

Article 75

If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74.

OVERVIEW

1. Article 75 provides that an aggrieved party may recover damages measured by the difference between the contract price and the price in a substitute transaction if the original contract has been avoided and if the substitute transaction was concluded in a reasonable manner and within a reasonable time after avoidance.¹ The last clause of article 75 provides that an aggrieved party may recover further damages under the general damage formula set out in article 74.² The formula in article 75 is a familiar one and can be found in domestic sales laws.³

RELATION TO OTHER ARTICLES

2. Article 75 sets out the first of two alternative damage formulas applicable if the contract is avoided. Article 75 measures damages as the difference between the contract price and the price in a substitute transaction, while article 76 measures damages as the difference between the contract price and a current (market) price when the aggrieved party does not enter into a substitute transaction. Article 76 (1) provides that an aggrieved party may not calculate damages under article 76 if it has concluded a substitute transaction.⁴ If, however, an aggrieved party concludes a substitute transaction for less than the contract quantity, both articles 75 and 76 may apply. Thus, one decision found that an aggrieved seller who resold only some of the contract goods to a third party may recover damages as to the resold goods under article 75 and damages as to the unsold goods under article 76.⁵ Where the aggrieved party failed to satisfy the conditions for applying article 75, one court applied the “abstract” calculation of article 76 instead.⁶ Where a party failed to prove that certain similar sales conducted at the same time constituted cover sales, it was allowed to calculate its damages under article 76.⁷

3. The final clause of article 75 provides that an aggrieved party may recover further damages under article 74.⁸ In addition, if the aggrieved party fails to satisfy the conditions for application of article 75, the aggrieved party may nevertheless recover damages under article 74.⁹ Even when it might recover under article 75, it has been held that an aggrieved party may choose to claim damages under article 74 instead.¹⁰ Some decisions indicate that damages recovered under article 74 may be calculated in much the same way they would be calculated under article 75,¹¹ but this approach has been rejected in another case.¹²

In one case a court refused a claim under article 74 because the buyer had failed to avoid the contract before making a cover sale.¹³

4. Damages recoverable under article 75 are reduced if it is established that the aggrieved party failed to mitigate those damages as provided in article 77. The reduction is the amount by which the loss should have been mitigated. See paragraphs 12-14 below.

5. Pursuant to article 6, the parties may agree to derogate from or vary the formula set out in article 75. Several decisions implicitly rely on article 6 when finding that article 75 is not applicable. One decision held that where the parties had agreed that an aggrieved party was entitled to a “compensation fee” if the contract was avoided because of the acts of the other party, the aggrieved party was entitled to recover both the compensation fee and damages under article 75.¹⁴ Another decision concluded that a post-breach agreement settling a dispute with respect to a party’s non-performance displaced the aggrieved party’s right to recover damages under the damage provisions of the Convention.¹⁵

CONDITIONS FOR APPLICATION OF ARTICLE 75

6. Article 75 applies if the contract is avoided and if the aggrieved party concludes a substitute transaction in a reasonable manner and within a reasonable time after avoidance.¹⁶

Avoidance of contract

7. Recovery of damages under article 75 is available only if the contract has been effectively avoided¹⁷ by the aggrieved party.¹⁸ Substitute transactions concluded before avoidance do not fall within the coverage of article 75.¹⁹ Notwithstanding the requirement that the contract be avoided, one court has concluded that, with reference to the need to promote observance of good faith in international trade, the aggrieved buyer could recover damages under article 75 without establishing that it had declared the contract avoided when the seller had made it clear that it would not perform.²⁰ In another case it was held that a refusal to perform entitled a party to avoid the contract without notice and then conduct cover sales.²¹ A court has also awarded an aggrieved

seller damages equivalent to those provided for in article 75 (the difference between the contract price and the lower price at which the seller resold the goods) even though the seller apparently never avoided the contract, where the seller complied with the requirements in article 88 for reselling the goods, including the requirement of notice of intention to resell.²²

Substitute transaction

8. An aggrieved party seeking damages calculated under article 75 must conclude a substitute transaction. If the seller is the aggrieved party, the substitute transaction involves the sale to some other buyer of the goods identified to the avoided contract.²³ An aggrieved buyer concludes a substitute transaction when it buys goods to replace those promised in the avoided contract.²⁴ Where a party fails to establish a clear connection between a purported cover sale and the original contract that has been avoided, it cannot rely on article 75 to calculate its damages.²⁵

