

### Article 85

If the buyer is in delay in taking delivery of the goods or, where payment of the price and delivery of the goods is to be made concurrently, if he fails to pay the price, and the seller is either in possession of the goods or otherwise able to control their disposition, the seller must take such steps as are reasonable in the circumstances to preserve them. He is entitled to retain them until he has been reimbursed his reasonable expenses by the buyer.

#### OVERVIEW

1. Article 85 creates both an obligation and a right, applicable to sellers that have retained possession or control of goods either because the buyer has delayed taking delivery or because the buyer has failed to make a payment due concurrently with delivery. Under the first sentence of article 85, such a seller must “take such steps as are reasonable in the circumstances” to preserve the goods. Under the second sentence of article 85, such a seller has the right to retain the goods until the buyer reimburses the seller’s reasonable expenses of preservation. Article 85 has been cited in relatively few decisions, most of which have focused on the seller’s right to reimbursement for the expenses of preserving the goods.

#### SELLER’S OBLIGATION TO PRESERVE GOODS

2. A number of decisions have dealt with the seller’s obligation to preserve goods under article 85. That obligation has been invoked to justify a seller’s actions after a buyer demanded that a seller stop making deliveries of trucks covered by a contract for sale: an arbitral tribunal stated that, because the buyer unjustifiably refused delivery, the seller had the right to take reasonable steps toward preserving the goods, including depositing them in a warehouse.<sup>1</sup> In another proceeding, a buyer sought interim relief in the form of an order preventing the seller from selling a key component of industrial machinery. The seller had retained the component after the buyer failed to make full payment for the machinery, and the seller planned to transfer the machinery to another warehouse and resell it. Because the proceeding focused on interim relief, the court applied the national law of the forum rather than the CISG, holding that the seller could move the goods to a new warehouse, but (despite article 87 of the Convention) it would have to advance the warehouse expenses itself, and (despite article 88 of the Convention) it would be restrained from exporting or reselling the component.<sup>2</sup>

#### SELLER’S RIGHT TO RETAIN GOODS UNTIL REIMBURSED FOR REASONABLE EXPENSES OF PRESERVATION

3. A number of decisions have held breaching buyers liable for expenses incurred by an aggrieved seller to preserve the goods. Thus it has been held that the costs of storing and insuring goods for a reasonable period after the buyer improperly refused delivery were recoverable under article 85.<sup>3</sup> Decisions awarding seller the costs of preserving goods usually (although not always) cite article 85 in support of the award,<sup>4</sup> but they frequently characterize the award as damages recoverable under article 74 CISG.<sup>5</sup> One court has stated that “when applying the CISG, the [buyer’s] duty to pay damages is based on article 74, in part also on article 85.”<sup>6</sup> The preservation costs for which sellers have successfully claimed reimbursement have generally been incurred after the buyer unjustifiably refused to take delivery,<sup>7</sup> although in one case they were incurred after the buyer failed to open a letter of credit required by the sales contract.<sup>8</sup> In several cases, an award to cover the seller’s expenses for preserving the goods was made only after the tribunal expressly determined the costs were reasonable,<sup>9</sup> and in one case reimbursement for part of the seller’s preservation expenses was denied because they were not reasonably incurred.<sup>10</sup> Where the seller was in breach and the buyer properly avoided the contract, however, it was found that the prerequisites for the seller to claim reimbursement, under either article 74 or article 85, for expenses of storing and reselling the goods were not met because the buyer did not breach its obligations to pay the price or take delivery; the seller’s claim was therefore denied.<sup>11</sup> And even where a buyer was found liable for seller’s costs of storing the goods in a warehouse, an arbitral tribunal denied seller’s claim for damage to the goods resulting from prolonged storage, because risk of loss had not passed to the buyer under applicable rules.<sup>12</sup> Finally, the principle of the second sentence of article 85 that, in proper circumstances, a seller can retain goods until reimbursed for the reasonable costs of preserving them has also been invoked to support the idea that, unless otherwise agreed, a seller is not obligated to make delivery until the buyer pays the price.<sup>13</sup>

#### Notes

<sup>1</sup> CLOUT case No. 141 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 25 April 1995 (Arbitral award No. 192/1994)].

