

### Article 73

(1) In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach of contract with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.

(2) If one party's failure to perform any of his obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.

(3) A buyer who declares the contract avoided in respect of any delivery may, at the same time, declare it avoided in respect of deliveries already made or of future deliveries 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.

### INTRODUCTION

1. This article provides special rules for instalment contracts. These rules set out when a seller or a buyer is entitled to declare the contract avoided with respect to a single instalment, future instalments, or the contract as a whole.<sup>1</sup> In accordance with article 26 a declaration of avoidance is effective only if the aggrieved party gives notice to the other party.

2. Article 73 does not preclude application of other articles of the Convention. When a seller fails to deliver an instalment or a buyer fails to pay for an instalment, the aggrieved party is entitled under article 47 or article 64 to give the breaching party an additional period of time and to avoid the instalment if that party fails to perform within the additional time.<sup>2</sup> When some but not all instalments are delivered, article 51 on partial delivery and article 73 may be applicable.<sup>3</sup> An aggrieved party may have both the right to suspend its performance under article 71 (1) and the right to avoid the contract as to future instalments under article 73 (2).<sup>4</sup> An aggrieved party may also be able to avoid its contractual obligations to make further deliveries under either article 72 or article 73.<sup>5</sup>

### WHAT CONSTITUTES AN INSTALMENT CONTRACT

3. An instalment contract is one that provides for delivery of goods in separate lots.<sup>6</sup> The goods do not have to be fungible, so that an instalment contract may cover delivery of different kinds of goods in each instalment (e.g., men's lambskin coats and women's lambskin coats).<sup>7</sup> One decision states that an instalment contract need not determine the quantity of individual instalments under article 73 as precisely as partial deliveries under article 51.<sup>8</sup>

4. Several decisions have characterized separate contracts between parties that have an ongoing relationship as an instalment contract governed by article 73<sup>9</sup> or have concluded that the aggrieved party might act under either article 73 or another article, such as article 71<sup>10</sup> or article 72.<sup>11</sup> One decision also applies article 73 to separate yearly supply contracts for aluminium between the same parties.<sup>12</sup> Another decision, however, distinguishes an instalment contract from a distribution or framework agreement: the latter may provide for non-sales matters such as exclusive representation in a geographical area or an agreement without any determinable quantity.<sup>13</sup>

### AVOIDANCE AS TO A SINGLE INSTALMENT

5. Paragraph (1) entitles a party to declare a contract avoided as to a single instalment if the other party commits a fundamental breach (see article 25) with respect to that instalment. The same standards for determining whether a party commits a fundamental breach apply both to a contract that requires a single delivery and to a contract that requires delivery by instalments. The aggrieved party was found to be entitled to avoid as to an instalment in the following cases: when the seller failed to deliver the promised goods;<sup>14</sup> when the seller conditioned delivery of an instalment on satisfaction of new demands;<sup>15</sup> where the goods of that specific instalment were found to be fundamentally defective;<sup>16</sup> where the buyer failed to open a letter of credit for a specific instalment.<sup>17</sup> On the other hand, the aggrieved party was found not to be entitled to avoid as to an instalment where the buyer delayed paying the price for the instalment.<sup>18</sup> It was held that an agreement may not be terminated where the buyer had fully performed its obligations before the termination.<sup>19</sup> A buyer was also not entitled to avoid the contract where the mistakes in delivery and invoicing were not regarded as a fundamental breach.<sup>20</sup>

## AVOIDANCE OF CONTRACT AS TO FUTURE INSTALMENTS

6. Paragraph (2) of article 73 entitles an aggrieved party to avoid the contract as to future instalments if the party has good grounds to conclude that the other party will commit a fundamental breach of contract (see article 25) with respect to the future instalments.<sup>21</sup>

