Section II of Part III, Chapter V

Damages (articles 74-77)

OVERVIEW

1. Articles 45 (1) (b) and 61 (1) (b) of the CISG provide that an aggrieved buyer and an aggrieved seller, respectively, may claim damages as provided in articles 74 to 77 if the other party “fails to perform any of his obligations under the contract or this Convention.” Articles 74 to 77, which comprise Section II of Chapter V of Part III, set out the damage formulas that apply to the claims of both aggrieved sellers and aggrieved buyers. These damage provisions are exhaustive and exclude recourse to domestic law.1

2. Article 74 establishes the general formula applicable in all cases where an aggrieved party is entitled to recover damages. It provides that “damages for breach of contract” comprise all losses, including loss of profits, caused by the breach, to the extent that these losses were foreseeable by the breaching party at the time the contract was concluded. An aggrieved party may claim under article 74 even if entitled to claim under article 75 or 76.2 The latter articles explicitly provide that an aggrieved party may recover additional damages under article 74.

3. Articles 75 and 76 apply only in cases where the contract has been avoided. Article 75 measures damages concretely by reference to the price in a substitute transaction, while article 76 measures damages abstractly by reference to the current market price. Article 76 (1) provides that an aggrieved party may not calculate damages under article 76 if it has concluded a substitute transaction under article 75.3 If, however, an aggrieved party concludes a substitute transaction for less than the contract quantity, both articles 75 and 76 may apply.4

4. Pursuant to article 77, damages recoverable under articles 74, 75 or 76 are reduced if it is established that the aggrieved party failed to mitigate losses. The reduction is the amount by which the loss should have been mitigated.

5. Several courts have deduced general principles from the provisions of Section II. Decisions assert that full compensation to an aggrieved party is a general principle on which the Convention is based.5 Another decision states that the Convention prefers “concrete” calculation of damages by reference to actual transactions or losses over abstract calculation by reference to the market price.6 It has been stated that the purpose of money damages under the Convention is to put the aggrieved party in the economic position he would have been in had the contract been properly performed (protection of indemnity and expectation interests) or, as an alternative, to compensate the aggrieved party for expenses he reasonably incurred in reliance on the contract when the purpose of those expenses is lost because of the breach.7

RELATION TO OTHER ARTICLES

6. Article 6 provides that parties may agree to derogate from or vary the provisions of the Convention, including the damage provisions set out in Section II of Chapter V. Several decisions implicitly rely on article 6 when enforcing contract terms limiting or liquidating damages. One decision concluded 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 75.8 Another decision concluded 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.9 The validity of contract terms that address damages is governed by applicable domestic law rather than the Convention (article 4 (a)).

7. A party who fails to perform is exempt from damages if he proves that the requirements of article 79 or article 80 are satisfied. Under article 79, the nonperforming party must show that “the failure was due to an impediment beyond his control” and “that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences”. If the exempt party does not give timely notice of the impediment and its effect as required by article 79 (4), however, he will be liable for damages resulting to the other party from such non-receipt (article 79 (4)). Under article 80, an aggrieved party may not rely on a breach by the other party to the extent that the breach was caused by the aggrieved party’s act or omission.

8. Article 44 provides that a party who fails to give due notice of non-conformity as required by articles 39 or 43 nevertheless has the option to recover damages “except for loss of profit” if he establishes a reasonable excuse for his failure.

9. Article 50 authorizes an aggrieved buyer to reduce the price according to a stated formula when it receives and keeps non-conforming goods. The buyer may waive its right to damages under articles 74 to 76 by claiming instead reduction of the price under article 50.10
10. If the contract is avoided, an aggrieved party who claims damages under article 75 or 76 is also subject to articles 81 to 84 on the effects of avoidance. Although avoidance generally releases the parties from their obligations under the contract, a party’s right to damages survives avoidance (article 81 (1)).

11. Other articles of the Convention may require a party to take specific measures to protect against losses. Articles 85 to 88, for example, state when and how a buyer or seller must preserve goods in their possession. The party taking such measures is entitled by these articles to recover reasonable expenses.

**BURDEN OF PROOF**

12. 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. Thus, the court opined, an aggrieved party claiming damages under articles 74, 75 and 76, or the breaching party claiming a reduction in damages under article 77, will bear the burden of establishing his entitlement to as well as the amount of damages or a reduction in damages. The same opinion concludes, however, that applicable domestic law rather than the Convention governs how a judge should reach his opinion (e.g. the weight to be given evidence) as this is a matter not governed by the Convention.

**SET OFF**

13. Although the Convention does not address the issue of whether a counterclaim may be set off against a claim under the Convention, the Convention does determine whether a counterclaim arising from the sales contract exists. If such a counterclaim does exist, then it may be subject to set off against a claim arising under the Convention.

**JURISDICTION; PLACE OF PAYMENT OF DAMAGES**

14. Several decisions have concluded that, for the purposes of determining jurisdiction, damages for breach of contract are payable at the claimant’s place of business. These decisions reason that the Convention includes a general principle that a creditor is to be paid at its domicile unless the parties otherwise agree.