9. Article 75 requires that the substitute transaction be entered into “in a reasonable manner and within a reasonable time after avoidance”. There is no express requirement that the price in the substitute transaction be reasonable. Nevertheless, one decision concluded that where an aggrieved seller resold the goods for approximately one-fourth of the contract price the resale was not a reasonable substitute and the court calculated damages under article 76 rather than article 75.²⁶ In another case the court held that where an aggrieved buyer paid a cover price that was almost double the original purchase price, it did not constitute a reasonable substitute transaction.²⁷ If there is a significant difference between the contract price and the price in the substitute transaction the damages recoverable under article 75 may be reduced pursuant article 77 because of the aggrieved party’s failure to mitigate damages.²⁸ The duty to mitigate is also important in determining whether a seller acted reasonably in concluding substitute sales almost immediately.²⁹ A court held that where a seller allowed an unreasonable period to elapse before starting to make the substitute sales, it failed to comply with its duty to mitigate damages under article 77.³⁰

Substitute transaction—reasonable manner

10. An aggrieved party must conclude the substitute transaction in a reasonable manner. To enter into a “reasonable” substitute transaction, an arbitral tribunal has held, an aggrieved buyer must act as a prudent and careful businessperson who buys goods of the same kind and quality, ignoring unimportant small differences in quality.³¹ A sale at market value on approximately the same freight terms was found to be a reasonable substitute sale.³² One court held that, where the seller’s failure to deliver caused the buyer to default on contracts with its own customers, the cover purchases concluded by the buyer’s customers could form the basis for the buyer’s claim under article 75.³³ Another decision, however, rejected this reasoning, holding that since the cover purchases were not made by the buyer, they did not fulfil the requirements of article 75.³⁴ One court held that an aggrieved seller who resold the goods for the same

price as the price at which the seller acquired them had acted reasonably for purposes of article 75, even though the seller suffered a loss of profit which was recoverable under article 74.³⁵ Where a seller attempted to sell the goods on two occasions, but failed, it provided evidence that the third sale was conducted in a reasonable manner.³⁶ Selling the goods in a limited market where a bigger market is readily available has been held not to constitute selling in a reasonable manner.³⁷

Substitute transaction—reasonable time

11. An aggrieved party must conclude the substitute transaction within a reasonable time after avoidance of the breached contract.³⁸ What time is reasonable will depend on the nature of the goods and the circumstances.³⁹ Noting that a reasonable time begins to run only when the contract is avoided, a court found that the aggrieved seller acted within a reasonable time by reselling shoes made for the winter season within two months where it was established that most potential buyers had already bought winter shoes by the time the contract was avoided.⁴⁰ Resale of scrap steel within two months of the time the seller avoided the contract has also been found reasonable.⁴¹ Another court found that an aggrieved seller who resold a printing press within six months after expiration of an additional period given the buyer to perform under article 63 had acted within a reasonable time.⁴² In one case a lower court held that the resale of motor cycles over a five-year period had been conducted within a reasonable time taking into account the nature of the goods and the market, but on appeal the court held that the time period of the resales was not reasonable, and the court reduced the amount of damages.⁴³ Where a seller waited more than six months without apparent reason to conduct a resale, it was held to be unreasonable.⁴⁴ These decisions assume that the aggrieved party must conclude the substitute transactions within the reasonable time, but one decision has apparently construed the reasonable time requirement to mean that a reasonable time must elapse after avoidance before the substitute transaction may be concluded.⁴⁵

CALCULATION OF DAMAGES

12. If the conditions for application of article 75 are satisfied, the aggrieved party may recover “the difference between the contract price and the price in the substitute transaction”. This amount may be adjusted by adding further damages recoverable under article 74, including loss of profit,⁴⁶ or by deducting the loss that could have been avoided if the aggrieved party had mitigated its damages in accordance with article 77. Most courts have had little difficulty applying the damage formula set out in article 75.⁴⁷