7. An aggrieved buyer was found to have the right to avoid as to future instalments in the following cases: where the seller made no delivery despite accepting payment;<sup>22</sup> where the seller failed to deliver first instalment;<sup>23</sup> where the seller declared that he would not make further deliveries;<sup>24</sup> where the seller refused to make further delivery of cherries because of a dramatic increase in the market price for cherries;<sup>25</sup> where seller's late delivery of three instalments caused disruption of buyer's production;<sup>26</sup> where the seller delivered poor quality goods;<sup>27</sup> where the buyer had good grounds to believe that the seller would be unable to deliver peppers that satisfied food safety regulations.<sup>28</sup> Where a buyer accepts defective instalments, it does not lose the right to avoid the contract as a whole if the seller again delivers defective goods, constituting a fundamental breach; in the particular instance, the buyer expressly declared its intent to require conforming goods.<sup>29</sup> Where a buyer fails to open a letter of credit for a specific instalment, but clearly expresses its intentions to open future letters of credit, the seller was held not entitled to avoid the contract in respect of the future instalments.<sup>30</sup>

8. In the following cases it was found that the seller had good grounds to avoid the contract: where the buyer's failure to open a letter of credit gave the seller good grounds to conclude that the buyer would not pay;<sup>31</sup> where the buyer continued to breach a contract term that prohibited the buyer from reselling the goods in specified markets;<sup>32</sup> where the buyer stated that it would not accept future deliveries within the contract period, although it was obliged to do so.<sup>33</sup>

## TIME OF AVOIDANCE

9. To avoid as to future instalments under article 73 (2) an aggrieved party must declare avoidance (by notice to the other party—see article 26) within a reasonable time.<sup>34</sup> A buyer who was entitled to avoid the contract as to future instalments effectively avoided the contract when it gave notice to the seller within 48 hours of the third late delivery.<sup>35</sup>

10. It was held that, where a party has failed to perform an instalment, the period within which the aggrieved party may declare the whole contract avoided begins to run from the time that the party obtains knowledge of the breach; the court held that declaring the contract avoided three months after such a breach in a contract for annual instalments was too long.<sup>36</sup> A party may be precluded from avoiding the contract in respect of a specific instalment if it fails to give timely notice, but may still be entitled to avoid the contract in respect of future instalments where the breach provides the aggrieved party with good grounds to conclude that a fundamental breach will take place in respect to the future instalments.<sup>37</sup>

## AVOIDANCE OF CONTRACT AS TO INTERDEPENDENT INSTALMENT

11. If a party intends to avoid as to an instalment under article 73 (1), paragraph (3) authorizes additional avoidance as to past or future instalments that are so interdependent with the avoided instalment that they could not serve the purposes contemplated by the parties at the time the contract was concluded. If a party avoids as to instalments under paragraph (3), it must notify the other party at the same time that it declares avoidance of the instalment under article 73 (1). There is no reason to consider the instalments in a contract for a commodity such as oil as interdependent.<sup>38</sup> Both parties must be aware of the interdependence of the different instalments in order to invoke article 73 (3).<sup>39</sup>

## Notes

<sup>1</sup> See Arbitration Court of the International Chamber of Commerce, 1996 (Arbitral award No. 8740), Unilex (buyer duly avoided as to last instalment when total delivery of coal was less than contract amount).

<sup>2</sup> Schiedsgericht der Börse für Landwirtschaftliche Produkte—Wien, Austria, 10 December 1997, Unilex (buyer's failure to take delivery); CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997]; Zürich Handelskammer, Switzerland, 31 May 1996 (Arbitration award No. 273/95), Unilex (buyer's failure to pay for instalment); Landgericht Ellwangen, Germany, 21 August 1995, Unilex (seller's failure to deliver to third party as agreed).

<sup>3</sup> CLOUT case No. 630 [Arbitration Court of the International Chamber of Commerce, Zurich, Switzerland, July 1999 (Arbitral award No. 9448)] (both articles 51 and 73 applicable but buyer did not establish right to withhold payments); Arbitration Court of the International Chamber of Commerce, 1995 (Arbitral award No. 8128), Unilex.

<sup>4</sup> See CLOUT case No. 578 [U.S. District Court, Western District of Michigan, United States, 17 December 2001 (Shuttle Packaging Systems v. Tsonakis)] (citing articles 71–73 for remedies available in instalment transaction); CLOUT case No. 630 [Arbitration Court of the International Chamber of Commerce, Zurich, Switzerland, July 1999 (Arbitral award No. 9448)] (buyer not entitled to suspend because he had taken partial delivery of goods); CLOUT case No. 238 [Oberster Gerichtshof, Austria, 12 February 1998] (in addition to right to avoid as to instalments under article 73, seller had right to suspend under article 71 (1), but seller failed to establish its right in this case), CLOUT case No. 993 [Højesteret [Supreme Court], Denmark, 17 October 2007 (Zweirad Technik v. C. Reinhardt A/S)]; Oberlandesgericht Brandenburg, Germany 18 November 2008 (Bbeer case), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu).

