. 318 [Oberlandesgericht Celle, Germany, 2 September 1998] (evidence did not establish current price). But see Oberlandesgericht Braunschweig, Germany, 28 October 1999, Unilex (calculation by reference not to market price but to seller's profit margin, which was lowest possible rate).

¹⁹ China International Economic and Trade Arbitration Commission, People's Republic of China, 18 April 1991, English translation available on the Internet at www.cisg.law.pace.edu (evidence did not reflect contract delivery terms); China International Economic and Trade Arbitration Commission, People's Republic of China, 20 January 1993 (Ferrosilicon case), English translation available on the Internet at www.cisg.law.pace.edu (delivery at port of shipment under an FOB contract).

²⁰ China International Economic and Trade Arbitration Commission, People's Republic of China, 20 January 1993 (Ferrosilicon case), English translation available on the Internet at www.cisg.law.pace.edu (delivery at port of shipment under an FOB contract).

²¹ Arbitration Court of the International Chamber of Commerce, October 1996 (Arbitral award No. 8740), Unilex (value of coal was subjective because it depends on buyer's needs and shipping terms; aggrieved party, who made no claim under article 74, could recover under article 75 only to the extent it had entered into substitute transactions).

²² CLOUT case No. 308 [Federal Court of Australia, Australia, 28 April 1995] (valuation arranged by insolvency administrator) (see full text of the decision).

²³ Oberlandesgericht Braunschweig, Germany, 28 October 1999, Unilex.

²⁴ CLOUT case No. 595 [Oberlandesgericht München, Germany, 15 September 2004].

²⁵ CLOUT case No. 328 [Kantonsgericht des Kantons Zug, Switzerland, 21 October 1999].

²⁶ Oberlandesgericht Hamburg, Germany, 4 July 1997, Unilex; China International Economic and Trade Arbitration Commission, People's Republic of China, September 2004 (Steel products case), English translation available on the Internet at www.cisg.law.pace.edu.

²⁷ China International Economic and Trade Arbitration Commission, People's Republic of China, September 2004 (Steel products case), English translation available on the Internet at www.cisg.law.pace.edu; China International Economic and Trade Arbitration Commission, People's Republic of China, 20 February 1994 (Cysteine case), English translation available on the Internet at www.cisg.law.pace.edu; Oberlandesgericht Graz, Austria, 9 November 1995, (Marble slabs case), English translation available on the Internet at www.cisg.law.pace.edu.

²⁸ China International Economic and Trade Arbitration Commission, People's Republic of China, 18 April 1991, English translation available on the Internet at www.cisg.law.pace.edu (disagreeing with date claimed by aggrieved party).

²⁹ CLOUT case No. 595 [Oberlandesgericht München, Germany, 15 September 2004]; China International Economic and Trade Arbitration Commission, People's Republic of China, 11 February 2000 (Silicon metal case), English translation available on the Internet

at www.cisg.law.pace.edu; China International Economic and Trade Arbitration Commission, People's Republic of China, 1 February 2000 (Silicon and manganese alloy case), English translation available on the Internet at www.cisg.law.pace.edu (delivery at port of shipment under a CFR contract).

³⁰ CLOUT case No. 976 [China International Economic and Trade Arbitration Commission, People's Republic of China, 26 June 2003] (Alumina case), English translation available on the Internet at www.cisg.law.pace.edu.

³¹ China International Economic and Trade Arbitration Commission, People's Republic of China, 1 February 2000 (Silicon and manganese alloy case), English translation available on the Internet at www.cisg.law.pace.edu (delivery at port of shipment under a CFR contract).

³² CLOUT case No. 807 [China International Economic and Trade Arbitration Commission, People's Republic of China, 30 June 1999 (Peppermint oil case)] (partial delivery of the goods by the seller).

³³ CLOUT case No. 981 [China International Economic and Trade Arbitration Commission, People's Republic of China, 25 December 1998 (Basic pig iron case)] (alleged cover purchase was concluded before avoidance of the contract).

³⁴ Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 19 December 1995 (Arbitral award No. 133/1994), English translation available on the Internet at www.cisg.law.pace.edu.

³⁵ China International Economic and Trade Arbitration Commission, People's Republic of China, 9 January 2008 (Metallic silicon case), English translation available on the Internet at www.cisg.law.pace.edu. See also China International Economic and Trade Arbitration Commission, People's Republic of China, 29 September 2004 (India rapeseed meal case), English translation available on the Internet at www.cisg.law.pace.edu.

³⁶ Tallinna Ringkonnakohus, Estonia, 19 February 2004 (Novia Handelsgesellschaft mbH v. AS Maseko), English translation available on the Internet at www.cisg.law.pace.edu (buyer refused to take up tomato paste as required under the contract); China International Economic and Trade Arbitration Commission, People's Republic of China, 1 February 2000 (Silicon and manganese alloy case), English translation available on the Internet at www.cisg.law.pace.edu (delivery at port of shipment under a CFR contract); China International Economic and Trade Arbitration Commission, People's Republic of China, 20 January 1993 (Ferrosilicon case), English translation available on the Internet at www.cisg.law.pace.edu (delivery at port of shipment under an FOB contract).

³⁷ China International Economic and Trade Arbitration Commission, People's Republic of China, 1 February 2000 (Silicon and manganese alloy case), English translation available on the Internet at www.cisg.law.pace.edu (delivery at port of shipment under a CFR contract).

³⁸ See, for example, CLOUT case No. 318 [Oberlandesgericht Celle, Germany, 2 September 1998] (aggrieved buyer failed to establish current price); China International Economic and Trade Arbitration Commission, People's Republic of China, 5 February 1996 (Peanut case), English translation available on the Internet at www.cisg.law.pace.edu; but see CLOUT case No. 976 [China International Economic and Trade Arbitration Commission, People's Republic of China, 26 June 2003] (Alumina case), English translation available on the Internet at www.cisg.law.pace.edu.