**Notes**

1CLOUT case No. 345 [Landgericht Heilbronn, Germany, 15 September 1997] (recourse to national law on damages excluded).

2CLOUT case No. 427 [Oberster Gerichtshof, Austria, 28 April 2000] (aggrieved party may claim under article 74 even if it could also claim under articles 75 or 76).

3See ICC award No. 8574, September 1996, Unilex (no recovery under article 76 because the aggrieved party had entered into substitute transactions within the meaning of article 75). See, however, CLOUT case No. 227 [Oberlandesgericht Hamm, Germany, 22 September 1992] (damages calculated under article 76 rather than article 75 where aggrieved seller resold goods for one-fourth of contract price and for less than current market price).

4CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994]. See also ICC award No. 8740, October 1996, Unilex (aggrieved buyer who was unable to establish the market price was not entitled to recover under article 76, and was entitled to recover under article 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 article 75 for contract quantity times the difference between the contract price and the price in the substitute transaction).

5CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002] (see full text of the decision); CLOUT case No. 93 [Arbitration—Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft—Wien, Austria, 15 June 1994] (citing article 74 for general principle within meaning of art. 7 (2)).

6CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996] (CISG favors concrete calculation of damages over the reference to market price in the article 76 formula) (see full text of the decision). See also CLOUT case No. 348 [Oberlandesgericht Hamburg, Germany, 26 November 1999] (damages not awarded under article 76 because they could be calculated by reference to actual transactions).

7CLOUT case No. 541 [Oberster Gerichtshof, Austria, 14 January 2002] (see full text of the decision).


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

11CIETAC award No. 75, China, 1 April 1993, Unilex, also available on the INTERNET at http://www.cisg.law.pace.edu/cgi-bin/search.
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15 See, e.g., CLOUT case No. 304 [Arbitration—International Chamber of Commerce No. 7531 1994] (awarding damages under article 74 for expenses incurred to preserve goods under articles 86, 87 and 88 (1)). See also CLOUT case No. 104 [Arbitration—International Chamber of Commerce No. 7197 1993] (awarding damages for expenses incurred in preserving perishable goods even though not required to do so by articles 85 to 88) (see full text of the decision).

16 FCF S.A. v. Adriafil Commerciale S.r.l., Bundesgericht, Switzerland, 15 September 2000, available on the Internet at http://www.bger.ch. See also CLOUT case No. 217 [Handelsgericht des Kantons Aargau, Switzerland, 26 September 1997] (aggrieved party has burden of establishing loss); 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). See generally CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000] (deriving from article 79 a general principle that claimant has burden of establishing its claim).

17 Article 77 of the Convention expressly provides that the party in breach may claim a reduction if the other party fails to take measures to mitigate the loss.

18 FCF S.A. v. Adriafil Commerciale S.r.l., Bundesgericht, Switzerland, 15 September 2000, available on the Internet at http://www.bger.ch (construing article 8 of Swiss Civil Code). See also CLOUT case No. 261 [Bezirksgericht der Sanne, Switzerland, 20 February 1997] (domestic law, rather than the Convention, determines how damages are to be calculated if the amount cannot be determined); CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997] (domestic law determines whether estimate of damages for future losses is sufficiently definite).

19 CLOUT case No. 288 [Oberlandesgericht München, Germany 28 January 1998] (applicable law, not the Convention, determines whether set off permitted); CLOUT case No. 281 [Oberlandesgericht Koblenz, Germany, 17 September 1993] (applicable domestic law determines whether set off allowed). But see CLOUT case No. 630 [Court of Arbitration of the International Chamber of Commerce, Zurich, Switzerland, July 1999] (appearing to suggest that, because the Convention itself does not provide set-off as a remedy for aggrieved buyers, buyer was not entitled to set off damages against its liability for the price of delivered goods).


21 CLOUT case No. 348 [Oberlandesgericht Hamburg, Germany, 26 November 1999] (buyer’s counterclaim offset against seller’s claim for price); CLOUT case No. 318 [Oberlandesgericht Celle, Germany, 2 September 1998] (buyer damages set off against price); CLOUT case No. 273 [Oberlandesgericht München, Germany, 9 July 1997] (buyer’s counterclaim would have been allowable as set off but seller had not breached). See also CLOUT case No. 280 [Oberlandesgericht Jena, Germany, 26 May 1998] (implicitly recognizing the possibility that buyer’s tort claim could be raised in order to be set off against seller’s claim for the price, but applying CISG notice provisions to bar tort claim). But see CLOUT case No. 630 [Court of Arbitration of the International Chamber of Commerce, Zurich, Switzerland, July 1999] (appearing to suggest that, because the Convention itself does not provide set-off as a remedy for aggrieved buyers, buyer was not entitled to set off damages against its liability for the price of delivered goods).

22 CLOUT case No. 205 [Cour d’appel, Grenoble, France, 23 October 1996] (deriving from article 57 (1) a general principle that the place of payment is the domicile of creditor); CLOUT case No. 49 [Oberlandesgericht Düsseldorf, Germany, 2 July 1993] (deriving general principle on place of payment from article 57 (1)).