<sup>5</sup> Helsinki Court of Appeal, Finland, 30 June 1998 (EP S.A. v. FP Oy), Unilex (where two separate orders for skincare ointment were to be filled from the same batch of product and there was a fundamental breach with respect to the quality of the first delivery, the aggrieved buyer could avoid as to the second delivery either under either article 72 or, if the two orders constituted instalments of an instalment contract, under article 73 (2)); Zürich Handelskammer, Switzerland, 31 May 1996 (Arbitration award No. 273/95), Unilex (fundamental breach as to future instalments is covered by both articles 72 and 73).

<sup>6</sup> Arbitration Court of the International Chamber of Commerce, August 1999 (Arbitral award No. 9887), Unilex (Chemical substance); CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998] (lambskin coats); CLOUT case No. 293 [Schiedsgericht der Hamburger freundschaftlichen Arbitrage, Germany, 29 December 1998] (cheese); CLOUT case No. 238 [Oberster Gerichtshof, Austria, 12 February 1998] (umbrellas); CLOUT case No. 246 [Audiencia Provincial de Barcelona, Spain, 3 November 1997] (manufactured springs); CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997] (sunflower oil); CLOUT case No. 154 [Cour d'appel, Grenoble, France, 22 February 1995] (jeans); Chamber of Commerce and Industry of Budapest, Hungary, 17 November 1995 (Arbitration award No. Vb 94124), Unilex (mushrooms); Chansha Intermediate Peoples' Court Economic Chamber, People's Republic of China, 18 September 1995 (case No. 89), Unilex (molybdenum iron alloy), English translation also available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu); Landgericht Ellwangen, Germany, 21 August 1995, Unilex (peppers); Arbitration Court of the International Chamber of Commerce, 1995 (Arbitral award No. 8128), Unilex (chemical fertilizer), CLOUT case No. 720 [Netherlands Arbitration Institute, the Netherlands, 15 October 2002 (Arbitral award No. 2319) (Condensate crude oil mix case)].

<sup>7</sup> CLOUT case No. 251 [Handelsgericht des Kantons Zürich, Switzerland, 30 November 1998] (see full text of the decision).

<sup>8</sup> CLOUT case No. 166 [Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996] (see full text of the decision).

<sup>9</sup> Schiedsgericht der Börse für Landwirtschaftliche Produkte—Wien, Austria, 10 December 1997, Unilex (from economic perspective two contracts for barley concluded on the same day calling for delivery during the same time period are part of same transaction and therefore governed by article 73), CLOUT case No. 796 [Juzgado de Primera Instancia Badalona, Spain, 22 May 2006 (Bermuda shorts case)].

<sup>10</sup> CLOUT case No. 238 [Oberster Gerichtshof, Austria, 12 February 1998] (attempted suspension under article 73 rather than article 71).

<sup>11</sup> Helsinki Court of Appeal, Finland, 30 June 1998 (EP S.A. v. FP Oy), Unilex (where two separate orders for skincare ointment were to be filled from the same batch of product and there was a fundamental breach with respect to the first delivery, the aggrieved buyer could avoid as to the second delivery either under either article 72 or, if the two orders constituted instalments of an instalment contract, under article 73 (2)); Zürich Handelskammer, Switzerland, 31 May 1996 (Arbitration award No. 273/95), Unilex (fundamental breach as to future instalments is covered by both articles 72 and 73); CLOUT case No. 993 [Højesteret [Supreme Court], Denmark 17, October 2007 (Zweirad Technik v. C. Reinhardt A/S)].

<sup>12</sup> Zürich Handelskammer, Switzerland, 31 May 1996 (Arbitration award No. 273/95), Unilex (fundamental breach as to future instalments is covered by both articles 72 and 73).

<sup>13</sup> CLOUT case No. 166 [Schiedsgericht der Handelskammer, Hamburg, Germany, 21 March, 21 June 1996] (leaving open whether contract in case before the court was an instalment contract) (see full text of the decision).

