



**United Nations Commission
on International Trade Law**

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

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.

* 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.

1. Article 76 provides that an aggrieved party may claim recovery of 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 a substitute transaction, article 76 calculates damages abstractly by reference to the current market price. The Convention prefers concrete calculation of damages.³ Paragraph (1) of article 76 provides that its damage formula is not available if an aggrieved party has concluded a substitute transaction.⁴ If an aggrieved party 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

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. An aggrieved party may also choose to recover damages under

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.

² ICC award No. 8502, November 1996, Unilex (reference to both art. 76 and art. 7.4.6 of Unidroit Principles of International Commercial Contracts).

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

⁴ See ICC award No. 8574, September 1996, Unilex (no recovery under art. 75 because aggrieved party concluded substitute transactions before it avoided the contract). See also CLOUT case No. 348 [Oberlandesgericht Hamburg, Germany, 26 November 1999] (damages not calculated under art. 76 because damages could be calculated by reference to actual transactions).

⁵ CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994] (see full text of the decision). See also ICC award No. 8740, 1996, Unilex (aggrieved buyer unable to establish market price 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 times the difference between the contract price and the price in the substitute transaction).

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

article 74 even when it might recover under article 76.⁷ If the conditions for recovery under article 76 are not satisfied, damages may nevertheless be recovered under article 74.

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. The reduction is the amount by which the loss should have been mitigated. See “calculation of damages” below.

5. Pursuant to article 6, the seller and buyer may agree to derogate from or vary the formulas 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.⁸

Conditions on 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).

7. Article 76 is not applicable if the contract has not been avoided.⁹ Thus, the article will not apply if the aggrieved party has not declared the contract avoided when entitled to do so¹⁰ or if the aggrieved party has not made an effective declaration of avoidance.¹¹

8. The formula of article 76 can only be applied if there is a current price. The current price is the price generally charged on the market for goods of the same kind under comparable circumstances.¹² 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

⁷ CLOUT case No. 427 [Oberster Gerichtshof, Austria, 28 April 2000] (aggrieved party may claim under art. 74 unless party regularly concludes similar transactions and has designated one as a substitute within art. 75); 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).

⁸ CIETAC award No. 75, China, 1 April 1993, Unilex.

⁹ 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] (art. 76 not applicable when the contract had not been avoided).

¹⁰ CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (no avoidance) (see full text of the decision).

¹¹ CLOUT case No. 238 [Oberster Gerichtshof, Austria, 12 February 1998] (declaration of avoidance too early) (see full text of the decision).

¹² 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).

adjustment to that price was not possible.¹³ The same tribunal accepted as the current price a price negotiated by the aggrieved seller in a substitute contract that was not ultimately concluded.¹⁴ 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.¹⁵ 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 76.¹⁶ 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.¹⁷

9. Damages may not be recovered under article 76 if the aggrieved party has purchased substitute goods. Where a seller had failed to deliver the goods and the aggrieved buyer bought no substitute goods, the buyer’s damages are to be calculated under article 76.¹⁸

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 76.¹⁹ The time at which the current price is to be determined is the date of the effective avoidance of the contract or, if the aggrieved party has taken over the goods before avoidance, then it is this earlier time instead.²⁰ For cases determining what constitutes evidence of a current price, see paragraph 8 above.

11. Paragraph (2) of article 76 indicates the relevant place for determining the current price. There are no reported cases construing this provision.

¹³ CIETAC award, China, 18 April 1991, available on the Internet at http://www.cietac-sz.org.cn/cietac/alfx/Case/My_03.htm (evidence did not reflect contract delivery terms).

¹⁴ *Id.*

¹⁵ ICC award No. 8740, 1998, Unilex (value of coal subjective because depends on buyer’s needs and shipping terms; aggrieved party, who made no claim under art. 74, could recover under art. 75 only to the extent it had entered into substitute transactions).

¹⁶ CLOUT case No. 308 [Federal Court of Australia, 28 April 1995] (valuation arranged by insolvency administrator) (see full text of the decision).

¹⁷ Oberlandesgericht Braunschweig, Germany, 28 October 1999, Unilex.

¹⁸ CLOUT case No. 328 [Kantonsgericht des Kantons Zug, Switzerland, 21 October 1999].

¹⁹ Oberlandesgericht Hamburg, Germany, 4 July 1997, Unilex.

²⁰ CIETAC award, China, 18 April 1991, available on the Internet at http://www.cietac-sz.org.cn/cietac/alfx/Case/My_03.htm (disagreeing with date claimed by aggrieved party).

Burden of proof; consideration of evidence

12. Although article 76 is silent on which party has the burden of establishing loss, decisions have placed this burden on the aggrieved party.²¹

²¹ See, e.g., CLOUT case No. 318 [Oberlandesgericht Celle, Germany, 2 September 1998] (aggrieved buyer failed to establish current price).