13. Several decisions have awarded additional damages under article 74 to compensate for incidental damages arising from the breach.⁴⁸ There will, of course, be no additional recovery if further damages are not established.⁴⁹

14. Several decisions have reduced the aggrieved party’s recovery under article 75 because that party failed to mitigate its losses. An aggrieved seller who resold the goods to

a third party at a price significantly below not only the original purchase price but also a modified price proposed by the buyer failed to mitigate its damages, and the seller was consequently entitled to recover only the difference between the purchase price and the proposed modified price.⁵⁰ Similarly, where a buyer bought replacement goods at almost double the new price proposed by the seller, the court held that it did not constitute a transaction in a reasonable manner.⁵¹ There is no reduction if there is no failure to mitigate.⁵² In particular, an aggrieved seller who has the capacity and market to sell similar goods may resell the goods intended for the defaulting buyer to a third party and the aggrieved party need not reduce its damages on the ground that the resale was mitigation pursuant to article 77.⁵³

BURDEN OF PROOF; CONSIDERATION OF EVIDENCE

15. Although none of the damage formulas in articles 74, 75 and 76 expressly allocates the burden of proof, one court has concluded that the Convention recognizes the general principle that the party who invokes a right bears the burden of establishing that right, and that this principle excludes application of domestic law with respect to burden of proof.⁵⁴ The same opinion concluded, however, that domestic law rather than the Convention governs how a judge should reach its opinion (e.g. the weight to be given evidence) as this was a matter not covered by the Convention.⁵⁵

Notes

¹ Articles 45 (1) (b) and 61 (1) (b) of the Convention provide that an aggrieved buyer and an 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 See paragraph 13 below.

³ See, for example, CLOUT case No. 102 [Arbitration Court of the International Chamber of Commerce, 1989 (Arbitral award No. 6281)] (applying Yugoslav law but also analysing article 75).

⁴ See Arbitration Court of the International Chamber of Commerce, September 1996 (Arbitral award No. 8574), Unilex (no recovery under article 76 because the aggrieved party had entered into substitute transactions within the meaning of article 75); see however, U.S. District Court, Southern District of New York, United States, 29 May 2009 (Doolim Corp. v. R Doll, LLC, et al.), available on the Internet at www.cisg.law.pace.edu; Oberlandesgericht Graz, Austria, 29 July 2004 (Construction equipment case), English translation available on the Internet at www.cisg.law.pace.edu.

⁵ CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994]. See also Arbitration Court of the International Chamber of Commerce, October 1996 (Arbitral award No. 8740), Unilex (aggrieved buyer who was unable to establish the market price is not entitled to recover under article 76, and entitled to recover under article 75 only to the extent it had made substitute purchases); but compare China International Economic and Trade Arbitration Commission, People's Republic of China, 30 October 1991, English translation available on the Internet at www.cisg.law.pace.edu (aggrieved buyer who had made purchases for only part of the contract quantity nevertheless awarded damages under article 75 for the contract quantity multiplied by the difference between the unit contract price and the unit price in the substitute transaction).

⁶ CLOUT case No. 227 [Oberlandesgericht Hamm, Germany, 22 September 1992] (damages calculated under article 76 rather than article 75 where the aggrieved seller resold goods for one-fourth of contract price); see also Efetio Lamias, Greece, 2006 (docket No. 63/2006) (Sunflower seed case) available on the Internet at www.cisg.law.pace.edu.

⁷ China International Economic and Trade Arbitration Commission, People's Republic of China, 11 February 2000 (Silicon metal case), English translation available on the Internet at www.cisg.law.pace.edu.

⁸ CLOUT case No. 539 [Oberlandesgericht Graz, Austria, 31 May 2002] (Timber case); Oberlandesgericht Graz, Austria, 24 January 2002 (Excavator case), English translation available on the Internet at www.cisg.law.pace.edu. See also paragraph 13 below.

⁹ Arbitration Court of the International Chamber of Commerce, September 1996 (Arbitral award No. 8574), Unilex (recovery allowed under article 74 where the aggrieved party was not entitled to recover under article 75 because it had concluded substitute transactions without having effectively avoided contract). See, however, Audiencia Provincial de Valencia, Spain, 31 March 2005, (Frischaff Produktions v. Guillem Export), English translation available on the Internet at www.cisg.law.pace.edu.

