

Article 82

(1) The buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.

(2) The preceding paragraph does not apply:

(a) If the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which the buyer received them is not due to his act or omission;

(b) If the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 38; or

(c) If the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered or ought to have discovered the lack of conformity.

OVERVIEW

1. Article 82 is closely related to article 81 (2) of the Convention, which requires the parties to an avoided contract to make restitution of whatever has been “supplied or paid under the contract.” Article 82 deals with the effect of an aggrieved buyer’s inability to make restitution of goods substantially in the condition in which the buyer received them. Specifically, article 82 (1) conditions an aggrieved buyer’s right to declare the contract avoided, or to require that the seller deliver substitute goods, on the buyer’s ability to return whatever goods have already been delivered under the contract substantially in the condition in which he received them.¹ Article 82 (2), however, creates three very broad exceptions to the rule of article 82 (1): a buyer is not precluded from avoiding the contract or demanding substitute goods if his inability to return the goods to the seller substantially in their original condition was not the result of the buyer’s own act or omission (article 82 (2) (a)); if the goods perished or deteriorated as a consequence of the examination of the goods provided for in article 38 (article 82 (2) (b)); or if the buyer’s inability to return the goods in their original condition arose from buyer’s resale, consumption or transformation of the goods in the normal course and “before he discovered or ought to have discovered the lack of conformity” (article 82 (2) (c)).

ARTICLE 82 IN GENERAL

2. The provisions in Chapter V, Section V of Part III of the CISG, which include article 82, have been cited in support of the proposition that avoidance of contract is “a constitutive right of the buyer, which changes the contractual relationship into a restitutional relationship.”² Article 82 has also been characterized as part of the Convention’s “risk distribution mechanism” for avoided contracts, under which “the seller alone bears the risk of chance accidents and force majeure.”³ This decision found that a buyer is not liable for loss or damage to the goods that occurred while they were

being transported back to the seller following the buyer’s justified avoidance of the contract.⁴ The court reasoned that this “one-sided or predominant burdening of the seller with the risks of restitution” of the goods is explained by the fact that the seller caused these risks by breaching the contract.⁵

ARTICLE 82 (1)

3. Article 82 (1) states that, in order to preserve its right to avoid the contract or require the seller to deliver substitute goods, an aggrieved buyer must have the ability to make restitution of goods that the buyer received under the contract “substantially in the condition in which he received them”. Several decisions have denied a buyer the right to avoid the contract because he could not meet this requirement. Thus, where a buyer attempted to avoid a contract for the sale of flower plants because the delivered plants allegedly were defective in appearance and colour, a court noted that the buyer had lost the right to avoid under article 82 (1) because it had discarded some plants and resold others.⁶ A buyer of textiles, some of which did not conform to a pattern specified in the contract, was also found to have lost the right to avoid because he had resold the goods.⁷ Another buyer lost the right to avoid the contract because, after he discovered that marble slabs delivered by the seller were stuck together and broken, he cut and processed the slabs, thus making it impossible to return them substantially in the condition in which they were received.⁸ Another decision held that the buyer had lost its right to avoid the contract because it had used the goods (a machine) for five years, which precluded restitution of the machine in the condition in which buyer had received it.⁹

4. On the other hand a court, noting that article 82 (1) only requires that goods be returned “*substantially*” in the condition in which they were received, declared that a buyer loses its right to declare avoidance under article 82 (1) only in cases where “the condition of the goods has changed in such a way that it would be unreasonable to expect the seller to redeem the

goods.”¹⁰ Another decision has noted that article 82 does not prevent a buyer from avoiding the contract where the seller failed to claim that the requirements of article 82 were not met¹¹—suggesting that, when a seller intends to invoke article 82 (1) in order to challenge the buyer’s avoidance of the contract, the seller bears the burden of coming forward with evidence that the buyer cannot return the goods substantially in the condition in which he received them. The same decision also indicates that article 82 only encompasses loss of or deterioration in the goods that occurs before the declaration of avoidance is made.¹² It has also been found that a buyer did not lose the right to avoid under article 82 merely by announcing, prior to trial, that he was attempting to resell the goods (an attempt that the court characterized as an effort to mitigate damages): the court indicated that article 82 would prevent the buyer from avoiding only if he had actually resold the goods before declaring the contract avoided.¹³ Another decision found that article 82 (1) did not deprive a buyer of the right to avoid the contract when the delivered goods suffered damage as they were being transported back to the seller (as the seller had agreed) provided the buyer did not bear risk of loss during such transport.¹⁴ Other decisions have refused to deny a buyer the right to avoid, even though the buyer could not make restitution of the goods substantially in the condition in which they were received, because the buyer had satisfied the requirements of one or more of the exceptions in article 82 (2).¹⁵

