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Article 77

A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

1. Article 77 requires an aggrieved party claiming damages to take reasonable steps to mitigate losses and, if he fails to do so, the breaching party may claim a reduction in the damages recoverable in the amount the loss should have been mitigated. If an aggrieved party does not request damages, whether by way of an affirmative claim or by way of set-off, article 77 does not apply¹.

¹ CLOUT case No. 424 [Oberster Gerichtshof, Austria, 9 March 2000] (see full text of the decision).

* 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.

Relation to other articles

2. Article 77 appears in Section II (Damages) of Chapter V and therefore does not expressly apply to remedies other than damages that are available under the Convention.
3. Other articles of the Convention may require parties to take specific measures to protect against losses. Articles 85 to 88 provide, for example, that buyers and sellers must take reasonable steps to preserve goods in their possession following breach².
4. Pursuant to article 6, the seller and buyer may agree to derogate from or vary the formula set out in article 77. One decision concluded that if an aggrieved party seeks to enforce a penalty clause in the contract article 77 does not require the aggrieved party to reduce the penalty in order to mitigate the loss³.
5. Article 77 does not state at what point in a legal proceeding the issue of mitigation must be considered by a court or tribunal. One decision concluded that the issue of whether mitigation should be considered in a proceeding on the merits or in a separate proceeding to determine damages is a procedural issue governed by domestic law rather than by the Convention⁴.

Measures to mitigate

6. An aggrieved party claiming damages must mitigate them by taking those steps that a reasonable creditor acting in good faith would take under the circumstances⁵. If a contract has already been avoided, an aggrieved party's notice to the breaching party of a proposed act to mitigate does not revoke the earlier avoidance⁶. In some circumstances the aggrieved party may be excused from taking such measures (see paragraphs 11 and 14 below).
7. Article 77 does not expressly state when the aggrieved party must take measures to mitigate. Several decisions state that an aggrieved party is not obligated to mitigate in the period before the contract is avoided (i.e. at a time when each party may require the other to perform)⁷. If an aggrieved party does take measures, however, he must do so within a reasonable time under the circumstances. One decision found that the seller's resale of goods to a third party two months after they

² CIETAC award, China, 6 June 1991, available on the Internet at <http://www.cietac-sz.org.cn/cietac/index.htm> (cost of freight for return of goods split between buyer who failed to return goods in a reasonable manner and seller who did not cooperate in return).

³ Hof Arnhem, the Netherlands, 22 August 1995, Unilex (validity of penalty clause determined under national law).

⁴ CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999] (applying German law).

⁵ CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (see full text of the decision).

⁶ Landgericht Berlin, Germany, 15 September 1994, Unilex.

⁷ CLOUT case No. 361 [Oberlandesgericht Braunschweig, Germany, 28 October 1999] (requiring seller to resell would make it impossible for seller to perform the original contract during period when breaching party entitled to demand performance); CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994].

had been rejected was reasonable within the context of the fashion industry⁸. Another decision found that the buyer's purchase of substitute goods approximately two weeks after the seller declared that it would not perform was not a failure to mitigate even though the price in a volatile market had risen sharply⁹.

– Measures by aggrieved buyers

8. Decisions have found the following measures by aggrieved buyers to be reasonable: paying another supplier to expedite delivery of already-ordered compressors that could be substituted for defective compressors¹⁰; contracting with a third-party supplier because of inability of breaching party to deliver moulds in time¹¹; contracting with a third party to treat leather goods when the seller refused to return the machine sold¹²; continuing to print fabric purchased notwithstanding the discovery of problems with the fabric¹³; requesting permission from a Government authority and proposing to test milk powder in the Free Trade Zone prior to import¹⁴; using the buyer's own buffer stocks of coal when the seller made late deliveries¹⁵; proposing to a sub-buyer that the goods the seller delivered late should be accepted with a 10 per cent reduction in price¹⁶; selling perishable goods even though not required to do so by articles 85 to 88¹⁷.

9. The aggrieved buyer was found to have failed to mitigate damages in the following circumstances: failure to inspect goods properly and to give documents setting out its claims of nonconformity¹⁸; failure to examine shipments of aluminium hydroxide before mixing the shipments together¹⁹; failure to stop the use of vine wax after the aggrieved party had discovered the wax to be defective²⁰;

⁸ CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994] (in August most retailers in Italian market have filled their stock for the coming season and have no reason to buy more goods for the winter season).

⁹ CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997] (transaction characterized as highly speculative).

¹⁰ CLOUT case No. 85 [Federal District Court, Northern District of New York, United States, 9 September 1994], *affirmed*, CLOUT case No. 138 [Federal Court of Appeals for the Second Circuit, United States, 6 December 1993, 3 March 1995].

¹¹ *Nova Tool & Mold Inc. v. London Industries Inc.*, Ontario Court of Appeal, Canada, 26 January 2000, available on the Internet at <http://is.dal.ca/~cisg/cases/nova2.htm>.

