

*Article 72***[Damages in case of avoidance and no substitute transaction]**

(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 71, recover the difference between the price fixed by the contract and the current price at the time he first had the right to declare the contract avoided and any further damages recoverable under the provisions of article 70.

(2) For the purposes of paragraph (1) of this article, 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 another place which serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

PRIOR UNIFORM LAW

ULIS, article 84.

Commentary

1. Article 72 sets forth an alternative means of measuring damages where the contract has been avoided but no substitute transaction was entered into under article 71.

Basic formula

2. Where the contract has been avoided, both parties are released from any future performance of their obligations¹ and restitution of that which has already been delivered may be required.² Therefore, the buyer would normally be expected to purchase substitute goods or the seller to resell the goods to a different purchaser. In such a case the measure of damages could normally be expected to be the difference between the contract price and the resale or repurchase price as is provided under article 71.

3. Article 72 permits the use of such a formula even though no resale or cover purchase took place in fact or where it is impossible to determine which was the resale or purchase contract in replacement of the contract which was breached³ or where the resale or purchase was not

¹ Article 66 (1).

² Article 66 (2). If the contract calls for delivery by instalments, article 64 (3) allows avoidance of the contract and a demand for restitution in respect of deliveries already made only "if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract."

³ If the seller has a finite supply of the goods in question or the buyer has a finite need for such goods, it may be clear that the seller has resold or that the buyer has made a cover purchase, as the case may be. However, if the injured party is constantly in the market for goods of the type in question, it may be difficult or impossible to determine

made in a reasonable manner and within a reasonable time after avoidance, as is required by article 71.

4. Pursuant to article 72 (2), the price to be used in the calculation of damages under article 72 (1) is the current price prevailing at the place where delivery of the goods should have been made. Article 72.(1) provides that the relevant date for determining the current price is the date on which the contract could first have been declared avoided.

5. The place where delivery should have been made is determined by the application of article 29. In particular, where the contract of sale involves carriage of the goods, delivery is made at the place the goods are handed over to the first carrier for transmission to the buyer whereas in destination contracts delivery is made at the named destination.

6. The "current price" is that for goods of the contract description in the contract amount. Although the concept of a "current price" does not require the existence of official or unofficial market quotations, the lack of such quotations raises the question whether there is a "current price" for the goods.

7. "If there is no current price" at the place where delivery of the goods should have been made, the price to be used is that "at another place which serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods". If no such price exists, damages must be calculated under article 70.

Additional damages

8. Article 72 recognizes that the injured party may incur additional losses, including loss of profit, which would not be compensated by the basic formula. In such a case the additional losses may be recovered under article 70, provided, of course, the conditions of article 70 are satisfied.

Example 72A: The contract price was \$ 50,000 CIF. Seller avoided the contract because of Buyer's fundamental breach. The current price on the date on which the contract could first have been avoided for goods of the contract description at the place where the goods were to be handed over to the first carrier was \$ 45,000. Seller's damages under article 72 were \$ 5,000.

Example 72B: The contract price was \$ 50,000 CIF. Buyer avoided the contract because of Seller's non-delivery of the goods. The current price on the date on which the contract could first have been avoided for goods of the contract description at the place the goods were to be handed over to the first carrier was \$ 53,000. Buyer's extra expenses caused by the Seller's breach were \$ 2,500. Buyer's damages under articles 70 and 72 were \$ 5,500.

which of the many contracts of purchase or sale was the one in replacement of the contract which was breached. In such a case the use of article 71 may be impossible.