¹⁰ CLOUT case No. 427 [Oberster Gerichtshof, Austria, 28 April 2000] (aggrieved party may claim damages under article 74 even if he could also claim damages under articles 75 or 76).

¹¹ CLOUT case No. 427 [Oberster Gerichtshof, Austria, 28 April 2000] (under article 74 seller can recover difference between cost of acquisition and contract price); CLOUT case No. 243 [Cour d'appel, Grenoble, France, 4 February 1999] (citing article 74 but quoting from article 75) (see full text of the decision); CLOUT case No. 140 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 16 March 1995 (Arbitral award No. 155/1994)] (citing article 74 but determining damages as difference between contract price and price in substitute transaction). See also CLOUT case No. 304 [Arbitration Court of the International Chamber of Commerce, 1994 (Arbitral award No. 7531)] (citing article 75 in support of an award of damages to aggrieved buyer for preserving and selling goods pursuant to articles 86, 87 and 88 (1); buyer did not purchase substitute goods); Efetio Lamias, Greece, 2006, (docket No. 63/2006) (Sunflower seed case), English translation available on the Internet at www.cisg.law.pace.edu. See Supreme Court, Poland, 27 January 2006 (Metallurgical sand case), Unilex, where the lower court awarded damages on this basis, but the court on appeal rejected that reasoning.

¹² Supreme Court, Poland, 27 January 2006 (Metallurgical sand case), Unilex..

¹³ Audiencia Provincial de Valencia, Spain, 31 March 2005 (Frischaff Produktions v. Guillem Export), English translation available on the Internet at www.cisg.law.pace.edu.

¹⁴ CLOUT case No. 301 [Arbitration Court of the International Chamber of Commerce, 1992 (Arbitral award No. 7585)].

¹⁵ China International Economic and Trade Arbitration Commission, People's Republic of China, 1 April 1993 (Arbitral award No. 75), Unilex, English translation available on the Internet at www.cisg.law.pace.edu.

¹⁶ U.S. District Court, Southern District of New York, United States, 29 May 2009 (Doolim Corp. v. R Doll, LLC), available on the Internet at www.cisg.law.pace.edu.

¹⁷ CLOUT case No. 424 [Oberster Gerichtshof, Austria, 9 March 2000] (no declaration of avoidance); CLOUT case No. 474 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 24 January 2000 (Arbitral award No. 54/1999)] (no avoidance); CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997]; CLOUT case No. 294 [Oberlandesgericht Bamberg, Germany, 13 January 1999]; CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (equivocal declaration of avoidance not effective) (see full text of the decision); Efetio Lamias, Greece, 2006 (docket No. 63/2006) (Sunflower seed case) English editorial analysis available on the Internet at www.cisg.law.pace.edu; Audiencia Provincial de Valencia, Spain, 31 March 2005 (Frischaff Produktions v. Guillem Export), English translation available on the Internet at www.cisg.law.pace.edu; Supreme Court, Poland, 27 January 2006 (Metallurgical sand case), Unilex; Oberlandesgericht Düsseldorf, Germany, 22 July 2004 (Shoes case), English translation available on the Internet at www.cisg.law.pace.edu; CLOUT Case 544 [Audiencia Provincial de Barcelona, Spain, 2 February 2004] (Soy oil case); Landgericht Hamburg, Germany, 21 December 2001 (Stones case), English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 982 [China International Economic and Trade Arbitration Commission, People's Republic of China, 25 December 1998 (Pig iron case)], English translation available on the Internet at www.cisg.law.pace.edu.

¹⁸ See CLOUT case No. 362 [Oberlandesgericht Naumburg, Germany, 27 April 1999] (a seller who resold goods after the aggrieved buyer had declared the contract avoided was not entitled to recover damages under article 75); China International Economic and Trade Arbitration Commission, People's Republic of China, 28 February 2005 (Wool case), English translation available on the Internet at www.cisg.law.pace.edu (seller failed to send a notice as required by the contract).