¹² CLOUT case No. 311 [Oberlandesgericht Köln, Germany, 8 January 1997].

¹³ *Schmitz-Werke v. Rockland*, [Federal] Fourth Circuit Court of Appeals, United States, 21 June 2002, 2002 US App. LEXIS 12336, 2002 WL 1357095 (continuation both at urging of seller and to mitigate damages; art. 77 not cited).

¹⁴ *Malaysia Dairy Industries v. Dairex Holland*, Rb 's-Hertogenbosch, the Netherlands, 2 October 1998, Unilex.

¹⁵ ICC award No. 8740, October 1996, Unilex (seller bore risk that buyer's buffers were insufficient in light of the unreliability of suppliers).

¹⁶ ICC award No. 8786, January 1997, Unilex.

¹⁷ CLOUT case No. 104 [Arbitration—International Chamber of Commerce No. 7197 1993] (see full text of the decision).

¹⁸ 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].

¹⁹ CLOUT case No. 284 [Oberlandesgericht Köln, Germany, 21 August 1997].

²⁰ CLOUT case No. 271 [Bundesgerichtshof, Germany, 24 March 1999].

failure to look for replacement goods in markets other than the local region²¹; failure to cancel its contract of sale with sub-buyer or to conclude a substitute purchase²²; failure to provide evidence of the price it received on its sale of nonconforming goods to a sub-buyer²³; failure to provide evidence as to whether the aggrieved buyer could buy the same product from the wholesaler newly-designated by the seller²⁴.

10. Several decisions have denied an aggrieved buyer's claim for reimbursement of expenditures because the expenditures did not limit the loss. One decision declined to award the buyer damages to compensate for the expenses of adapting a machine to process defective wire delivered by the seller because the cost of the adaptation was disproportionate to the purchase price of the wire²⁵. A buyer was denied recovery for the costs of translation of a manual to accompany the goods to be resold because the aggrieved buyer failed to notify the seller, which, as it was a multinational company, would already have had manuals in the language into which the manual was translated²⁶. A few decisions have denied the aggrieved party's claim for the cost of enforcing its claim for breach of contract through a collection agent or lawyer²⁷.

11. Several decisions have found that the buyer's failure to act was not a breach of its duty to mitigate losses. One tribunal found that an aggrieved buyer's failure to buy substitute goods from another supplier was justified by the short delivery time in the contract and the alleged difficulty in finding another supplier²⁸. A court concluded that the buyer had not breached its duty to mitigate by its failure to inform the seller that the buyer's sub-buyer needed the goods without delay because it had not been established that the buyer knew of the sub-buyer's production plans²⁹.

²¹ CLOUT case No. 318 [Oberlandesgericht Celle, Germany, 2 September 1998].

²² CLOUT case No. 476 [Arbitration-Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, award No. 406/1998 of 6 June 2000].

²³ CLOUT case No. 303 [Arbitration—International Chamber of Commerce No. 7331 1994].

²⁴ Helsingin hovioikeus [Helsinki Court of Appeal], Finland, 26 October 2000, found on the Internet at <http://cisgw3.law.pace.edu/cases/001026f5.html>.

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

²⁶ CLOUT case No. 343 [Landgericht Darmstadt, Germany, 9 May 2000] (see full text of the decision).

²⁷ CLOUT case No. 296 [Amtsgericht Berlin-Tiergarten, Germany, 13 March 1997] (employing debt collection agency in breaching party's jurisdiction rather than bringing suit in aggrieved party's jurisdiction and enforcing this judgment in breaching party's jurisdiction); CLOUT case No. 410 [Landgericht Alsfeld, Germany, 12 May 1995] (hiring collection lawyer in the aggrieved party's jurisdiction rather than the breaching party's jurisdiction); Landgericht Düsseldorf, Germany, 25 August 1994, Unilex (employment of agent reasonable only if established that agent had more effective means of recovery than aggrieved party); Landgericht Berlin, Germany, 6 October 1992, available on the Internet at <http://www.cisg-online.ch/cisg/urteile/173.htm> (hiring collection agency contrary to duty to mitigate because it was foreseeable that buyer would refuse to and the additional expenses of hiring an attorney would have been included in trial costs recoverable from defaulting buyer).

²⁸ CLOUT case No. 166 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996] (no "manifest violation" of duty to mitigate) (see full text of the decision).

²⁹ Amtsgericht München, Germany, 23 June 1995, Unilex.

– Measures by aggrieved sellers

12. Decisions have found the following measures by aggrieved sellers to be reasonable: incurring expenses to transport, store, and maintain the undelivered machinery³⁰; reselling goods to a third party³¹.

13. The aggrieved seller was found to have failed to mitigate damages in the following circumstances: drawing on a guaranty before avoiding the contract³²; reselling goods at a price below the price offered by the breaching buyer when the latter sought unsuccessfully to amend the contract³³.