ARTICLE 82 (2) (a)

5. Even if a buyer is unable to give restitution of previously delivered goods substantially in the condition in which they were received, article 82 (2) (a) provides that the buyer retains the right to avoid the contract or to require the seller to deliver substitute goods if the buyer’s inability to make restitution is not due its own act or omission. This provision was cited by a court in holding that a buyer was not liable for damage to goods that occurred while they were being transported back to the seller following the buyer’s justified avoidance of contract: the seller itself conceded that the damage occurred while the goods were in the hands of the carrier, and thus could not have been caused by the buyer’s act or omission.¹⁶ On the other hand, article 82 (2) (a) did not preserve the avoidance rights of a buyer who cut and processed non-conforming marble slabs before avoiding the contract, because the buyer’s inability to make restitution of the goods substantially in the condition in which they were received was indeed due to its own acts.¹⁷

ARTICLE 82 (2) (b)

6. Article 82 (2) (b) preserves an aggrieved buyer’s right to avoid the contract or to demand substitute goods where

the buyer’s inability to make restitution of the goods substantially in the condition in which they were received arose as a result of the examination of the goods provided for in article 38. This provision has been invoked to preserve the avoidance rights of a buyer that processed wire before discovering that it did not conform to the contract: the court found that defects in the wire could not be detected until it was processed.¹⁸ The court also determined that the rule of article 82 (2) (b), which by its terms applies if the goods “have perished or deteriorated” because of the article 38 examination, applied even though the processing of the wire actually enhanced its value.¹⁹ On the other hand, a court has held that the substantial change in condition of marble slabs that occurred when the buyer cut and processed them did not result from the article 38 examination, and thus the buyer’s avoidance rights were not preserved under article 82 (2) (b).²⁰

ARTICLE 82 (2) (c)

7. Under article 82 (2) (c), a buyer retains the right to avoid the contract or to demand that the seller deliver substitute goods even though he is unable to make restitution of the goods substantially in their delivered condition, provided that the goods were “sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered or ought to have discovered the lack of conformity”. Under this provision, a buyer who resold paprika in the ordinary course of business before discovering that the goods contained ethylene oxide in amounts that exceeded domestic legal limits retained his right to avoid the contract.²¹ On the other hand, the requirements for this exception were not satisfied when a buyer resold textiles that were, in part, of a different pattern than that called for in the contract; as a result, the buyer lost the right to avoid because it could not make restitution of the goods as required by article 82 (1).²² A buyer that cut and processed marble slabs after discovering that they were non-conforming also did not meet the requirements of article 82 (2) (c), and the buyer was deemed to have lost the right to avoid the contract.²³ A buyer who had been aware of defects in the machine since its commissioning in 2000 nevertheless used that machine for almost six years, which aggravated the defects making it impossible to make restitution of the machine in the same condition in which the buyer received it, in accordance with article 82 (2) (c).²⁴ It has been suggested that a buyer’s resale of the goods after declaring the contract avoided is beyond the scope of article 82.²⁵ It has also been held that the provisions of article 82, specifically including the exception in article 82 (2) (c), do not apply by analogy when the seller is the party avoiding the contract, and do not prevent a seller from avoiding even when the buyer has resold the goods.²⁶

Notes

¹ Although it is located in the part of CISG entitled “Effects of avoidance” (Part III, Chapter V, Section V), article 82 is not limited to situations where a buyer seeks to avoid the contract (or some part thereof) under articles 49, 51, 72 or 73: it also applies when a buyer does not avoid the contract and instead invokes the substitute goods remedy in article 46 (2). Whereas article 81 (2) clearly requires an avoiding buyer to make restitution of goods delivered under the avoided contract, article 46 (2) does not expressly state that a buyer who wishes to require the seller to deliver substitute goods must return the original goods, except insofar as use of the term “substitute goods” suggests such an obligation. Article 82, however, indicates that a buyer seeking substitute goods must in fact give back the originals substantially in the condition in which it received them, unless one of the exceptions in article 82 (2) applies.