¹⁹ Arbitration Court of the International Chamber of Commerce, September 1996 (Arbitral award No. 8574), Unilex (purchases by aggrieved buyer before it had avoided contract did not constitute substitute transactions under article 75); CLOUT case No. 85 [U.S. District Court, Northern District of New York, United States, 9 September 1994], affirmed in part by CLOUT case No. 138 [U.S. Court of Appeals (2nd Circuit), United States, 6 December 1995] (substitute compressors had been ordered before breach).

²⁰ CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997]. See also Oberlandesgericht Graz, Austria, 29 July 2004 (Construction equipment case), English translation available on the Internet at www.cisg.law.pace.edu.

²¹ Landgericht Hamburg, Germany, 26 November 2003 (Phtalic anhydride case), English translation available on the Internet at www.cisg.law.pace.edu.

²² CLOUT case No. 540 [Oberlandesgericht Graz, Austria, 16 September 2002]. See also Supreme Court, Poland, 27 January 2006 (Metallurgical sand case), Unilex (calculation of damages in terms of article 74 based on the cover sales, although the contract has not been avoided prior to the cover sales).

²³ CLOUT case No. 631 [Supreme Court of Queensland, Australia, 17 November 2000] (see full text of the decision); China International Economic and Trade Arbitration Commission, People's Republic of China, 30 November 1997 (Canned oranges case), English translation available on the Internet at www.cisg.law.pace.edu.

²⁴ CLOUT case No. 85 [U.S. District Court, Northern District of New York, United States, 9 September 1994], affirmed in part by CLOUT case No. 138 [U.S. Court of Appeals (2nd Circuit), United States, 6 December 1995] (compressors ordered from another supplier before seller breached were not substitute goods under article 75); China International Economic and Trade Arbitration Commission, People's Republic of China, 7 May 1997 (Horsebean case), English translation available on the Internet at www.cisg.law.pace.edu.

²⁵ China International Economic and Trade Arbitration Commission, People's Republic of China, 30 November 1997 (Canned oranges case), English translation available on the Internet at www.cisg.law.pace.edu (the quantity and quality of the purported cover sale for oranges from Spain, differed substantially from the original contract).

²⁶ CLOUT case No. 227 [Oberlandesgericht Hamm, Germany, 22 September 1992].

²⁷ CLOUT case No. 1029 [Cour d'appel de Rennes, France, 27 May 2008] (Brassiere cups case), English translation available on the Internet at www.cisg.law.pace.edu.

²⁸ Arbitration Court of the International Chamber of Commerce, 1995 (Arbitral award No. 8128), Unilex (higher price paid by aggrieved buyer in substitute transaction justified because of buyer's obligation to deliver goods promptly to sub-buyer).

²⁹ Hof van Beroep Antwerp, Belgium, 22 January 2007 (N.V. Secremo v. Helmut Papst), English translation available on the Internet at www.cisg.law.pace.edu.

³⁰ Hof van Beroep Antwerp, Belgium, 24 April 2006 (GmbH Lothringer Gunther Grosshandels-gesellschaft für Bauelemente und Holzwerkstoffe v. NV Fepco International), English translation available on the Internet at www.cisg.law.pace.edu.

³¹ Arbitration Court of the International Chamber of Commerce, 1995 (Arbitral award No. 8128) Unilex.

³² CLOUT case No. 631 [Supreme Court of Queensland, Australia, 17 November 2000]; Supreme Court of Queensland, Court of Appeal, Australia, 12 October 2001 (Downs Investments v. Perwaja Steel), [2001] QCA 433, [2002] 2 Qd R 462, available on the Internet at www.cisg.law.pace.edu; China International Economic and Trade Arbitration Commission, People's Republic of China, 25 July 2006 (Bleached softwood Kraft pulp case), English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 986 [China International Economic and Trade Arbitration Commission, People's Republic of China, 4 February 2002] (Styrene monomer case), English translation available on the Internet at www.cisg.law.pace.edu; China International Economic and Trade Arbitration Commission, People's Republic of China, 10 August 2000 (Silicon metal case), English translation available on the Internet at www.cisg.law.pace.edu.

³³ Rechtbank Arnhem, the Netherlands, 19 July 2006 (Skoda Kovarny v. B. van Dijk Jr. Staalhandelmaatschappij B.V.), Unilex (buyer's customers had to reorder steel from different suppliers due to the seller refusing to deliver the goods at the originally agreed prices). See however, Arbitration Court of the International Chamber of Commerce, 20 December 1999 (Copper cable case), available on the Internet at www.cisg.law.pace.edu.