<sup>14</sup> CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997].

<sup>15</sup> CLOUT case No. 293 [Schiedsgericht der Hamburger freundschaftlichen Arbitrage, Germany, 29 December 1998].

<sup>16</sup> CLOUT case No. 989 [China International Economic and Trade Arbitration Commission, People's Republic of China, 5 April 1999] (Air conditioner equipment case), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu).

<sup>17</sup> China International Economic and Trade Arbitration Commission, People's Republic of China, 18 September 1996 (Lanthanide compound case), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu).

<sup>18</sup> Zürich Handelskammer, Switzerland, 31 May 1996 (Arbitration award No. 273/95), Unilex.

<sup>19</sup> Arbitration Court of the International Chamber of Commerce, 2003 (Arbitral award No. 11849) (Fashion products case), available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu).

<sup>20</sup> CLOUT case No. 880 [Tribunal cantonal [Appellate Court] Vaud, Switzerland, 11 April 2002] (Clothing case), available in English on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu).

<sup>21</sup> Arbitration Court of the International Chamber of Commerce, 1999 (Arbitral award No. 10274) (Poultry feed case), available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu).

<sup>22</sup> CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997].

<sup>23</sup> Zürich Handelskammer, Switzerland, 31 May 1996 (Arbitration award No. 273/95), Unilex (failure to deliver first instalment gave the buyer good grounds for concluding that later instalments would not be delivered).

<sup>24</sup> CLOUT case No. 293 [Schiedsgericht der Hamburger freundschaftlichen Arbitrage, Germany, 29 December 1998].

<sup>25</sup> CLOUT case No. 265 [Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 25 May 1999].

<sup>26</sup> CLOUT case No. 246 [Audiencia Provincial de Barcelona, Spain, 3 November 1997].

<sup>27</sup> Arbitration Court of the International Chamber of Commerce, August 1999 (Arbitral award No. 9887), Unilex; China International Economic and Trade Arbitration Commission, People's Republic of China, August 2006 (Chilling press case), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu) (delivery of an instalment of steel containing severe defects and failure to deliver subsequent instalments).

<sup>28</sup> Landgericht Ellwangen, Germany, 21 August 1995, Unilex.

<sup>29</sup> Oberster Gerichtshof, Austria 17 December 2003 (Tantalum powder case), available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu).

<sup>30</sup> China International Economic and Trade Arbitration Commission, People's Republic of China, 18 September 1996 (Lanthanide compound case), English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu).

<sup>31</sup> Chamber of Commerce and Industry of Budapest, Hungary, 17 November 1995 (Arbitration award No. Vb 94124), Unilex; Arbitration Court of the International Chamber of Commerce, 1999 (Arbitral award No. 10274) (Poultry feed case), available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu).

<sup>32</sup> CLOUT case No. 154 [Cour d'appel, Grenoble, France, 22 February 1995] (resale of jeans in Africa and South America; also citing article 64 (1)).

<sup>33</sup> Arbitration Court of the International Chamber of Commerce, 1999 (Arbitral award No. 10274) (Poultry feed case), available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu).

<sup>34</sup> Landgericht Darmstadt, Germany 29 May 2001 (Furniture case), available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu) (declaring the contract avoided two months after becoming aware of the breach was deemed too late).

<sup>35</sup> CLOUT case No. 246 [Audiencia Provincial de Barcelona, Spain, 3 November 1997].

<sup>36</sup> Oberlandesgericht [Appellate Court] Brandenburg, Germany, 18 November 2008 (Beer case), available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu); CLOUT case No.720 [Netherlands Arbitration Institute, the Netherlands, 15 October 2002 (Arbitral award No. 2319)] (buyer failed to give timely notice of the avoidance in respect of a particular instalment).

<sup>37</sup> CLOUT case No.720 [Netherlands Arbitration Institute, the Netherlands, 15 October 2002 (Arbitral award No. 2319)] (crude oil delivered did not meet the reasonable quality norm, and there was no indication that the seller would be able to meet that norm in future).

<sup>38</sup> Ibid.

<sup>39</sup> CLOUT case No. 880 [Tribunal cantonal de Vaud, Switzerland, 11 April 2002] (mistakes in delivery and invoicing in a clothing contract).