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Article 88

(1) A party who is bound to preserve the goods in accordance with article 85 or 86 may sell them by any appropriate means if there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the price or the cost of preservation, provided that reasonable notice of the intention to sell has been given to the other party.

(2) If the goods are subject to rapid deterioration or their preservation would involve unreasonable expense, a party who is bound to preserve the goods in accordance with article 85 or 86 must take reasonable measures to sell them. To the extent possible he must give notice to the other party of his intention to sell.

(3) A party selling the goods has the right to retain out of the proceeds of sale an amount equal to the reasonable expenses of preserving the goods and of selling them. He must account to the other party for the balance.

1. Under article 88 a party who is required by either article 85 or article 86 to preserve the goods for the other side may be entitled or even required to sell the goods to a third party.

* 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.

Article 88 (1): a preserving party's option to sell the goods to a third party

2. In several decisions, a party who was under an obligation to preserve goods was found under article 88 (1) to have the right to sell them to a third party. Where a buyer refused to take delivery of trucks that it had contracted to purchase, triggering the seller's obligation to preserve the goods under article 85, the seller was held to have the right to resell them at the market price when the buyer continued to refuse delivery.¹ And where a buyer rightfully avoided a contract for the sale of scaffold fittings after the goods had been delivered, thus imposing on the buyer an obligation under article 86 to preserve them for the seller, and the seller thereafter refused to take the goods back, the buyer was found to have the right to sell the goods.² In another decision, a buyer had rightfully avoided a contract for the sale of jeans after discovering that the delivered goods had various non-conformities; because the buyer had made the jeans available for return to the seller on 22 September 1993 but the seller had not taken them back, the court approved the buyer's sale of the goods, which occurred between April 1995 and November 1996.³ The court also approved the buyer's actions in disposing of a portion of the jeans that were infected with fungus, and reselling the remainder through "special sales" of second-quality goods, noting that the seller had been notified that the buyer would initiate the sale in order to recoup its costs unless the seller suggested another solution.⁴ In another decision, which was reached under applicable domestic law but which the tribunal justified by reference to article 88 of the Convention, an arbitral tribunal also approved a preserving party's decision to dispose of some goods while reselling the remainder: the seller had withheld delivery of equipment because the buyer refused to make payment, and the tribunal asserted that the seller's "right to sell undelivered equipment in mitigation of its damages is consistent with recognized international law of commercial contracts. The conditions of article 88 of the Convention are all satisfied in this case: there was unreasonable delay by the buyer in paying the price and the seller gave reasonable notice of its intention to sell".⁵ Specifically, the tribunal found that the seller proved it had made reasonable efforts in reselling the goods by showing that it had sought buyers all over the world and by offering a reasonable explanation for why the goods did not fetch as much as the original contract price; the seller also demonstrated that it had used its best efforts to resell the goods by showing that the part of the equipment the seller decided to scrap could not be resold; with respect to notice, the seller had informed the buyer of its intention to resell, and although it had not notified the buyer of its intention to scrap some equipment, the buyer had never responded to the sales notices, and it was clear

¹ Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 25 April 1995, Unilex.

² CLOUT case No. 304 [Arbitration—International Chamber of Commerce No. 7531 1994] (see full text of the decision).

³ CLOUT case No. 348 [Oberlandesgericht Hamburg, Germany, 26 November 1999] (see full text of the decision).

⁴ *Id* (see full text of the decision).

⁵ Iran/US Claims Tribunal, 28 July 1989, (*Watkins-Johnson Co., Watkins-Johnson Ltd. v. Islamic Republic of Iran, Bank Saderat Iran*), Unilex.

that the buyer was not genuinely interested in receiving delivery of the goods and had not been prejudiced.⁶

3. Other decisions have suggested limits to the authorization to resell given by article 88 (1). Thus where a seller had withheld delivery of one component of machinery because the buyer had paid only part of the price,⁷ and the buyer sought interim relief in the form of an order preventing the seller from selling the component to any third party, the court recognized that article 88 (1) would authorize the seller to sell the goods if the buyer had unreasonably delayed paying the price, but the court nevertheless issued the order against resale, on the grounds that it was not bound by article 88 in an action for interim relief.⁸ And an arbitral tribunal has found that a seller was only authorized to resell undelivered goods under article 88 (1) (and thus to recover the expenses of preserving and reselling the goods) if the buyer had breached its obligation to pay the sale price or take delivery; in the case at hand it was the seller who fundamentally breached and the buyer that rightfully avoided the contract; thus the tribunal concluded that the seller was not entitled to proceed under article 88 (1).⁹

Article 88 (2): a preserving party's obligation to take reasonable measures to sell the goods to a third party