<sup>2</sup> CLOUT case No. 96 and No. 200 [Tribunal cantonal de Vaud, Switzerland, 17 May 1994] (both abstracts dealing with the same case).

<sup>3</sup> Hof van Beroep Antwerpen, Belgium, 24 April 2006 (GmbH Lothringer Gunther Grosshandelsgesellschaft für Bauelemente und Holzwerkstoffe v. NV Fepco International), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu).

<sup>4</sup> See CLOUT case No. 361 [Oberlandesgericht Braunschweig, Germany, 28 October 1999] (citing article 85 and awarding the seller's costs for cold storage of meat) (see full text of the decision); Arbitration Court of the International Chamber of Commerce, August 1998 (Arbitral award No. 9574), Unilex (citing article 85 and awarding the seller's costs for storing and transporting equipment and spare parts); CLOUT case No. 141 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 25 April 1995 (Arbitral award No. 192/1994)] (citing article 85 and awarding the seller's costs for storing trucks in warehouse); CLOUT case No. 104 [Arbitration Court of the International Chamber of Commerce, 1993 (Arbitral award no. 7197)] (citing article 85 and awarding the seller's costs for storing goods in a warehouse). But see Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 9 September 1994 (Arbitral award No. 375/1993), Unilex (apparently not citing article 85 when awarding seller's costs for storing goods). See also U.S. District Court, Eastern District of California, United States, 19 May 2008 (*The Rice Corporation v. Grain Board of Iraq*), available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu) (without citing article 85, court finds that "the Convention require[s] the seller of goods to take all reasonable steps to preserve the cargo where the buyer has delayed taking delivery of the goods, [and] permits the seller to store the goods at the expense of the buyer, . . ."); CLOUT case No. 96 and No. 200 [Tribunal cantonal de Vaud, Switzerland, 17 May 1994] (both abstracts dealing with the same case) (citing article 85, but applying the national law of the forum to deny seller an interim order requiring the buyer to pay the costs of transporting the goods to a new warehouse) (see full text of the decision).

<sup>5</sup> See CLOUT case No. 361 [Oberlandesgericht Braunschweig, Germany, 28 October 1999] (see full text of the decision); CLOUT case No. 104 [Arbitration Court of the International Chamber of Commerce, 1993 (Arbitral award No. 7197)] (see full text of the decision).

<sup>6</sup> CLOUT case No. 361 [Oberlandesgericht Braunschweig, Germany, 28 October 1999] (see full text of the decision).

<sup>7</sup> Hof van Beroep Antwerpen, Belgium, 24 April 2006 (GmbH Lothringer Gunther Grosshandelsgesellschaft für Bauelemente und Holzwerkstoffe v. NV Fepco International), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu); CLOUT case No. 141 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 25 April 1995 (Arbitral award No. 192/1994)]; CLOUT case No. 361 [Oberlandesgericht Braunschweig, Germany, 28 October 1999] (see full text of the decision); Arbitration Court of the International Chamber of Commerce, August 1998 (Arbitral award No. 9574), Unilex; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 9 September 1994 (Arbitral award No. 375/1993), Unilex.

<sup>8</sup> CLOUT case No. 104 [Arbitration Court of the International Chamber of Commerce, 1993 (Arbitral award No. 7197)] (see full text of the decision).

<sup>9</sup> Hof van Beroep Antwerpen, Belgium, 24 April 2006 (GmbH Lothringer Gunther Grosshandelsgesellschaft für Bauelemente und Holzwerkstoffe v. NV Fepco International), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu) (awarding reimbursement for the cost of storing and insuring the goods to the extent such costs were reasonably incurred); CLOUT case No. 141 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 25 April 1995 (Arbitral award No. 192/1994)]; CLOUT case No. 361 [Oberlandesgericht Braunschweig, Germany, 28 October 1999] (see full text of the decision); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 9 September 1994 (Arbitral award No. 375/1993), Unilex.