²Landgericht Düsseldorf, Germany, 11 October 1995, Unilex.

³CLOUT case No. 422 [Oberster Gerichtshof, Austria, 29 June 1999].

⁴Ibid.

⁵Ibid.

⁶Rechtbank Rotterdam, the Netherlands, 21 November 1996, Unilex. Presumably the resale occurred after the buyer discovered or ought to have discovered the alleged lack of conformity.

⁷CLOUT case No. 82 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994]. Again, the resale presumably occurred after the buyer discovered or ought to have discovered the alleged lack of conformity.

⁸CLOUT case No. 316 [Oberlandesgericht Koblenz, Germany, 27 September 1991].

⁹CLOUT case No. 1025 [Cour de cassation, France, 3 November 2009 (Société Anthon GmbH & Co. v. SA Tonnellerie Ludonnaise)], English translation available on the Internet at www.cisg.law.pace.edu (see full text of the decision).

¹⁰Bundesgericht, Switzerland, 18 May 2009 (Packaging machine case), English translation available on the Internet at www.cisg.law.pace.edu.

¹¹CLOUT case No. 2 [Oberlandesgericht Frankfurt a.M., Germany, 17 September 1991] (see full text of the decision).

¹²Ibid.

¹³Amtsgericht Charlottenburg, Germany, 4 May 1994, Unilex. The court also indicated that the buyer would lose the right to avoid only if the resale occurred before the buyer discovered the lack of conformity. Article 82 (2) (c), however, preserves the buyer's right to avoid unless the resale (or other ordinary course consumption or transformation of the goods by the buyer) occurs after the buyer discovers or ought to have discovered the lack of conformity—resales that occur after the buyer discovered or ought to have discovered the lack of conformity do not come within the exception.

¹⁴CLOUT case No. 594 [Oberlandesgericht Karlsruhe, Germany 19 December 2002].

¹⁵CLOUT case No. 235 [Bundesgerichtshof, Germany, 25 June 1997] (article 82 (2) (b) satisfied); Landgericht Ellwangen, Germany, 21 August 1995, Unilex (article 82 (2) (c) satisfied). For discussion of the exceptions in article 82 (2), see *infra* paragraphs 5-7.

¹⁶CLOUT case No. 422 [Oberster Gerichtshof, Austria, 29 June 1999].

¹⁷CLOUT case No. 316 [Oberlandesgericht Koblenz, Germany, 27 September 1991].

¹⁸CLOUT case No. 235 [Bundesgerichtshof, Germany, 25 June 1997].

¹⁹Ibid. (see full text of the decision).

²⁰CLOUT case No. 316 [Oberlandesgericht Koblenz, Germany, 27 September 1991].

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

²²CLOUT case No. 82 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994].

²³CLOUT case No. 316 [Oberlandesgericht Koblenz, Germany, 27 September 1991].

²⁴CLOUT case No. 1510 [Cour de cassation, France, 27 November 2012], appealing the decision of: Cour d'appel de Bordeaux, France, 27 June 2011, available in French at www.cisg-france.org

²⁵Amtsgericht Charlottenburg, Germany, 4 May 1994, Unilex, where the court stated that the buyer would have lost the right to avoid the contract under article 82 (1) only if it had resold by the time of the letter declaring the contract avoided. The court also indicated that the buyer would retain the right to avoid unless the resale occurred before the buyer discovered the lack of conformity. Article 82 (2) (c), however, preserves the buyer's right to avoid unless the resale (or other ordinary course consumption or transformation of the goods by the buyer) occurs after the buyer discovers or ought to have discovered the lack of conformity—resales that occur after the buyer discovered or ought to have discovered the lack of conformity do not come within the exception.

²⁶Oberlandesgericht Karlsruhe, Germany, 14 February 2008, English translation available on the Internet at www.cisg.law.pace.edu.