4. The article 88 (2) obligation to take reasonable measures to resell goods, which is imposed on a party required to preserve goods under article 85 or 86 if they are subject to rapid deterioration or their preservation would involve unreasonable expense, was deemed violated where an aggrieved buyer deposited goods that it had received under an avoided contract (and was attempting to return to the seller) in a warehouse, where they remained for almost three years accumulating storage charges: an arbitral tribunal concluded that the buyer had failed to meet its article 88 (2) resale obligation, which was triggered when the storage fees (eventually totalling almost the contract price for the goods) reached unreasonable levels; as a result of the buyer's violation of article 88 (2), the tribunal denied the greater part of the buyer's claim against the seller for the expenses of preservation.¹⁰ On the other hand, several decisions have involved circumstances that were deemed not to trigger an obligation under article 88 (2) to attempt to resell goods. Thus in issuing an interim order forbidding an aggrieved seller from reselling a key component of industrial machinery that the seller had retained because the buyer failed to pay the full contract price, a court noted that article 88 (2) would not require the seller to sell the component because it was not subject to rapid

⁶ *Id.*

⁷ Despite the buyer's partial payment, the seller had not avoided the contract and thus was presumably obliged to preserve the goods pursuant to article 85.

⁸ CLOUT case No. 96 and No. 200 [Tribunal Cantonal Vaud, Switzerland, 17 May 1994] (both abstracts dealing with the same case).

⁹ CLOUT case No. 293 [Arbitration—Schiedsgericht der Hamburger freundschaftlichen Arbitrage, 29 December 1998] (see full text of the decision).

¹⁰ China International Economic and Trade Arbitration Commission (CIETAC), People's Republic of China, 6 June 1991, Unilex. The tribunal also noted that resale by the buyer pursuant to article 88 (2) would have avoided or reduced the deterioration in the condition of the goods (chemicals) that occurred during the lengthy storage period.

deterioration.¹¹ And an aggrieved seller that rightfully withheld delivery of venison when the buyer refused to make payment was found not to be obligated to sell the goods under article 88 (2) “because the meat in question could be preserved through freezing, because the cost of such preservation did not exceed 10 per cent of the value of the meat, and because the decrease in prices in venison to be expected after the Christmas holidays does not constitute a deterioration” in the meaning of article 88 of the Convention.¹²

Article 88 (3): disposition of the proceeds of sale

5. Several decisions have dealt with the rules in article 88 (3) that govern how proceeds of a sale conducted under the authority of article 88 are to be allocated between the parties. According to article 88 (3), a party that has sold goods pursuant to article 88 has the right to retain from the sale proceeds “an amount equal to the reasonable expenses of preserving the goods and selling them”, but must “account to the other party for the balance”. In one case an arbitral tribunal, applying domestic law but also supporting its decision by reference to article 88 (3), found that an aggrieved seller who had justifiably resold the goods to a third party could deduct from sale proceeds the expenses it incurred in carrying out the sale, with the balance to be credited against the buyer’s liability under the contract: the tribunal found that the seller had adequately documented and proved such costs, and the buyer had not substantiated its objections to the documentation.¹³ Similarly, a buyer who rightfully avoided the contract and justifiably sold the goods after the seller refused to take them back was found to have submitted exhibits that adequately documented the total profit the buyer gained from the sale, and the seller had not made specific objection to the documentation; the buyer, however, was denied the right to deduct certain other expenses (agent costs and carriage costs) because the buyer failed to prove it was entitled to such deductions.¹⁴ In the same decision, furthermore, the court found that the breaching seller’s claim under article 88 (3) for the balance of the sale proceeds was subject to set-off by the buyer’s claim for damages under articles 45 and 74: although article 88 (3) expressly mentions only a selling party’s right to deduct reasonable costs of preserving and selling the goods from the sale proceeds, the court suggested that the Convention contained a general principle within the meaning of article 7 (2) that permitted reciprocal claims arising under the Convention (here, the buyer’s claims for damages and the seller’s claim for the balance of the sale proceeds) to be offset; the court refused, however, to declare whether the buyer’s right in this case to set off its damage claim against its liability for the balance of sale proceeds was derived directly from the Convention, or was based on applicable domestic law that led to the same result.¹⁵

¹¹ CLOUT case No. 96 and No. 200 [Tribunal Cantonal Vaud, Switzerland, 17 May 1994] (both abstracts dealing with the same case) (see full text of the decision).

¹² CLOUT case No. 361 [Oberlandesgericht Braunschweig, Germany, 28 October 1999] (see full text of the decision).

¹³ Iran/US Claims Tribunal, 28 July 1989, (*Watkins-Johnson Co., Watkins-Johnson Ltd. v. Islamic Republic of Iran, Bank Saderat Iran*), Unilex.

¹⁴ CLOUT case No. 348 [Oberlandesgericht Hamburg, Germany, 26 November 1999] (see full text of the decision).

¹⁵ *Id.* (see full text of the decision).