³⁴ Arbitration Court of the International Chamber of Commerce, 20 December 1999 (Copper cable case), available on the Internet at www.cisg.law.pace.edu.

³⁵ Oberlandesgericht Graz, Austria, 24 January 2002 (Excavator case), English translation available on the Internet at www.cisg.law.pace.edu.

³⁶ Arbitration Court of the International Chamber of Commerce, 2000 (Arbitral award No. 10329) (Industrial product case), available on the Internet at www.cisg.law.pace.edu.

³⁷ Højesteret, Denmark, 17 October 2007 (Zweirad Technik v. C. Reinhardt A/S), English translation available on the Internet at www.cisg.law.pace.edu.

³⁸ But see CLOUT case No. 308 [Federal Court of Australia, Australia, 28 April 1995] (where a seller is unable to resell goods until the breaching buyer returns them the seller has a reasonable time to resell from the time they are returned and damages should be calculated as of the date of the return) (see full text of the decision); CLOUT case No. 629 [Kantonsgericht Zug, Switzerland, 12 December 2002] (party waited to make sure that buyer would refuse the goods before concluding the cover sale).

³⁹ Højesteret, Denmark, 17 October 2007 (Zweirad Technik v. C. Reinhardt A/S), English translation available on the Internet at www.cisg.law.pace.edu; Hof van Beroep Antwerp, Belgium, 22 January 2007 (N.V. Secremo v. Helmut Papst), English translation available on the Internet at www.cisg.law.pace.edu; China International Economic and Trade Arbitration Commission, People's Republic of China, 25 July 2006 (Bleached softwood Kraft pulp case), English translation available on the Internet at www.cisg.law.pace.edu.

⁴⁰ CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994] (avoidance on 7 August; resale on 6 and 15 October). See also CLOUT case No. 629 [Kantonsgericht Zug, Switzerland, 12 December 2002] (party waited to make sure that buyer would refuse the goods before concluding the cover sale and then concluded cover sale within two days).

⁴¹ CLOUT case No. 631 [Supreme Court of Queensland, Australia, 17 November 2000] (see full text of the decision); Supreme Court of Queensland, Court of Appeal, Australia, 12 October 2001 (Downs Investments v. Perwaja Steel), [2001] QCA 433, [2002] 2 Qd R 462, available on the Internet at www.cisg.law.pace.edu.

⁴² CLOUT case No. 645 [Corte di Appello di Milano, Italy, 11 December 1998 (Bielloni Castello S.p.A. v. EGO S.A.)].

⁴³ Højesteret, Denmark, 17 October 2007 (Zweirad Technik v. C. Reinhardt A/S), English translation available on the Internet at www.cisg.law.pace.edu.

⁴⁴ Hof van Beroep Antwerp, Belgium, 24 April 2006 (GmbH Lothringer Gunther Grosshandelsgesellschaft für Bauelemente und Holzwerkstoffe v. NV Fepeco International), English translation available on the Internet at www.cisg.law.pace.edu; Hof van Beroep Gent, Belgium, 20 October 2004 (NV Van Heygen Staal v. GmbH Stahl- und Metalhandel Klockner), English translation available on the Internet at www.cisg.law.pace.edu (seller waited more than two months without apparent reason before starting to conduct cover sales).

⁴⁵ Arbitration Court of the International Chamber of Commerce, September 1996 (Arbitral award No. 8574), Unilex (reasonable time must pass after avoidance before an aggrieved buyer may purchase substitute goods). But see Bundesgericht, Switzerland, 15 September 2000 (FCF S.A. v. Adriafile Commerciale S.r.l.), English translation available on the Internet at www.cisg.law.pace.edu (aggrieved buyer made reasonable substitute purchase even though it concluded the purchase promptly after avoidance).