<sup>10</sup> Hof van Beroep Antwerpen, Belgium, 24 April 2006 (GmbH Lothringer Gunther Grosshandelsgesellschaft für Bauelemente und Holzwerkstoffe v. NV Fepco International), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu).

<sup>11</sup> CLOUT case No. 293 [Schiedsgericht der Hamburger freundschaftlichen Arbitrage, Hamburg, Germany, 29 December 1998] (see full text of the decision).

<sup>12</sup> CLOUT case No. 104 [Arbitration Court of the International Chamber of Commerce, 1993 (Arbitral award No. 7197)] (see full text of the decision).

<sup>13</sup> CLOUT case No. 96 and No. 200 [Tribunal cantonal de Vaud, Switzerland, 17 May 1994] (both abstracts dealing with the same case) (see full text of the decision).

<sup>2</sup>High People's Court of Zhejiang Province, People's Republic of China, 20 August 2014, (Grand Resources Group Co. Ltd v. STX Corp.) (2014) *Zhe Shang Wai Zhong Zi* No. 48 Civil Judgment, available on the Internet at [www.ccmt.org.cn](http://www.ccmt.org.cn); CLOUT case No. 867 [Tribunale di Forlì, Italy, 11 December 2008 (Mitias v. Solidea S.r.l)], English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu) (allowing the buyer to recover the reasonable costs of storing goods after properly avoiding the contract; citing article 85 rather than article 86). But see CLOUT case No. 594 [Oberlandesgericht Karlsruhe, Germany 19 December 2002], where the court noted that the buyer's obligation under article 86 to take reasonable steps to preserve goods was limited to periods when the goods were in the buyer's possession, and did not impose on the buyer responsibility for transporting non-conforming goods back to a seller who had agreed to remedy the lack of conformity (see full text of the decision).

<sup>3</sup>High People's Court of Zhejiang Province, People's Republic of China, 20 August 2014, (Grand Resources Group Co. Ltd v. STX Corp.) (2014) *Zhe Shang Wai Zhong Zi* No. 48 Civil Judgment, available on the Internet at [www.ccmt.org.cn](http://www.ccmt.org.cn); CLOUT case No. 867 [Tribunale di Forlì, Italy, 11 December 2008 (Mitias v. Solidea S.r.l)], English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu) (allowing the buyer to recover the reasonable costs of storing goods after properly avoiding the contract; citing article 85 rather than article 86); CLOUT case No. 304 [Arbitration Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7531)].

<sup>4</sup>CLOUT case No. 85 [U.S. District Court, Northern District of New York, United States, 9 September 1994] (characterizing recovery of preservation costs as "consequential damages"), affirmed in relevant part in CLOUT case No. 138 [U.S. Court of Appeals (2nd Circuit), United States, 6 December 1993, 3 March 1995] (characterizing recovery of preservation costs as "incidental damages") (see full text of the decision).

<sup>5</sup>China International Economic and Trade Arbitration Commission, People's Republic of China, 6 June 1991, Unilex, English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu).

<sup>6</sup>High People's Court of Zhejiang Province, People's Republic of China, 20 August 2014, (Grand Resources Group Co. Ltd v. STX Corp.) (2014) *Zhe Shang Wai Zhong Zi* No. 48 Civil Judgment (the buyer was effectively ordered to pay such expenses to the sub-buyer as it was held to be bound to return the goods to the seller at the sub-buyer's warehouse), available on the Internet at [www.ccmt.org.cn](http://www.ccmt.org.cn).

<sup>7</sup>Bulgarian Chamber of Commerce and Industry, Bulgaria, 12 February 1998 (Arbitral award No. 11/1996) (Steel ropes case), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu).

<sup>8</sup>CLOUT case No. 155 [Cour de cassation, France, 4 January 1995] (see full text of the decision).