14. The seller was excused from taking steps to mitigate in the following circumstances: not reselling the goods during the period when the breaching party was entitled to demand performance on the ground that to require the seller to sell would make it impossible for the seller to perform the original contract³⁴; not reselling the stockings made to the buyer's particular specifications³⁵.

15. One court has stated that an aggrieved seller's damages are not to be reduced under article 77 by the price received in a resale of the goods where the seller had the capacity and market to make multiple sales. The court reasoned that to treat the resale as a substitute transaction under article 75 meant that the seller would lose a sale bringing the same profit as the first contract³⁶.

Reduction of damages

16. The breaching party may claim a reduction in the damages to be awarded to the aggrieved party in the amount by which reasonable mitigation measures would have reduced the loss to the aggrieved party. Several decisions have calculated the reduction without specific reference to the loss that could have been avoided. One decision found that the aggrieved buyer who failed to mitigate should be entitled only to 50 per cent of the difference between the contract price and the price the buyer received when it resold the nonconforming goods to its customers³⁷. An

³⁰ CLOUT case No. 301 [Arbitration—International Chamber of Commerce No. 7585 1992] (need to mitigate because of size and specifications of machinery) (see full text of the decision).

³¹ CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994]; CLOUT case No. 93 [Arbitration—Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft, Wien—Austria, 15 June 1994] (resale by seller not only justified but may have been obligatory under art. 77); CLOUT case No. 227 [Oberlandesgericht Hamm, Germany, 22 September 1992]; *Watkins-Johnson Co. v. Islamic Republic of Iran*, Iran—US Claims Tribunal, 28 July 1989, Unilex (seller's right to sell undelivered equipment in mitigation of its damages is consistent with recognized international law of commercial contracts).

³² CLOUT case No. 133 [Oberlandesgericht München, Germany, 8 February 1995] (aggrieved seller drew on guaranty following breach without taking steps to mitigate).

³³ CLOUT case No. 395 [Tribunal Supremo, Spain, 28 January 2000].

³⁴ CLOUT case No. 361 [Oberlandesgericht Braunschweig, Germany, 28 October 1999].

³⁵ CIETAC award (Contract #QFD890011), China, post-1989, available in English translation on the Internet at <http://cisgw3.law.pace.edu/cases/900000c1.html>.

³⁶ CLOUT case No. 427 [Oberster Gerichtshof, Austria, 28 April 2000] (see full text of the decision).

³⁷ CLOUT case No. 474 [Arbitration-Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, award No. 54/1999 of

arbitral tribunal divided the loss between the aggrieved buyer and the breaching seller who was claiming payment for partial delivery because of the buyer's failure to mitigate damages³⁸.

Notice of mitigation steps

17. Article 77 does not explicitly require an aggrieved party to notify the other party of proposed steps to mitigate losses. One decision denied a buyer compensation for the cost of translating a manual where the buyer had failed to notify the seller on the ground that if the buyer had done so the seller could have supplied existing translations³⁹.

Pleading; burden of proof

18. The second sentence of article 77 states that the breaching party may claim a reduction in damages for failure to mitigate losses. Decisions divide on which party bears the burden of pleading the failure to mitigate. An arbitral tribunal has stated that the tribunal should review *ex officio* whether the aggrieved party had complied with its duty to mitigate but that the breaching party had the burden of establishing failure to comply⁴⁰. A court decision, on the other hand, stated that no adjustment to damages will be made if the breaching party fails to indicate what steps the other party should have taken to mitigate⁴¹. Another decision, however, requires the aggrieved party to indicate the offers for substitute transactions it had solicited before putting the breaching party to the burden of establishing the loss due to failure to mitigate⁴².

19. Decisions on who has the ultimate burden of establishing failure to mitigate consistently place the burden on the breaching party of establishing the failure to mitigate and the amount of consequent loss⁴³.

24 January 2000].

³⁸ CLOUT case No. 265 [Arbitration—Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 25 May 1999].

³⁹ CLOUT case No. 343 [Landgericht Darmstadt, Germany, 9 May 2000].

⁴⁰ ICC award No. 9187, June 1999, Unilex.

⁴¹ *FCF S.A. v. Adriafile Commerciale S.r.l.*, Bundesgericht, Switzerland, 15 September 2000, available on the Internet at <http://www.bger.ch/fr/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm>.

⁴² CLOUT case No. 318 [Oberlandesgericht Celle, Germany, 2 September 1998] (although burden of establishing failure to mitigate on breaching party but irrelevant in case because buyer was obliged to indicate which offers for a substitute transaction she obtained and from which companies) (see full text of the decision).

⁴³ CLOUT case No. 318 [Oberlandesgericht Celle, Germany, 2 September 1998] (see full text of the decision); CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (breaching party had to establish how other party had breached its duty, the possible alternatives and the loss that would have been presented; issue raised on appeal without specific reference to facts that might be relevant) (see full text of the decision).