⁴⁶ Oberlandesgericht Graz, Austria, 24 January 2002 (Excavator case), English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 539 [Oberlandesgericht Graz, Austria, 31 May 2002 (Timber case)] (recovery of lost profit); CLOUT case No. 980 [China International Economic and Trade Arbitration Commission, People's Republic of China, 12 February 1999] (Chrome plating production line equipment case), English translation available on the Internet at www.cisg.law.pace.edu (loss of profit).

⁴⁷ See, for example, CLOUT case No. 631 [Supreme Court of Queensland, Australia, 17 November 2000] (see full text of the decision); CLOUT case No. 140 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 16 March 1995 (Arbitral award No. 155/1994)]; CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994]; CLOUT case No. 301 [Arbitration Court of the International Chamber of Commerce, 1992 (Arbitral award No. 7585)]. But see CLOUT case No. 217 [Handelsgericht des Kantons Aargau, Switzerland, 26 September 1997] (majority of judges awarded seller of custom-made cutlery 10 per cent of purchase price as damages, a sum which included losses incurred on the resale of the cutlery); Landgericht Braunschweig, Germany, 30 July 2001 (Metal case), English translation available on the Internet at www.cisg.law.pace.edu.

⁴⁸ CLOUT case No. 631 [Supreme Court of Queensland, Australia, 17 November 2000]; CLOUT case No. 217 [Handelsgericht des Kantons Aargau, Switzerland, 26 September 1997] (recovery of transportation costs) (see full text of the decision); CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994] (recovery of interest on bank loan); Landgericht Berlin, Germany, 30 September 1992, Unilex (recovery of legal fees but not of sales commission that would have been paid if the buyer had performed); CLOUT case No. 539 [Oberlandesgericht Graz, Austria, 31 May 2002 (Timber case)] (recovery of lost profit).

⁴⁹ CLOUT case No. 294 [Oberlandesgericht Bamberg, Germany, 13 January 1999] (aggrieved buyer failed to prove additional costs were foreseeable under article 74).

⁵⁰ CLOUT case No. 395 [Tribunal Supremo, Spain, 28 January 2000].

⁵¹ CLOUT case No. 1029 [Cour d'appel de Rennes, France, 27 May 2008] (Brassiere cups case), English translation available on the Internet at www.cisg.law.pace.edu.

⁵² CLOUT case No. 427 [Oberster Gerichtshof, Austria, 28 April 2000] (see full text of the decision); CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994]; Arbitration Court of the International Chamber of Commerce, 2000 (Arbitral award No. 10329) (Industrial product case), available on the Internet at www.cisg.law.pace.edu.

⁵³ CLOUT case No. 427 [Oberster Gerichtshof, Austria, 28 April 2000] (damages recovered under article 74). See also CLOUT case No. 645 [Corte di Appello di Milano Italy, 11 December 1998 (Bielloni Castello S.p.A. v. EGO S.A.)] (evidence did not establish that aggrieved seller had lost a sale by its resale to a third party).

⁵⁴ Bundesgericht, Switzerland, 15 September 2000 (FCF S.A. v. Adriafile Commerciale S.r.l.), English translation available on the Internet at www.cisg.law.pace.edu (breaching party failed to indicate measures aggrieved party should have taken in mitigation). See also CLOUT case No. 217 [Handelsgericht des Kantons Aargau, Switzerland, 26 September 1997] (aggrieved party has the burden of establishing loss) (see full text of the decision); Arbitration Court of the International Chamber of Commerce, March 1995 (Arbitral award No. 7645), Unilex ("Under

general principles of law” the party claiming damages has the burden of establishing existence and amount of damages caused by the breach of the other party).

⁵⁵ Bundesgericht, Switzerland, 15 September 2000 (FCF S.A. v. Adriafile Commerciale S.r.l.), English translation available on the Internet at www.cisg.law.pace.edu (construing article 8 of Swiss Civil Code). See also CLOUT case No. 261 [Bezirksgericht der Sanne, Switzerland, 20 February 1997] (domestic law, rather than the Convention, determines how damages are to be calculated if the amount cannot be determined). For practical application of these rules, see Landgericht Hamburg, Germany, 26 November 2003 (Phthalic anhydride case), English translation available on the Internet at www.cisg.law.pace.edu; Landgericht Braunschweig, Germany, 30 July 2001 District Court (Metal case), English translation available on the Internet at www.cisg.law.pace.edu.